



QUEENSLAND



# ELECTORAL AND ADMINISTRATIVE REVIEW COMMISSION

## REPORT ON REVIEW OF ARCHIVES LEGISLATION

JUNE 1992

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**ELECTORAL AND ADMINISTRATIVE  
REVIEW COMMISSION**

**REPORT**

ON

**REVIEW OF**

**ARCHIVES LEGISLATION**

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Electoral and Administrative Review Commission

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## PREVIOUS EARC REPORTS

1. 90/R1 Review of Guidelines for the Declaration of Registerable Interests of Elected Representatives of the Parliament of Queensland (August 1990)
2. 90/R2 The Local Authority Electoral System of Queensland (September 1990)
3. 90/R3 Queensland Joint Electoral Roll Review (October 1990)
4. 90/R4 Queensland Legislative Assembly Electoral System (November 1990)
5. 90/R5 Judicial Review of Administrative Decisions and Actions (December 1990)
6. 90/R6 Freedom of Information (December 1990)
7. 91/R1 Review of Public Assembly Law (February 1991)
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10. 91/R4 Whistleblower Protection (October 1991)
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12. Determination of Legislative Assembly Electoral Districts (November 1991) <sup>(1)</sup>
13. 91/R6 Information and Resource Needs of Non-Governmental Members of the Legislative Assembly (November 1991)
14. 91/R7 The Review of the Elections Act 1983-1991 and Related Matters (December 1991)
15. 92/R1 Codes of Conduct for Public Officials (May 1992)
16. 92/R2 The Investigation of Public Registration of Political Donations, Public funding of Election Campaigns and Related Issues (June 1992)

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(1) This determination was notified in the Queensland Government Gazette of 27 November 1991 as required by the *Electoral Districts Act 1991* (Qld). It does not form part of the numbered series of EARC Reports.

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## LIST OF ABBREVIATIONS/GLOSSARY

<b>archival period</b>	The period of restricted access as defined in cl.4 of the draft Archives Bill 1992 (Qld)
<b>archives</b>	The term may be used to denote either a body of records, the place where such records are housed, or the organisation or agency responsible for administering the records.
<b>Archives Authority or Authority</b>	Queensland Archives Authority
<b>Can.</b>	Canada
<b>CJC</b>	Criminal Justice Commission
<b>the Commission</b>	Electoral and Administrative Review Commission
<b>Cwth</b>	Commonwealth
<b>draft Archives Bill</b>	The draft Archives Bill 1992 (Qld) which appears as Appendix A to this Report
<b>EARC</b>	Electoral and Administrative Review Commission
<b>Fitzgerald Report</b>	The Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (G.E. Fitzgerald QC, Chairman)
<b>FOI</b>	Freedom of Information
<b>FOI Bill</b>	Freedom of Information Bill 1991 (Qld)
<b>Issues Paper No. 16</b>	Electoral and Administrative Review Commission, Issues Paper No. 16 <i>Archives Legislation (September 1991)</i> , Brisbane
<b>PSMC</b>	Public Sector Management Commission
<b>Qld</b>	Queensland
<b>QSA</b>	Queensland State Archives
<b>Tas.</b>	Tasmania
<b>the Act</b>	<i>Electoral and Administrative Review Act 1989</i> (Qld)
<b>the FOI Bill</b>	FOI Bill 1991 (Qld)
<b>the L&amp;A Act</b>	<i>Libraries and Archives Act 1988</i> (Qld)
<b>the L&amp;A Regs</b>	<i>Libraries and Archives Regulations 1989</i> (Qld)
<b>The Senate Committee</b>	Senate Standing Committee on Constitutional and Legal Affairs

<b>Vic.</b>	Victoria
<b>WA</b>	Western Australia
<b>WLR</b>	Weekly Law Reports

## CHAPTER ONE

### THE REVIEW PROCESS

#### Background to the Review

1.1 The Electoral and Administrative Review Commission (the Commission) was established by the *Electoral and Administrative Review Act 1989 (Qld)* (the Act). The Commission's object is to provide reports to the Chairman of the Parliamentary Committee for Electoral and Administrative Review, the Speaker of the Legislative Assembly and the Premier, with a view to achieving and maintaining:

"(a) *efficiency in the operation of the Parliament;*

*and*

(b) *honesty, impartiality and efficiency in -*

(i) *elections;*

(ii) *public administration of the State;*

(iii) *Local Authority Administration"* (s.2.9(1) of the Act).

1.2 The Commission's functions are, in part, to investigate and report in relation to:

"(iii) *the whole or part of the public administration of the State,*

*including any matters pertaining thereto specified in the Report of the Commission of Inquiry, or referred to the Commission by the Legislative Assembly, the Parliamentary Committee, or the Minister"* (s.2.10(1)(a)(iii) of the Act).

1.3 The Act further provides that:

*"Without limiting the extent of the Commission's functions, in the discharge of its function to investigate and report in relation to the operation of the Parliament or the public administration of the State the Commission may investigate and report in relation to all or any of the matters specified in the Schedule"* (s.2.10(2) of the Act).

1.4 The archives legislation of Queensland is not directly referred to in the Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the Fitzgerald Report), or in the Schedule to the Act. Nevertheless, the Commission determined that the proper protection and preservation of public records so that they may be made available for use by government agencies and by the public is a matter relating to honesty, impartiality and efficiency in the public administration of the State. The nature and content of archives legislation in Queensland was, therefore, an appropriate matter for investigation and report by the Commission.

1.5 In addition, the archives legislation of Queensland does relate to Item 10 of the Schedule to the Act:

*"Availability to the public of information concerning -*

(a) *decisions made by or on behalf of the Government;*

(b) *discharge of functions and exercise of powers by units of public administration."*

## The Need For Review

- 1.6 The decision of the Commission to review Queensland's archives legislation arose out of two of the Commission's previous reviews.
- 1.7 First, during the course of its review of the Queensland Legislative Assembly Electoral System, the Commission encountered disturbing evidence of past inadequacies in the protection of public documents. While undertaking an historical analysis of the zonal electoral system in Queensland, it became apparent that, following the State election in December 1989, the papers documenting the activities and decision-making of the 1985 Electoral Commissioners were either destroyed or removed from the office in which they had been stored. While those documents may not have affected the content of the *Report on Queensland Legislative Assembly Electoral System*, the Commission observed in respect of the missing documents of the 1985 Electoral Commission that:

*"Whether any person has committed an offence against the law of Queensland in relation to the loss of these documents is uncertain. The matter is however sufficiently serious to warrant further investigation by an appropriate authority, whether that be the Queensland Police, the Criminal Justice Commission or the State Library Board. Under the Libraries and Archives Act 1988 the State Library Board is responsible for control over the retention and disposal of the public records of Queensland. The Commission has received correspondence from the Chair of the Library Board of Queensland, M Cross, seeking such material in relation to this matter as the Commission has available. As soon as practicable after the furnishing of this Report the Commission will make all relevant material in its possession available to the Library Board. Perhaps in the first instance the Library Board should examine the matter and decide whether it investigates the missing documents itself or refers the matter to the appropriate law enforcement authorities.*

*Of more significance is the question of the proper protection of State documents in Queensland public administration. The loss of these documents suggests that there may be a systemic problem in Queensland public administration, namely, a less than appropriate regard for the proper custody and archiving of State records. The Commission proposes to consider this matter further and determine whether it will itself review the archival system in public administration in Queensland or whether it will exercise its powers under Part III of the Electoral and Administrative Review Act which in essence enables the Commission to require another authority to conduct investigation of a matter and furnish a report to the Commission. It is important, as part of the overall reform processes with which this Commission is concerned, to ensure that Queensland has appropriate and effective archival systems" (EARC 1990e, paras 10.36 - 10.37).*

- 1.8 The systemic problem relating to the proper custody and archiving of State records is illustrated also by other apparent destructions of public records in recent years in Queensland, either deliberately or out of ignorance of statutory duties to preserve public records. The destruction, without the authorisation of the State Archivist, by the Special Branch of the Queensland Police Service of files relating to the political or other activities of certain individuals is one such incident.
- 1.9 Second, in December 1990, the Commission furnished its *Report on Freedom of Information*. In that Report, the Commission stated that:

*"The Commission recognises that the FOI legislation which it has recommended will require the Queensland State Archives to perform additional functions such as the transfer of older personal affairs records to Government agencies which have received FOI requests for such documents. The Commission understands that existing archives resources, particularly in respect of storage space for archival documents, personnel and funding are already severely constrained. In the view of the Commission, it is of great importance that Queensland State Archives is adequately resourced to efficiently and effectively meet the requirements imposed upon it by FOI legislation.*

*The Commission considers that a review of existing archives legislation and the administrative practices and resources of the Queensland State Archives is necessary. Such a review has not been encompassed by the Commission's review of FOI legislation, as it is necessarily more widely focussed, being concerned as it should be with the public interest in accessing Government information, and, also the public interest in preserving the archival documents of Queensland. Further, the Commission regards the powers, practices and procedures of the Queensland State Archives as important matters. Accordingly, interested persons should have an opportunity to advise the Commission of any relevant concerns and to provide any relevant information before any recommendations are made by the Commission.*

*The Commission will undertake a separate review of these matters" (EARC 1990c, paras 5.40 - 5.42).*

- 1.10 *The Libraries and Archives Act 1988 (Qld) (the L&A Act) and the Libraries and Archives Regulations 1989 (Qld) (the L&A Regs) currently regulate the public records of Queensland. The L&A Act provides for the administration of the Queensland State Archives (QSA) (the office charged with the administration of public records), the promotion of archives and the preservation of public records.*
- 1.11 In 1990, the Public Sector Management Commission (PSMC) reviewed the Department of the Premier, Economic and Trade Development. In its report on that review, the PSMC recommended that the QSA be administered under its own legislation and that the administrative responsibility for archives be transferred to the Administrative Services Department (see PSMC 1990).
- 1.12 It has also previously been recognized that the existing structures for the housing of archives are inadequate. To improve this situation a much-needed new building is currently being constructed, and it is estimated that the construction will be completed towards the middle of 1993. The move to large custom-built premises will enable QSA to expand and improve the functions it presently performs. However, notwithstanding the improvements the new building will bring, the potential for QSA to fulfil its functions will not be realised unless:
- (a) an improved legislative framework is put in place to facilitate the carrying out of those functions; and
  - (b) adequate resources are available to enable the efficient use of the new premises and allow implementation of any new legislation.
- 1.13 The need for review of the administrative practices of the QSA is also brought to light by the impending enactment of Freedom of Information (FOI) legislation. When enacted, FOI legislation will provide a right of access to current public records. Archives legislation, on the other hand, provides rights of access to older public records. The Commission considered, therefore, it was appropriate to review the integration of the rights of access under the different legislation.

### **Principles Governing the Review Process**

- 1.14 The procedures of this review were developed to comply with the Commission's statutory responsibilities in section 2.23 of the Act which provides:

*"(1) The Commission is not bound by rules or the practice of any court or tribunal as to evidence or procedure in the discharge of its functions or exercise of its powers, but may inform itself on any matter and conduct its proceedings in such manner as it thinks proper.*

(2) *The Commission -*

- (a) *shall act independently, impartially, fairly, and in the public interest;*
- (b) *shall make available to the public all submissions, objections and suggestions made to it in the course of its discharging its functions, and otherwise act openly, if to do so would be in the public interest and fair;*
- (c) *shall not make available to the public, or disclose to any person, information or material in its possession, if to do so would be contrary to the public interest or unfair;*
- (d) *shall include in its reports -*
  - (i) *its recommendations with respect to the relevant subject-matter;*
  - (ii) *an objective summary and comment with respect to all considerations of which it is aware that support or oppose or are otherwise pertinent to its recommendations."*

1.15 On 21 September 1991 the Commission released *Archives Legislation Issues Paper No. 16 (91/I6)* which sought written public submissions on the Commission's review of archives legislation in Queensland. The commencement of the Commission's review, and the availability of Issues Paper No. 16, were widely publicised through an advertisement which appeared in *The Courier-Mail*, *The Sunday Sun* and a wide selection of regional newspapers. A copy of the advertisement appears at Appendix C to this Report.

1.16 Issues Paper No. 16 sought to focus attention on existing Queensland archives legislation, examining its appropriateness and adequacy. It also sought to focus attention on the role of archives in Queensland, the management and preservation of archives, and access to, and the dissemination of, information contained in archives.

1.17 Approximately 1200 copies of Issues Paper No. 16 were distributed to Public Libraries, Magistrates' Courts, government departments and agencies, community and professional groups and members of the public within Australia and overseas.

## **The Issues**

1.18 Issues Paper No. 16 identified a number of issues relevant to the review of archives legislation. These issues became the subject of comment by persons and organisations through written submissions to the Commission and participation in a public seminar. The issues identified in Issues Paper No. 16 were:

### **"The Nature of Archives**

#### **Functions and Powers of an Archives Authority**

1. *What powers and functions should archives legislation confer upon an archives authority in Queensland (para.3.25)?*
2. *Having regard to other issues raised for consideration by this Issues Paper, should archives legislation in Queensland give greater recognition to a comprehensive range of responsibilities to be met by an archives authority (para.3.26)?*

#### **Definition of Public Records**

3. *How should archives legislation define the records, or other resources, which are to be included within the operation of the legislation (para.3.43)?*

4. *Should the records of the Parliament and the courts come within the operation of archives legislation? If so, what powers should officers of the Queensland State Archives have in relation to such records (para.3.44)?*
5. *Should archives legislation in Queensland make special provision for the records of inter-governmental authorities (para.3.47)?*

#### Legal Title to Public Records

6. *Should archives legislation in Queensland make explicit that a public record will remain the property of the Queensland Government, until such time as the legal title in that public record passes to some other person or body, by way of sale or transfer (para.3.50)?*

#### Retention of Records Other than Public Records

7. *Is there a public interest in the collection and preservation of certain non-governmental archives, and should archives legislation in Queensland provide statutory recognition of this public interest? If so, what types of non-governmental records should be preserved (para.3.61)?*
8. *What powers should the Queensland State Archives be given in relation to non-public records (para.3.62)?*
9. *Should archives legislation in Queensland make provision for the care and preservation of records of ministerial records (para.3.70)?*
10. *Should archives legislation provide that the Queensland State Archives may receive and preserve the personal and political papers of Ministers and authorise arrangements with Ministers to facilitate such receipt and preservation (para.3.73)?*
11. *In relation to ministerial records and the personal and political papers of Ministers, should archives legislation in Queensland contain a provision such as section 6(2) of the Archives Act 1983 (Cth) (para.3.74)?*

#### Archives and Public Records Management

##### Effective Public Records Management in Queensland

12. *When authorising disposal of public records should the Archives have regard to the present needs of accountability or concentrate only on future historical research needs (para.4.27)?*
13. *If so, what person or body should be responsible for ensuring that government agencies properly create, maintain, use and preserve public records, and how should this be done (para.4.28)?*

#### The Preservation of Public Records

##### Records Creation

14. *What information should properly be recorded by government agencies? Does the existing provision in the L&A Act (s.52) adequately state the obligation of government agencies (para.5.9)?*

##### Records Maintenance and Use

15. *Should archives have the function of creating records management standards, to be observed by all government agencies in Queensland? If so, who should have the power to prescribe those standards? Should there be a provision for Parliamentary review of any such prescription (para.5.16)?*



16. *Is adequate provision otherwise made in existing provisions of the L&A Act to ensure that government agencies properly maintain, store and use public records (para.5.17)?*

Records Disposition

17. *With whom should rest the responsibility of drawing up destruction schedules? How should this person or body be insulated from political or other pressure in relation to the destruction of records (para.5.22)?*
18. *Should archives legislation provide that public records which are not required as archives may be deposited elsewhere, in preference to destruction, on the condition that adequate safeguards for access and privacy be maintained (para.5.32)?*
19. *Should archives legislation allow for the sale of public records not otherwise required for retention as archives? If so, what restrictions should be imposed upon the sale of such public records (para.5.35)?*

Effective Enforcement of Archives Obligations

20. *Should archives legislation in Queensland vest in the State Archivist or a delegate of the State Archivist, a general right to inspect public records held by public authorities? If so, what application should such a general right have to the records of the Parliament and of the courts (para.5.53)?*
21. *Should archives legislation explicitly provide that, in addition to, or as an alternative to, the commission of a criminal offence, a public servant who fails to comply with a requirement of archives legislation commits a disciplinary offence (para.5.57)?*
22. *It is necessary to charge an identifiable person with the commission of an offence under archives legislation. Where such a person is not readily apparent, how should difficulties in identification be addressed (para.5.60)?*
23. *What person or body should properly investigate failures to fulfil duties imposed by archives legislation? Should that particular person or body be specifically nominated by archives legislation (para.5.67)?*
24. *What powers of investigation should that person or body possess, and what investigative procedures should that person or body be authorised to pursue (para.5.68)?*

**A Right of Access to All Public Records**

A Right of Access to Non-current Records

25. *Given that it has been recommended that FOI legislation govern access to current public records, should there be a complementary right of access to non-current records, whether these latter records are held by the Queensland State Archives or by some other government agency (para.6.7)?*

Applying the Models to Access Systems in Queensland

26. *Following the expiration of an archival period, should statutory rights of access to public records be provided:*
- (a) *exclusively under archives legislation (Model 1);*
  - (b) *under archives legislation, unless withheld from access under archives legislation, in which case such records may be available under rights of access provided under FOI legislation with unlimited retrospective operation (Model 2); or*

- (c) *under FOI legislation with unlimited retrospective operation (Model 3) (para.6.30)?*
27. *If rights of access to public records are to be provided under archives legislation, should such rights of access apply:*
- (a) *to all records in the open access period regardless of whether they have been transferred to archives; or*
- (b) *only to those records which have been transferred to archives by the time they reach the open access period, in which case those records which have not yet been transferred to archives would be accessible under FOI legislation (para.6.33)?*

#### Archival Period

28. *What should be the archival period for public records held by the Queensland State Archives (para.6.41)?*
29. *Should the open access period be reduced from 30 years to say 10 years, with an exception for documents which originated with another government (in which case the open access period should be equivalent to that prescribed in the archives legislation of the other government) (para.6.42)?*
30. *Should one archival period apply to all records or should different archival periods apply to different types of public records? For example, is a longer archival period necessary for records relating to the personal affairs of any person so as to protect individual privacy interests (para.6.43)?*
31. *Should the archival period operate from the date of creation of the record or from the date of "last dealing" of the record (para.6.46)?*

#### Mandatory Transfer

32. *Should archives legislation include a requirement that government agencies transfer their records to the Queensland State Archives once they are no longer needed by that agency, and otherwise, after a fixed period of time (para.6.48)?*
33. *If so, what should be the length of that fixed period (para.6.49)?*

#### Accelerated Access

34. *Should archives legislation in Queensland allow a class of records to be made available for public access prior to that class reaching the open access period (para.6.54)?*

#### Special Access

35. *Should archives legislation in Queensland allow, in given circumstances, for public records to be made available to a person prior to those records becoming generally available for open access? If so, in what circumstances should such special rights of access be available (para.6.59)?*
36. *Should archives legislation allow, in given circumstances, a person to access public records which would otherwise be exempt from access? If so, in what circumstances should such special rights of access be available (para.6.60)?*

#### Exemptions from Access

37. *Each of the three models for access outlined above assumes that there will be a need to exempt some records in the open access period from access, but is there a need to maintain secrecy for records once they reach the open access period (para.6.72)?*

38. *If so, should archives legislation in Queensland retain a discretionary basis for the exemption of public records from access? In whom should such a discretion lie (para.6.73)?*
39. *Alternatively, should the grounds on which public records may be withheld from access be delineated in legislation? On what grounds should public records be exempt from rights of access (para.6.74)?*
40. *Should the application of exemption provisions under archives legislation be determined on a record by record basis or by reference to classes of records (i.e. Model 1 or Model 2) (para.6.77)?*
41. *Should government be given the power to issue certificates which determine conclusively that certain public records are exempt? If so, in respect of which grounds of exemption should that power exist (para.6.80)?*

#### Appeals

42. *Should rights of appeal in respect of a decision refusing or restricting access to a document in the open access period be conferred by archives legislation or FOI legislation (para.6.89)?*
43. *Should there be a right to seek an internal reconsideration of such a decision? Should there be a further right of appeal to an independent external body? If so, to which person or body should that right of external appeal lie (para.6.90)?*
44. *If archives legislation is to provide for the issue of ministerial certificates (see paras 6.78-6.80), should the person or body conducting external review be able to review ministerial certificates, and if so, what powers should that person or body have upon a review of such a certificate (para.6.91)?*
45. *Should archives legislation provide for the protection of authors and suppliers of information from actions for defamation and breach of confidence where such actions are based on the publication of a public record under archives legislation, and for the protection from criminal and civil liability of officers of the Queensland State Archives who, in good faith, make decisions under archives legislation (para.6.94)?*

#### Archival Reference Services

46. *Setting aside the issue of sufficient resources, how may the Queensland State Archives ensure that, so far as possible, comprehensive reference services are provided (para.6.99)?*

#### Dissemination of Information Contained in Archives

47. *Setting aside the issue of sufficient resources, are there ways in which the Queensland State Archives may ensure a more extensive dissemination of information contained in public records within its custody (para.6.102)?*

#### Administration of Archives

##### Administrative Location

48. *Should the Queensland State Archives continue to be administered by the Administrative Services Department, or should it be administered by another Department, or should it be constituted as a statutory authority, independent of any government department (para.7.13)?*

##### Advisory Committee

49. *Should an advisory council be established under archives legislation to provide advice and executive assistance for the administration of archives (para.7.19)?*

50. *What should be the composition of this advisory body? What functions should it perform, and what powers should it have to carry out those functions (para.7.20)?*
51. *Should archives legislation require the Queensland State Archives to prepare and furnish to the Minister, and to Parliament, reports on the compliance of government agencies with the statutory duties imposed by archives legislation (para.7.28)?*

Queensland State Archives Resources

52. *How should the current resource constraints (other than financial constraints which are addressed below) of the Queensland State Archives be addressed (para.7.34)?*
53. *How should present constraints in the financial resources of the Queensland State Archives be addressed (para.7.37)?*
54. *Should charges be introduced in respect of any services provided to the public by the Queensland State Archives? If so, in respect of which services should these charges be introduced, and what charges would be appropriate (para.7.42)?"*

**Submissions and Comments in Response**

- 1.19 By 29 November 1991, the closing date for initial submissions, the Commission had received a total of 31 submissions from individuals, government bodies (state and local) and organisations.
- 1.20 All initial submissions were copied and made available for public inspection at public libraries and court houses throughout Queensland. In addition, approximately 150 copies of the bound volume of initial submissions were forwarded to a variety of individuals and bodies.
- 1.21 Comments in response to initial submissions were formally accepted by the Commission until 24 January 1992. Submissions and comments in response received since that date, have also been considered by the Commission. All late submissions and all comments in response received were made available for perusal in the Commission's Public Reading Room.
- 1.22 At the time of completion of this Report, a total of 39 submissions and comments in response had been received by the Commission in response to Issues Paper No. 16. These included submissions from 7 Local Authorities, 13 State government bodies, 3 Federal government bodies, 8 other organizations and 8 from individuals. A numbered list of organisations and individuals who made submissions or provided comments in response is attached to this Report as Appendix D.
- 1.23 In conducting its review the Commission was able to draw great assistance from the information contained in the submissions. Throughout this Report the Commission has, where appropriate, quoted material from submissions which accurately reflected the consensus of opinion, or which raised a point not raised in other submissions, and which was helpful in elucidating all aspects of the various issues that were raised.

### **Public Seminar**

- 1.24 To encourage further public discussion of the matters raised in Issues Paper No. 16 and those emerging during the course of the review, the Commission conducted a public seminar on 9 December 1991, entitled "Archives Legislation".
- 1.25 The Seminar was advertised in *The Courier-Mail* and *The Sunday Sun* and also by notice forwarded to numerous government agencies and community organisations. Approximately 250 participants attended the Seminar. The day's proceedings were recorded and a copy of the transcript was made available for inspection in the Commission's Public Reading Room.
- 1.26 The Seminar Programme with details of speakers, themes and particular topics is reproduced as Appendix E to this Report.

### **Consultations**

- 1.27 Staff of the Commission were made available upon request to address, or consult with, government agencies, educational institutions, interest groups and the media.
- 1.28 The Commission engaged as consultant to the archives legislation review Mr Chris Hurley, Senior Archivist, Public Records Office, Victoria. The Commission also benefited from consultation with Mr Lindsay Curtis, Legal Consultant, a former Deputy Secretary of the Commonwealth Attorney-General's Department; and Mr Peter Bayne, Reader in Law at the Faculty of Law of the Australian National University, who provided comment and advice on integration of access to public records under FOI and archives legislation. The Commission also received general advice from Ms Lee McGregor, State Archivist, QSA.

### **Research**

- 1.29 The Commission's staff researched the archives literature of the Commonwealth and other Australian States as well as writings on archives legislation in overseas jurisdictions.

### **Terminology**

- 1.30 In this Report, references to numbered submissions will be in brackets preceded by the letter 'S'. For example, a reference to Submission No. 13 will be '(S13)'. The numbered submissions are listed in Appendix D to this Report. References to clauses and the Schedule of the draft Archives Bill 1992 also appear throughout the text in brackets preceded by the letters cl. or cll. or Sch. Other publications referred to in the text are collated in alphabetical order by author's name in the Bibliography. References in the text of the Report to a publication will be to the author's name, year of publication and page number, for example: (Ketelaar 1985, p.5).
- 1.31 Reference is made throughout this Report to the FOI Bill. The draft Archives Bill 1992 (Qld) (Appendix A) also contains references to the Freedom of Information Act 1992. These references refer to the Freedom of Information Bill 1991 (Qld) introduced and tabled in the Queensland Parliament on 5 December 1991.

### **Structure and Content of Report**

- 1.32 The structure of the Report generally follows the order of issues raised in Issues Paper No. 16. The Chapters of the Report deal with the following matters:
- Chapter 2 the nature of archives; what bodies and persons should be subject to archives legislation; and what records are archival;
  - Chapter 3 public records management as an accountability mechanism;
  - Chapter 4 the creation, preservation and disposition of public records;
  - Chapter 5 accessing public records under archives legislation;
  - Chapter 6 providing access services;
  - Chapter 7 the administration of archives;
  - Chapter 8 summary and recommendations; and
  - Chapter 9 acknowledgements and concluding remarks.

### **Scheme of the Report**

- 1.33 In making its recommendations on archives legislation, the Commission has proposed a scheme under which the role of archives will evolve from one where archives are merely seen as the keepers and preservers of public records, to one where:
- (a) archives are responsible for preserving records relating to the public administration and heritage of the State; and
  - (b) archives are institutionalised as a vital organ responsible for ensuring accountability in government.
- 1.34 In making its recommendations the Commission has aimed to:
- (a) bring within the operation of the archives legislation all those bodies responsible for creating or receiving records relating to the public administration of the State;
  - (b) establish an "independent" body, the Queensland Archives Authority (referred to throughout the Report as "the Archives Authority" or "the Authority") responsible for creating and imposing standards for the creation, preservation and disposition of public records; and
  - (c) establish and integrate with FOI legislation immutable rights of access to all public records for all Queenslanders regardless of their geographical location.
- 1.35 The Commission's recommendations are embodied in the draft Archives Bill 1992 (Qld) which appears at Appendix A and is referred to throughout this Report as the draft Archives Bill.

## CHAPTER TWO

### NATURE OF ARCHIVES

#### Introduction

- 2.1 The purpose of archives is to collect and preserve the essential records of a society, that is those records which constitute the memory of the society, which provide the evidence of the respective rights and obligations of government and individuals, and which constitute the source for a society's understanding and identification of itself (see cl.3 of the draft Archives Bill).
- 2.2 Archives may have once been seen as merely a part or off-shoot of a State Library. But over time there has been a growing recognition that archives have a significant role to play as an independent entity in the institutional framework of government (cl.3).

#### Separation of Archives Legislation from Libraries Legislation

##### MATTERS FOR CONSIDERATION

- 2.3 Issues Paper No. 16 did not invite public comment on this matter. This was because, in its 1990 *Report Into the Department of the Premier, Economic and Trade Development*, the PSMC recommended that the QSA become an organisation independent of the Library Board of Queensland, and that archives legislation be separated from libraries legislation in Queensland (see PSMC, 1990).
- 2.4 The L&A Act and the L&A Regs currently regulate the archival documents of the State. Section 50 of the L&A Act states in part that: "*The Queensland State Archives is part of the State Library of Queensland.*"
- 2.5 The L&A Act currently provides for the subordination of the State Archivist to the State Librarian, the Library Board of Queensland and the Minister (s.51(2)(b)).

##### ARGUMENTS MADE IN PUBLIC SUBMISSIONS

- 2.6 Although Issues Paper No. 16 did not invite public comment on this matter a number of submissions addressed the point. The large majority were in favour of separation of archives legislation from libraries legislation.
- 2.7 In support of separation, P.D. Wilson (S14) made the following comments:

*"I hold the strongest belief that there should be NO administrative connection of any kind between the State Archives and the State Library. I emphasise that, within their limitations of funding, professional education and management of priorities, successive Library Boards and State Librarians in Queensland have made reasonably fair attempts to allow the State Archivist to discharge his or her responsibilities. But speaking from fourteen years experience, I am convinced that there has always been a yawning gap between what librarians consider archives are, and what purposes they serve, and what archivists consider their role in administrative life to be."*

- 2.8 In their comments in support of legislative separation of the two institutions, G.I. Acland and P. Taylor (S22) commented:

*"From overseas experiences and following the example of a majority of other Australian states the case is well made for the separation of archival legislation from library legislation.*

...

*The mission and goals of an archival authority are quite different from those of a library."*

- 2.9 J.R. Blake (S7) expressed a contrary view commenting that: *"Library and archives legislation should be complementary. It seems logical to me that archives could be a section of the library service."*

#### ANALYSIS AND COMMENT

- 2.10 The need for separation between archives and libraries legislation arises from the differences in the essential character of the two institutions. The role of a library is, inter alia, to collect, house and make available books and other material on a variety of topics. An archives institution, on the other hand, is first and foremost a guardian of records - that is, its primary role is to preserve the records of an administration and make these available to users (Smith 1984, pp.13-14).
- 2.11 The need for separation between the institutions is recognised in all Australian jurisdictions except Queensland and Western Australia (see Issues Paper No.16 Appendix B).
- 2.12 There has already been administrative separation in Queensland, where the QSA comes within the Administrative Services portfolio, whereas the State Library is within the Premier, Economic and Trade Development portfolio. There exists, however, a need for legislative separation. As discussed at paragraph 2.3, the PSMC recommended that the QSA become an organisation independent of the Library Board of Queensland, and that the State's archives legislation be separated from its libraries legislation (see PSMC 1990).
- 2.13 The Commission agrees with this recommendation and considers it appropriate that archives legislation hereafter be separate from libraries legislation (see draft Bill cl. 1 & 2 and Schedule).

#### RECOMMENDATION

- 2.14 **The Commission recommends that archives legislation be separated from libraries legislation.**



## Functions and Powers of an Archives Authority

### MATTERS FOR CONSIDERATION

- 2.15 Issues Paper No. 16 (at p.13) commented that:

*"Sections 21 and 22 of the L&A Act set out the functions and powers of the Library Board of Queensland. These sections were drafted in the context of an Act which envisaged the subordination of the Queensland State Archives to the Library Board of Queensland. Accordingly, sections 21 and 22 are dominated by administrative and library functions and powers, with only limited attention paid to adequate provision for archival requirements."*

- 2.16 If archives legislation is separated from libraries legislation then the functions of the Archives Authority would need to be clearly defined. Sections 5 and 6 of the *Archives Act 1983* (Cwlth) were drafted following an analysis of the functions and powers necessary and desirable for the operation of an archives authority.

### ARGUMENTS MADE IN PUBLIC SUBMISSIONS

- 2.17 The submissions which addressed this issue were unanimous in their support for enshrining enumerated functions of an archives authority in legislation in a way similar to the Commonwealth model.

- 2.18 The Australian Society of Archivists Incorporated (S23) submitted that:

*"These responsibilities and powers should be set out in legislation. While recognising the dangers of too narrow an interpretation based upon a specific enumeration of functions and powers, on balance the ASA prefers this approach followed in sections 5 and 6 of the Commonwealth Archives Act."*

- 2.19 The Coordinated Response from the Queensland Public Service (S20) commented that:

*"All Departments which respond to the question on the powers and functions of an archives authority agree that specific legislation on the powers and functions of an archives authority is desirable, and they support the adoption of a model similar to the Commonwealth model as expressed in Sections 5 and 6 of the Archives Act 1983 (Commonwealth)."*

### ANALYSIS AND COMMENT

#### Functions

- 2.20 The functions of an archives authority need to be defined in wide terms in order for it to carry out its role as preserver of public records (cl.9).
- 2.21 Section 50 of the L&A Act provides that the functions of the QSA are:

*"...to promote the making and preservation of the public records of Queensland, to exercise control over their retention and disposal, to provide facilities for their storage and use and to provide administration in respect of anything stored by it."*

- 2.22 This section enumerates a limited number of specific functions. Such an enumeration runs the risk of a limitative interpretation (Ketelaar 1985, p.30).
- 2.23 In contrast to section 50 of the L&A Act, section 5 of the *Archives Act 1983* (Cwlth), as part of an overall legislative scheme, is drafted in much wider terms. The *Archives Act 1983* (Cwlth) is wide in scope and envisages an active role played by the Australian Archives in records management, mandates the transfer of records after 25 years and provides extensively for rights of access to Commonwealth records held by the Australian Archives.

### Powers

- 2.24 Powers are those means by which functions may be fulfilled. Therefore, it is to state the obvious to say that an authority cannot carry out its functions unless the powers conferred upon it enable it to do so.
- 2.25 Therefore if the functions of an archives authority are to be set in wide terms so too must its powers.
- 2.26 At the Commission's public seminar on Archives Legislation, Mr John Cross, Principal Archivist, Archives Office of NSW, in addressing the powers issue, drew a distinction between powers conferred upon an archives authority by first generation legislation (eg. the L&A Act) and powers conferred by second generation legislation (eg. the *Archives Act 1983* (Cwlth)). He said that most first generation legislation:

*"... is tied to library legislation and is concerned only with;*

- . prohibiting destruction of records without prior approval;*
- . establishing an archival authority to give or deny such approval;*
- . and with empowering the authority to receive records not authorised for destruction.*

...

*The second generation of archives legislation does all of the things the first generation did, but it also*

- . mandates transfer of records, generally after 25 to 30 years;*
- . regulates records management;*
- . and confers a right of public access.*

*The Commonwealth and Tasmanian Acts, both 1983 ... do these things" (EARC 1991b, pp.10-11).*

- 2.27 Whilst Mr John Cross endorsed the broadening of powers in second generation legislation, he acknowledged that legislative powers on their own were not enough and added: *"There must also be conceptual and administrative freedom"* (EARC 1991b, p.11).
- 2.28 The powers conferred on an archives authority will depend not only on the functions of the authority, but also on the composition or nature of the authority.

- 2.29 It is recommended later in this Report that an archives authority be constituted as a statutory corporation. That is, as an independent agency within a ministerial portfolio, responsible to the Minister, but not subject to operationally detailed direction as to its administration of archives legislation.
- 2.30 The Commission therefore considers that the proposed Archives Authority should exercise wide powers in the pursuit of its functions (cll. 10, 37, 38 and 39).

#### RECOMMENDATIONS

- 2.31 **The Commission recommends that:**
- (a) **archives legislation set the functions of the Archives Authority in wide terms similar to those in Section 5 of the *Archives Act 1983* (Cwlth) (see Appendix F);**
  - (b) **archives legislation confer such powers as set out in section 6 of the *Archives Act 1983* (Cwlth) (see Appendix F) and, additionally, broader records management powers including power to set minimum standards for the management of public records in Queensland, and powers relating to public rights of access to records held by the Archives Authority.**

#### Definition of "Record"

#### INTRODUCTION

- 2.32 The word "archives" may be used in different ways. It may be used to denote either a body of records, the place where such records are housed, or the organisation or agency responsible for administering the records (Rhoads 1983, p.3).
- 2.33 In whichever sense it is used, the term archives is concerned with records. In particular, where archives legislation is concerned, the term denotes public records.
- 2.34 The Commission recognises the need to clearly identify what constitutes a record, and what constitutes a public record.

#### MATTERS FOR CONSIDERATION

- 2.35 In Issues Paper No. 16 (at p.13) it was noted that:

*"Government decisions and actions are no longer achieved and evidenced merely by means of paper records. These materials still form the largest part of public records, but increasingly, technical innovations in information creation, storage, management and retrieval are being adopted by government agencies."*

2.36 Issues Paper No. 16 further observed that:

*"The L&A Act does not provide a definition for the word 'records'. The scope of the definition of 'public records' in the L&A Act is, therefore, dependent upon the ordinary meaning of the term 'records'. It may not be broad enough to include information contained in records or objects government agencies may wish to retain as archives, nor information created and stored by technological systems currently used by government agencies or which may be introduced at some time in the future."*

2.37 Having raised the possible shortcomings of the way in which the L&A Act deals with the definition of record the Commission invited comment on how archives legislation should define records, or other resources, which are to be included within the operation of the legislation.

#### ARGUMENTS MADE IN PUBLIC SUBMISSIONS

2.38 The broad opinion amongst the submissions was that the term "record" should be defined in wide terms.

2.39 P.D. Wilson (S14) submitted that: *"Records should be given the widest possible interpretation, emphasising the aspect of information conveyance, so as to avoid any confusion with artefacts."*

2.40 A number of submissions referred to the need for any adopted definition to be able to cater for any new technological developments in the storage of information.

2.41 Typical of the response on this point was the submission by the Queensland Historians Institute (S28), who submitted that: *"The statutory definition should be sufficiently wide to include current and developing technological advances in record keeping in a variety of formats."*

#### ANALYSIS AND COMMENT

2.42 If archives legislation is to be effective the definition of "record" must be sufficiently broad to cater for future technical innovations. Ketelaar (1985, p.103) has suggested that problems of interpretation (as to what constitutes a record) created by new technology should be avoided by defining words in general language rather than by an enumeration of physical types and forms.

2.43 Yet to couch a definition in wide terms, without specificity, may cause uncertainty and, eventually, undue recourse to litigation.

2.44 To be effective, therefore, the definition must be wide enough to cater for future developments, and, at the same time, be enumerative so as to prevent unwarranted ambiguity (cl.4).

#### RECOMMENDATION

2.45 **The Commission recommends that archives legislation contain a definition of "record":**

(a) **similar to the definition of "record" in Section 3(1) of the *Archives Act 1983 (Tas.)*:**

"a document or object that is, or has been, made or kept by reason of any information or matter that it contains or can be obtained from it or by reason of its connections with any event, person, circumstance, or thing"; and

- (b) which includes a non-exhaustive list of examples of records.

### Definition of "Public Record"

- 2.46 Once it is established that a record exists it is then necessary to identify it as a public record. For this, two enquiries must be made:
- (a) is there a "sufficient connection" between the record and a unit of public administration so as to constitute it a record of that unit?
- and
- (b) is the unit of administration, in fact, a "public authority" for the purposes of archives legislation?

### "SUFFICIENT CONNECTION"

- 2.47 To identify those records which are public records, archives legislation commonly utilises either one, or both, of two tests:
- (1) the purpose or provenance of the records (s.2(1) *Public Records Act 1973* (Vic.)); and
- (2) the custody or ownership of the records (s.3(1) *Archives Act 1983* (Cwlth)).
- 2.48 The Commission considers that archives legislation in Queensland should clearly bring within its scope all records "made and received" by units of public administration.
- 2.49 The Commission further considers that wide application of the legislation is particularly important if an archives authority in Queensland is to have extensive records management functions.
- 2.50 To achieve these aims a similar provision to the definition of "Crown record" in the *Archives Act 1983* (Tas.) will need to be employed.
- 2.51 The Tasmanian legislation uses both the tests mentioned above, provides a very broad definition:

*'Crown record' means a record -*

- (a) *made for the use, or any purpose, of the Crown;*

*or*

- (b) *in the case of a record not so made, kept by an officer or employee of the Crown for any public purpose in accordance with a duty or responsibility imposed, on a power or authority conferred, by or under an Act" (s.3(1) Archives Act 1983 (Tas.)).*

- 2.52 The adoption of a similar provision in Queensland would reinforce the inalienability provision suggested for archives legislation in the State (see paras 2.100 - 2.112), by encompassing all records received by, or created by and intended to remain the property of Queensland government agencies, irrespective of their location (cl.4).
- 2.53 While recognizing the merits of the definition, the Commission is also conscious of three limitations and acknowledges that it will require modification.
- 2.54 Firstly, the Commission sees that paragraph (a) of the definition may, be too wide in its operation - that is, it may deem records still to be public records even though the public authority which "made" the record has divested itself of property in the records (eg. by sending the original of a letter to its intended recipient).
- 2.55 Secondly, the use of the word "Crown" may be too limiting in that it is not every public authority that comes within that term.
- 2.56 And thirdly, it may not be possible in every case to point to an express statutory authority, as required by paragraph (b), for the "keeping" of a record.
- 2.57 The Commission further considers that the adoption of the definition described at paragraph 2.51 will clearly identify to all public authorities the records which are subject to archival requirements.
- 2.58 Thus, any uncertainty, such as that expressed by the Aboriginal and Torres Strait Islander Commission (S33), about what records are subject to the control of the QSA, will be resolved.

#### "PUBLIC AUTHORITY"

#### Matters for Consideration

- 2.59 The general definition of "public record" established so far must be further refined by defining those government agencies which make or receive a "public record" and which must comply with the requirements of the legislation.
- 2.60 The definition of "public authority" contained in section 5(1) of the L&A Act does not include the records of the Legislative Assembly or the Governor acting in the Governor's official capacity. Moreover, it does not include bodies (whether or not incorporated) not established for a public purpose by an enactment, but which are supported directly or indirectly by government (by supply of funds or anything else) or over which government is in a position to exercise control. The definition does include, however: "*a Court established by or under any Act*" (s.5(1) L&A Act).

#### Arguments made in Public Submissions

- 2.61 A number of submissions made to the Commission referred to the need to specify what bodies would be subject to archives legislation.

- 2.62 On a general level, the Co-ordinated Response from the Queensland Public Service (S20) commented that:

*"Any review of archives legislation should clearly specify the types of public authorities which are required to discharge responsibilities under the legislation."*

- 2.63 On a more specific level a number of submissions commented on what bodies should be regarded as a "public authority". In particular, and in response to the Commission's request for comment on the point, a number of submissions dealt with the issue of whether the records of the Parliament and the courts should come within the operation of archives and what powers officers of the QSA should have in relation to such records.

- 2.64 A. Sandell (S6) submitted that:

*"No government Department should be absolved from participating in the Archives Legislation. This includes Parliament and the Courts. To ensure this they should be specifically mentioned in the legislation. Just what records from Parliament and the Courts will be handed over to the Archivist and when may need to be negotiated. Whatever the result, and wherever the records finally reside, the State Archivist must be responsible for their preservation, maintenance and access to authorised persons or other Government Departments."*

- 2.65 Other submissions agreed that the Parliament and the courts should be subject to archives legislation, but disagreed as to what powers officers of the QSA should have in relation to their records.

- 2.66 The Mulgrave Shire Council (S37) submitted that:

*"The records of the Parliament and the Courts should be covered within the operation of the Archives legislation. The State Archivist or his nominee should be allowed total access to such Records."*

- 2.67 The CJC (S13) in their submission drew attention to the separation of powers issue raised in Issues Paper No. 16 (at p.16) and whether the Executive Council and the Governor should be subject to archives legislation:

*"In the opinion of the CJC any concerns in relation to issues of the separation of powers and the independence of Parliament are outweighed by the public interest aspects of bringing the records of Parliament and the courts within the operation of Archives legislation. Both Parliament and the courts should be accountable to the people. Similarly, the Executive Council, and the Governor acting in his official capacity, should be accountable to the people."*

*Certain safeguards could be built into the legislation to otherwise protect the independence of these bodies.*

*It is suggested that the powers of officers in relation to the records of Parliament and the courts generally should be the same as in relation to any other public records, as should the operation in general of all of the provisions of the legislation."*

## Analysis and Comment

### *Parliament and Courts*

- 2.68 In relation to the definition of public records it has been stated that the law:
- "... should be applied not only to the whole range of bodies which discharge the legislative, judicial and administrative functions of the State but also to State controlled corporations and all other organisations directly or indirectly controlled by government, which can be considered as public bodies" (Ketelaar 1985, p.103).*
- 2.69 In support of this, a number of submissions made to the Commission stated that the public interest clearly lies in the preservation of records from all three constitutional branches of government.
- 2.70 Whilst the archival function may be seen as essentially a function of the executive government, any consideration of the inclusion of the records of the legislature and the courts within the definition of "public record" raises issues about the separation of powers.
- 2.71 The Commission considers the establishment of an independent archives authority would resolve many of the separation of powers issues which may arise out of the collection and preservation of the records of the Parliament and the judiciary by officers of the archives.
- 2.72 Notwithstanding this solution to the separation of powers issue, however, questions of considerable complexity still surround whether or not records of the Parliament and the courts should be subject to archives legislation.
- 2.73 The Archives Bill 1978 (Cwlth) excluded both the records of Parliament and the judiciary on the grounds that it would be inappropriate for the regulatory powers of the Archives *"... to be made applicable to the records of those arms of the Government which traditionally enjoy a certain degree of independence and autonomy"* (Archives Bill 1978 (Cwlth): Explanatory Memorandum, quoted in Senate Standing Committee 1979a, para. 33.21).
- 2.74 In reviewing aspects of this Bill the Senate Standing Committee on Constitutional and Legal Affairs argued, however, that:
- "The purpose of the Archives Bill is to guarantee that our national history can be both preserved and reconstructed. This guarantee must exist with respect to the operation of the Head of State, of the Legislature and the Judiciary ..."* (Senate Standing Committee 1979a, para. 33.23).
- 2.75 The Commission considers the records of the Parliament and the courts should be subject to archives legislation (cl.4). The Commission also considers, however, that problems will arise in relation to the Archives Authority exercising powers of entry and inspection. To ameliorate this problem archives legislation should specifically exclude the operation of such provisions in relation to the Parliament and the courts, or allow for consultation (cl. 37(5) & (6)) (see paras 4.83 - 4.98 and 4.111).



- 2.76 With respect to the courts, the question arose during the Commission's review what records of the courts should be caught under archives legislation. Because the courts are courts of record, the official records of proceedings would be required to be preserved. What is contentious, however, and which might be caught by the provisions of archives legislation if not excluded, are such things as judges' notebooks and draft judgments which are sensitive.
- 2.77 The Commission considers the adoption of a formulation similar to paragraph (g) of the definition of "unit of public administration" in section 1.3(1) of the *Electoral and Administrative Review Act 1989* (Qld) will resolve this difficulty. Under this provision the records of the registries and other administrative offices of the State's courts will, save in respect of powers of entry and inspection, be subject to archives legislation (cl.4). Such things as judges' notes and draft judgements, however, will not be caught under the draft Archives Bill.

#### *Records of the Governor Acting in Official Capacity*

- 2.78 The Archives Bill 1978 (Cwlth) excluded the records of the Governor-General from the public access provisions of that Bill. Following a review of the Bill by the Senate Committee, however, the definition of "Commonwealth institution" was amended to include the official establishment of the Governor-General.
- 2.79 Speaking at the Commission's public seminar on Archives Legislation, Dr J. Stokes, Director, Access and Client Services, Australian Archives, said of this amendment to the Bill:

*"This had the effect of bringing in the administrative records of the Governor-General's office but not personal correspondence between the Governor-General and the Monarch. The only problems which have arisen in this area have related to correspondence with or relating to the monarch which has ended up on departmental files. At the request of the British Government we're still withholding for 75 years correspondence relating to the abdication of King Edward VIII in 1936. This would certainly make an interesting case if it ever got to the Administrative Appeals Tribunal" (SP6).*

- 2.80 The Commission considers that it is in the public interest that the records of the Governor, acting in the Governor's official capacity, be collected and preserved (cl.4). However, correspondence between the Governor and the Monarch, or the Governor-General, should be a matter for consultation at a later time between the respective governments (cl.5).

#### *Records of Local Authorities*

- 2.81 At the Commission's public seminar on Archives Legislation, the chairman Commissioner B. Hunter asked the following question of Mr C. Hurley, Senior Archivist, Public Records Office, Victoria:

*"When we talk about government records generally, we just mean that - we mean the State - I've got a special interest in local government records and there are a lot of people at the local government level sometimes who feel a special proprietorial interest in their own records to the extent that sometimes they might feel it improper that you should demand them. For example, if the City of Brisbane had some records, relating to its original incorporation or creation as a body corporate, and I understand those records are earlier than the incorporation records of the State of Queensland, how would you feel if they felt that they belonged to BCC and not to the State?" (EARC 1991b, p.55).*

2.82 Mr C. Hurley said in response:

*"Well, I won't trespass on the tenderness of feelings here in Queensland. I can comment a little on how we handle that question in Victoria. I'd say it's not an attitude that's confined to local government, you come across that attitude in central government as well. It's that agencies, particularly long lived ones, start to feel very proprietorial about their records and overlayed on that is possessiveness - not just of municipal records - but of local records generally. This can extend to the records of central government agencies which operated locally. So you can have things like the Magistrates Courts records and the records of lands departments particularly, in which there is a very strong local focus and a very strong local interest - not simply in the subject of the records, but also in retaining the records locally" (EARC 1991b, p.55).*

- 2.83 There is no doubt that local authorities and other agencies understandably will feel proprietorial about their records. However, it is in the public interest that the records of local government authorities be collected and preserved.
- 2.84 In making the assertion that the public interest should be paramount, the Commission recognizes that the people who are likely to be most interested in the preservation of local government records are the people from within those municipalities.
- 2.85 The Commission considers the correct way to overcome this problem, however, is not to exempt local government records from the definition of public record, but to facilitate the availability of such records at regional repositories (cll. 4 & 21).

*Bodies Not Established under an Enactment for a Public Purpose, but Supported by Government*

- 2.86 Increasingly, there are associations which are carrying out activities contributing to the public good, but which are not bodies established under an enactment for a public purpose.
- 2.87 These associations are private organisations carrying out public purposes with financial or other assistance from government. Such agencies may include welfare organisations, volunteer natural disaster services, volunteer legal services etc. Clause 9(1)(c) of the FOI Bill 1991 (Qld) includes these bodies as public authorities.
- 2.88 The Commission considers these bodies should be included as public authorities in archives legislation, but only in respect of the records of such bodies relating to the seeking and the use of the financial or other assistance supplied, and only to the extent that those bodies are required to account to the government in respect of such matters (cl.4).

RECOMMENDATIONS

2.89 **The Commission recommends that:**

- (a) **archives legislation contain a definition of "public record" similar to that of "Crown record" contained in section 3(1) of the Archives Act 1983 (Tas.);**

- (b) paragraph (a) of the definition be modified to confine it to documents in which the public authority has retained property;
- (c) the introductory words of the section, "Crown record", be modified to read "public record";
- (d) paragraphs (a) and (b) be modified by replacing the word "Crown" with the words "public authority"; and
- (e) paragraph (b) be modified by adding at the end of the paragraph the words, "or in accordance with established practice".

The Commission further recommends that:

- (a) archives legislation contain a definition of public authority which includes -
  - (i) a definition of public authority similar to that contained in Section 5(1) of the L&A Act, save in respect of paragraph (a) which should be modified to accommodate paragraph (g) of the definition of "unit of public administration" in section 1.3(1) of the *Electoral and Administrative Review Act 1989 (Qld)*;
  - (ii) the Parliament;
  - (iii) the Governor acting in his official capacity;
  - (iv) those bodies contained in clause 9(1) of the FOI Bill 1991 (Qld);
- (b) the Parliament and courts be excluded from provisions relating to the power of entry and inspection in relation to records management practices;
- (c) correspondence between the Governor and the Monarch, or the Governor-General, be exempt from archives legislation, pending consultation in respect of arrangements regarding the applicability of archives legislation to such material.

### Records of Inter-Governmental Authorities

#### MATTERS FOR CONSIDERATION

- 2.90 Inter-governmental activity is an increasingly important area of public administration. The records of inter-governmental authorities provide valuable evidence of the heritage of the State. The area is, however, one over which exclusive jurisdiction cannot be asserted. Notable instances of where the State may wish to seek special arrangements for the preservation of inter-governmental records are when Commonwealth bodies carry out operations within the State. For example, operations by the Great Barrier Reef Marine Park Authority, or, operations and activities carried out by the Commonwealth with respect to the North Queensland World Heritage listed rainforests.

- 2.91 Issues Paper No. 16 (at p.16) outlined the provisions in the *Archives Act 1983* (Cwlth) which deal with inter-governmental records and invited comment on whether archives legislation in Queensland should make special provision for the records of inter-governmental authorities.

#### ARGUMENTS MADE IN PUBLIC SUBMISSIONS

- 2.92 Generally, those submissions that addressed the inter-governmental records issue agreed that archives legislation should make provision for such records.

- 2.93 The Queensland Branch of the Records Management Association of Australia (S9) commented:

*"Archives legislation should make provision for the records of inter-governmental authorities which include Statutory Authorities and Quasi Autonomous Non-government Organisations.*

*The records of such authorities provide valuable evidence of the history and development of Queensland."*

- 2.94 The Australian Society of Archivists Incorporated (S23) was of a similar view, and commented that:

*"As records of inter-governmental authorities may provide essential evidence in relation to the state of Queensland, the ASA is of the opinion that Queensland state archival legislation should make special provision for the custody of the records of such authorities."*

- 2.95 The Queensland Historians Institute (S28) submitted that:

*"Inter-governmental authorities should be included in the definition of a public authority/agency in the Act. Otherwise a range of record groups such as Inter-departmental Committees, special joint boards established between local authorities, government departments and statutory authorities, Ministerial Councils and quasi governmental bodies will be lost to government and public archives users."*

#### ANALYSIS AND COMMENT

- 2.96 Records of Commonwealth-State bodies are presently dealt with in section 23 of the *Archives Act 1983* (Cwlth). Dr J. Stokes explained the practical application of this section at the Commission's public seminar:

*"Section 23 of the Commonwealth Act provides that records of inter-governmental authorities may be regulated out of any of the provisions of the Commonwealth Act. However, this has not been done and we still approach inter-governmental records on a case by case basis. It's probably too much to hope that we could ever get uniform Commonwealth-State relations on inter-governmental records, but it will be helpful if we could at least work out standard access procedures to be applied regardless of whether the records were deemed to be the property of the Commonwealth or of the State. A joint Commonwealth-State working party looked at the issue last year, but to my knowledge it hasn't reached any final conclusions yet" (EARC 1991b, p.50).*

- 2.97 The Commission considers the records of inter-governmental agencies should, where appropriate, be treated as "public records" to ensure their preservation and availability for historical research (cl.5).

#### RECOMMENDATION

- 2.98 **The Commission recommends that archives legislation authorise the Archives Authority to reach agreement with the archives bodies of other governments as to retention, archival storage and access in relation to inter-governmental authorities' records, and that where appropriate the provisions of such agreement be sanctioned by regulations.**

#### **Legal Title to Public Records**

#### MATTERS FOR CONSIDERATION

- 2.99 Issues Paper No. 16 (at p.17) made the following observation:

*"In certain European jurisdictions, public archives are 'inalienable'. That is, they are owned by the government, and cannot lawfully be removed from government ownership or abandoned or given away. Where such legislation exists, the ownership and custody rights over public records cannot lawfully pass from the state, and private possession of public records is made unlawful."*

- 2.100 Although inalienability provisions exist in certain European jurisdictions, such is not the case, to the knowledge of the Commission, in archives legislation of common law jurisdictions. The legislation of common law jurisdictions does, however, commonly contain a provision requiring the return of public records which are not in official custody.
- 2.101 Against this background Issues Paper No. 16 called for submissions on whether archives legislation in Queensland should make it explicit that public records remain the property of the Queensland Government.

#### ARGUMENTS MADE IN PUBLIC SUBMISSIONS

- 2.102 The majority of submissions which commented on this issue were in favour of archives legislation providing that public records are inalienable. A small number of submissions, however, were not in favour of inalienability with respect to certain records.
- 2.103 In support of inalienability the Beaudesert Shire Council (S10) submitted that: *"Legal title to public records created, maintained, returned or preserved by Public Sector Agencies should never be sold or transferred."*
- 2.104 Similarly, the Queensland Branch of the Records Management Association of Australia (S9) submitted that: *"The legal title to public records created, maintained, retained and preserved by government agencies should never be sold or transferred."*

- 2.105 In relation to government documents and police records P.C. O'Brien (S1) submitted that:

*"Government documents and police records in particular must be seen as public property and not as part of the territorial imperative of the creating authority. They were created using public money and are therefore the property of the people of Queensland."*

- 2.106 The submission of the Australian Council of Archives (S27) agreed that public records should remain the property of the Queensland Government, but only until such time as the legal title is alienated by way of sale or transfer.

- 2.107 In answer to the question whether all public records should remain the property of the Queensland Government, the Brisbane City Council (S24) submitted:

*"No, as Local Government records are classed as 'public records' and should not be considered as remaining the property of the Queensland Government. Such records should be retained by the Local Authority or transferred to State Archives for preservation, and made available to the public in accordance with relevant access rights as determined between the Agency and the State Archives."*

- 2.108 The Mulgrave Shire Council (S37), in similar terms, agreed with the submission by the Brisbane City Council.

#### ANALYSIS AND COMMENT

- 2.109 In relation to inalienability it has been recommended that:

*"Public archives are public property, part of the public domain, and therefore inalienable and imprescriptible. These qualities may, depending on the law of the given country, be made explicit in an archival law. The National Archives should have a right to replevin (or, at least, a right to make copies) of public archives which have gone astray" (Ketelaar 1985, p.104).*

- 2.110 The Commission considers that inalienability would reinforce provisions seeking to preserve public records and to prevent their unlawful destruction or loss out of State custody. Inalienability would also make sale of public records unlawful. There will be cases where public records are transferred into, or held in, the custody of a person or body other than the Archives Authority (such as the transfer of records relating to a joint venture between the State and a private institution, to the custody of that private institution, or the transfer of records with local importance to a regional university or local authority). In those cases inalienability would guarantee that the records remain the property of the State and that requirements prescribed by the Archives Authority as to the preservation and safe custody of those records must be observed (cl. 24 & 25).

- 2.111 In acknowledging that public records should be inalienable, the Commission recognizes that public records contained in or on electronic media will require special attention (cl.9). That is, in so far as electronic media are concerned, it is, and will be, difficult, in some instances, to detect whether the public record held is an original or a copy or whether it has been altered.

## RECOMMENDATIONS

2.112 **The Commission recommends that:**

- (a) **archives legislation provide that public records are inalienable;**
- (b) **archives legislation provide specially for the retention and protection of public records held in or on any form of electronic media.**

**Non-public Records**

## MATTERS FOR CONSIDERATION

## 2.113 Issues Paper No. 16 (at p.17) observed that:

*"The collection and preservation of records relating to the history and government of Queensland and to persons or organisations who have played an important role in the development of the State could constitute an important function of the Queensland State Archives."*

- 2.114 At present in Queensland, the L&A Act provides merely for the retention of "public records" by the QSA. The Act makes no provision for the custody of records other than "public records" as defined by the Act.
- 2.115 Currently in Queensland, many private records of public interest are deposited with the John Oxley Library, a division of the State Library of Queensland, which collects, preserves and makes available material relating to the history and development of the Colony and State of Queensland (Library Board of Queensland 1990, p.4).
- 2.116 In view of the current practice, and the likely effect the expanding of functions of the QSA may have, Issues Paper No. 16 invited submissions on whether there is a public interest in the collection and preservation of certain non-government archives, and whether archives legislation in Queensland should provide statutory recognition of this public interest. Issues Paper No. 16 also invited comment on what types of non-government records should be preserved.

## ARGUMENTS MADE IN PUBLIC SUBMISSIONS

- 2.117 The majority of submissions which commented on this issue were of the view that there is a public interest in the collection and preservation of certain non-governmental records. However, the submissions were fairly evenly divided on whether archives legislation should provide statutory recognition of this public interest and as to what types of non-governmental records should be subject to archives legislation.
- 2.118 In support of the claim that there is a public interest in the preservation of non-governmental records, Boonah Shire Council (S17) submitted that: *"Bearing in mind that archives constitute the memory of a society, Council considers it necessary to preserve non-governmental records."*

2.119 The Anglican Church of Australia (S2) gave evidence of the public interest in non-public records and commented on what powers the QSA should have in relation to those records. In relation to public interest the Church commented that:

*"There is some public interest in the archives held by this Church. This is evidenced by the use that the public makes of these archives, as follows -*

- . academic researchers, who use the archives in the fields of societal history, community history, history generally and architecture;*
- . ecclesiastical historians from the Anglican Church and other churches;*
- . genealogical researchers."*

2.120 As to what powers the QSA should have in relation to such records the Church submitted that:

*"... the Queensland State Archives be given the power to accept deposits of records from private archives, with access rules being set by the person or body making the deposit; the Queensland State Archives should be required to provide preservation and conservation for such records in similar fashion to that which is provided for government records."*

2.121 The Church also submitted that:

*"... no legislation should authorize the compulsory acquisition of Church records by the Queensland State Archives, or by any other statutory body."*

2.122 The Capricornia Collection Society (S3) was of a similar view regarding the powers the QSA should have with respect to non-public records. The Society did recognize, however, that QSA may have a role in the recording of non-public records:

*"A Register of non-governmental records could be maintained by the Queensland State Archives to complement its activities but it should not have the statutory authority to acquire private records even for the purpose of preservation. It is the belief of the Society that potential donors of private records would be reluctant to even acknowledge the existence of such records should there be the possibility of these records being acquired or registered for proper preservation. Thus significant records could be left unattended thereby defeating the goal of preservation.*

...

*While there is definitely a public interest in the collection and preservation of certain non-governmental archives, archives legislation in Queensland should not provide statutory enforcement of this public interest."*

2.123 The Rockhampton City Council (S32) were not supportive of the QSA having a role in respect of non-public records, commenting that:

*"We do not see this as being in the best interests of providing access for the people of Queensland. It means that more and more such records will be centralised in Brisbane, making access more and more difficult for people from the rest of the State. This simply appears to be a duplication of the role already being played by the John Oxley Library and many other libraries throughout the State. We must question the motives for such collection, and the ability of State Archives to make this material readily accessible to the public. Local history is a very important aspect of a community's life, and surely a local community has a right to be able to access that history as much as possible at the local level.*

*The suggestion of the maintenance of a register of the location of such records is a sensible one, and surely offers a more workable alternative than having everything centralised in Brisbane."*



- 2.124 The Royal Historical Society of Queensland (S26) indicated that they were not in favour of the QSA having a role with respect to non-public records, commenting:

*"There are a number of organizations and institutions throughout Queensland (including our own) which has been successfully collection non-government archives and making them available for research for many years (78 in our society's case). The public interest in the collection of private records is fulfilled by these organizations who consult with the Queensland State Archives on conservation matters."*

- 2.125 The Library Board of Queensland (S15) referred to the current position in Queensland, submitting reasons why the QSA should not be involved with non-public records:

*"The existing situation where the John Oxley Library collects the private records and the State Archives collects the public records, has worked well for many years and has avoided costly and wasteful duplication of effort.*

...

*In addition to the John Oxley Library's holdings other collecting institutions such as tertiary institution libraries, and local authority libraries have invested substantial time and money over many years in collecting private archives. Historical, family history and other specialist societies also collect private archives relating to their particular fields of interest. And some larger organizations such as churches and banks maintain their own archives. Thus, there is already a plethora of organizations and individuals collecting private archives.*

*The financial stringency of the last ten years within both the public and private sectors has meant increasing difficulty in securing adequate resources to maintain and develop archival holdings. As a result there has been a move amongst the major collecting libraries towards rationalising collections to try to reduce duplication and competition.*

*Although many archives are donated to institutions, many others have to be purchased. Competition simply forces the prices up. Since many of these organizations are government funded, the government is virtually bidding against itself in many cases. It makes good economic sense to try to rationalize collecting fields and avoid duplication wherever feasible. It runs completely counter to this trend to have yet another government body, i.e. the State Archives, competing in the field of private archives."*

- 2.126 On the issue of whether the QSA should be responsible for keeping a register of non-public records the Library Board of Queensland (S15) submitted that:

*"... such a register already exists for the whole of Australia. This is the **Australian Historic Records Register: a record of the Australian Bicentennial Historic Records Search** which was published by the National Library in 1989. There is also the publication **Guide to Manuscripts in Australian Libraries**. These two publications together represent a major investment of resources in documenting the private archives and manuscripts in existence throughout Australia. The Library Board of Queensland sees little point in expending further resources to duplicate these efforts."*

## ANALYSIS AND COMMENT

- 2.127 In support of the proposition that archives have a role with respect to non-public records it has been recommended that:

*"The National Archives should be entitled by law to acquire private archives. Legislation should be considered making the National Archives responsible for the compilation and maintenance of a register of all archives of non-public provenance and all documentary collections with research value. Any change in the place of their deposit should be reported; and any proposal to sell or otherwise dispose of them should be forbidden, or should be subject to the approval of the competent Archives Authority. The state may be given a right to preferential purchase of private archives."* (Ketelaar 1985, p.104).

- 2.128 The *Archives Act 1983* (Cwlth) requires that persons or organisations holding archival resources of the Commonwealth (records of national significance or public interest) notify the Australian Archives of the existence of those resources so that a register of the location of such resources may be maintained (ss.65 & 66).
- 2.129 The Commission recognizes that, for the reasons outlined by the Library Board of Queensland, the majority of non-public records should be collected and preserved by the John Oxley Library. However, the Commission also considers that there is good reason for vesting the Archives Authority with power to receive records of non-governmental bodies (as in cl.43). For example, the Commission recommends later in this Report that the Archives Authority be given a role in acquiring "personal or political papers" of Ministers.
- 2.130 Such papers comprise an inextricable mix of "private" and "official" documents. It is fundamental to archival technique that the assemblage should not be divided into private and official portions and lodged with two or more custodians. A Minister's papers (in their entirety) should be kept intact and lodged with a single custodian.
- 2.131 If the Archives Authority is to accept Ministers' papers, then it follows that the Authority must have power to accept "non-public records" to enable it to accept Ministerial deposits, even if no others, intact.
- 2.132 For the reasons outlined by the Library Board of Queensland the Commission does not consider it necessary or appropriate that the QSA keep a register of all non-public records.

## RECOMMENDATION

- 2.133 **The Commission recommends that the Archives Authority have the right to receive records of non-governmental bodies such as corporate bodies, trade unions, educational institutions, religious institutions, political organisations and the private papers of certain individuals.**

## Records of a Minister

### MATTERS FOR CONSIDERATION

- 2.134 Issues Paper No. 16 divided the records held in the office of a Minister into four categories: departmental records; cabinet documents; personal or political records; and ministerial records. Records which fall within the first two categories are collected and preserved under current provisions of the L&A Act. The personal or political records of a Minister, and other records produced by a Minister, but not under the control of a public authority ("ministerial records"), do not come within the scope of the L&A Act.
- 2.135 Against this background, Issues Paper No. 16 (at pp.21-22) called for submissions on the following matters:

*"Should archives legislation in Queensland make provision for the care and preservation of records of ministerial records (para.3.70)?"*

*Should archives legislation provide that the Queensland State Archives may receive and preserve the personal and political papers of Ministers and authorise arrangements with Ministers to facilitate such receipt and preservation (para.3.73)?"*

*In relation to ministerial records and the personal and political papers of Ministers, should archives legislation in Queensland contain a provision such as section 6(2) of the Archives Act 1983 (Cth) (para.3.74)?"*

### ARGUMENTS MADE IN PUBLIC SUBMISSIONS

- 2.136 Most of the submissions which responded to the three questions raised by the Commission agreed that they should be answered in the affirmative.
- 2.137 James Cook University of North Queensland (S11) submitted that:

*"... a special case exists for ministerial records and the personal and political papers of Ministers. There is a complex interaction between the public and private archives of senior ministers which justifies maintaining the integrity of the archives. Hence, we respond positively to issues 3.70, 3.73 and 3.74.*

*In particular, we would not wish to see the development of independent archival repositories of prominent ministers, on the American model. This would lead to an unjustifiably excessive distribution of key archives."*

- 2.138 The submission by the Queensland Historians Institute (S28) agreed that: *"... it is essential to preserve Ministerial records as they contain policy initiatives, decisions and procedures for obtaining Cabinet endorsement and the implementation of the decision."*
- 2.139 In relation to the personal records of a Minister, the Institute commented that: *"The Ministers records deemed to be personal and private should be kept separately."*
- 2.140 A. Sandell (S6) was of the view that:

*"Records of Ministers, other than personal or purely political should be transferred to State Archives. This would normally happen within a reasonable period of time of a Minister vacating his portfolio for whatever reason.*

*Ministers should be encouraged to also transfer personal records to State Archives. They may place a time factor on access to these documents. This time factor will not be subject to any scrutiny or discussion."*

- 2.141 The Library Board of Queensland (S15) outlined in their submission the current situation in Queensland, reasons for improvement and what could be done legislatively to bring about those improvements. The Board submitted:

*"Under the present **Libraries and Archives Act 1988** the status of records held in the office of a Minister is not clearly defined. Such records are likely to include departmental records, cabinet records, records relating to a Minister's duties as an officer of the Crown plus electoral and party records. Often it is quite difficult to distinguish the various categories.*

*In theory one could argue that the existing Act already provides for State Archives to control certain of these categories as public records. However, in practice such records have not come to State Archives as part of a normal administrative process. In general, they appear to have been treated as the private property of the relevant minister to do with as he or she pleased. In terms of the accountability of government in a democratic society, this presents major problems. It is extremely difficult for bodies such as the Public Sector Management Commission, EARC, the Auditor-General, law enforcement agencies, commissions of inquiry, courts etc. to effectively carry out their review and prosecution responsibilities if the necessary documentation has been lost, destroyed or otherwise rendered unavailable.*

***The National Archives of Canada Act 1987** provides a useful model for the control of the records to be found in the office of a Minister and one which might reasonably be adopted in Queensland. Whatever model is used, it is essential that those records kept in a Ministers Office which document his or her work as a Minister of the Crown be identified as public records and transferred to the State Archives at the appropriate time and with the appropriate access conditions."*

- 2.142 The Mulgrave Shire Council (S37) agreed that Ministers' records should be regarded as public records and that:

*"... archives legislation should provide for State Archives to receive and preserve the personal and political papers of Ministers and to authorise arrangements for the receipt and preservation of same."*

- 2.143 The Council further submitted that archives legislation should contain a provision similar to section 6(2) of the *Archives Act 1983* (Cwlth) in relation to Ministerial records.

#### ANALYSIS AND COMMENT

##### "Ministerial Records"

- 2.144 It is anticipated that rights of access to ministerial records in Queensland will exist following the enactment of the FOI Bill. Clause 21 of the current Bill provides access to the "official documents of a Minister".
- 2.145 The FOI Bill therefore recognises that, although not clearly within the definition of "public record", there is a strong public interest in the availability of such records for public access. Issues Paper No. 16 (at p.20) provided the example of records produced by a Minister and his or her staff or other persons during the policy formulation process, but not transferred to or retained by a government agency. Although not "public records" within the current definition in the L&A Act, those records, in addition to related records held by a government agency, would constitute the official record of the formulation of that policy.

- 2.146 The State Archivist, Ms Lee McGregor described the current inadequacy of the L&A Act in relation to "ministerial records" at the Commission's public seminar:

*"... the current definition of public records ... requires some revision so as to ensure that it includes those records held in a Minister's office which relate to his duties as an officer of the Crown. Until now in Queensland those records have been treated largely as the property of the Minister to do with as he or she wished. In terms of government accountability, that obviously presents some problems. It's extremely difficult for bodies such as the PSMC, EARC, the Auditor-General, law enforcement agencies, commissions of inquiries, courts, etcetera, to effectively carry out their review and prosecution responsibilities if the necessary documentation has been lost, destroyed or otherwise rendered unavailable. It also represents a major loss of source material for later research purposes, so I would like to see the Act address that whole question of Ministerial records" (EARC 1991b, p.87).*

- 2.147 The *National Archives of Canada Act 1987* (Can.) leaves little room for ambiguity in relation to its application to ministerial records and, also, expressly provides that:

*"No record under the control of a government institution and no ministerial record, whether or not it is surplus property of a government institution, shall be destroyed or disposed of without the consent of the Archivist" (s.5(1)).*

- 2.148 The Commission considers that records under the control of a Minister relating to any public authority other than another Minister should be subject to archives legislation (cl.4).

#### Personal or Political Records

- 2.149 Section 6(2) of the *Archives Act 1983* (Cwlth) provides:

*"Where, in the performance of its functions, the Archives enters into arrangements to accept the custody of records from a person other than a Commonwealth institution, those arrangements may provide for the extent (if any) to which the Archives or other persons are to have access to those records and any such arrangements have effect notwithstanding anything contained in Division 3 of Part V."*

- 2.150 This provision was carefully designed to enable the Australian Archives to reach agreements with Ministers about the custody of their political and private records (not included within the operation of the *Archives Act 1983* (Cwlth)). The capacity to enter into specific agreements given by section 6(2) of the *Archives Act 1983* (Cwlth) has been vital for this purpose.
- 2.151 Ministerial papers are an important archival resource. It is desirable that collections of ministerial papers should not be dismembered by separating out those papers which may be regarded as part of the official records. The QSA therefore needs to be able to offer appropriate storage and confidentiality for the whole of a Minister's papers.
- 2.152 The appropriateness of having a provision similar to section 6(2) of the *Archives Act 1983* (Cwlth) was outlined earlier in this Report under the heading "Non-Public Records" (see paras 2.128 - 2.134).

2.153 The Commission considers that, in the interest of preserving the heritage of the State, personal or political records should be collected and preserved by the Archives Authority (cl.43). However, although it is appropriate that such records be the subject of arrangements between the Archives Authority and persons delivering the records, the question of resources must be kept in mind. Archives should not become a dumping ground for merely unwanted records that are to be held in perpetuity free from public access. The Commission further considers, therefore, that any arrangement for the holding of personal or political records should have no effect, after 75 years from the death of the person delivering the records to the extent that the arrangement restricts or prohibits public access to the records. This will allow sufficient time for any sensitivity once contained in the records to dissipate and, at the same time, prevent idle occupation of archives resources.

#### RECOMMENDATIONS

2.154 **The Commission recommends that:**

- (a) **archives legislation in Queensland contain provisions relating to the collection and preservation by the Archives Authority of the records of a Minister, other than a record that is of a personal or political nature or that is under the control of a government institution, similar to the provisions of the *National Archives of Canada Act 1987* (Can.);**
- (b) **archives legislation in Queensland include a similar provision to section 6(2) of the *Archives Act 1983* (Cwlth);**
- (c) **archives legislation provide that no arrangement entered into for the storage and preservation of personal or political records shall have effect, after 75 years, from the death of the person delivering the records, to the extent that such arrangement precludes public access to those records after that time.**

## CHAPTER THREE

### ARCHIVES AND PUBLIC RECORDS MANAGEMENT

#### Public Records Management as an Accountability Mechanism

##### MATTERS FOR CONSIDERATION

- 3.1 There are three basic phases in the records management continuum: (1) records creation; (2) records use and maintenance; and (3) records disposition. If records management and archival skills are utilized during all stages of the records management continuum, benefits will accrue to public administration.
- 3.2 Under the L&A Act the responsibility for making and retaining "complete and accurate records" of the activities of a public authority is imposed on the Chief Officer of that authority (s.52(2) L&A Act). Access to public records under the L&A Act is subject to any restrictions or conditions imposed by the Chief Officer of the public authority. Moreover, access is also subject to the discretion of the State Archivist (Reg. 21 L&A Regs). Destruction of public records is carried out with the approval of the State Archivist (s.55 L&A Act); the State Archivist being subject to directions from the Minister, the Library Board and the Director and the State Librarian (s.51(2)(b) L&A Act).
- 3.3 After discussing effective public records management and public records management as an accountability mechanism, Issues Paper No. 16 (at p.29) invited comment on:

*"When authorising disposal of public records should the Archives have regard to the present needs of accountability or concentrate only on future historical research needs?"*

##### ARGUMENTS MADE IN PUBLIC SUBMISSIONS

- 3.4 Very few submissions referred to this issue raised by the Commission.
- 3.5 The submissions which did address the issue suggested it was a misconception to ask whether regard should be had to the present needs of accountability or concentrate only on future historical research needs when authorising disposal of public records.
- 3.6 In this regard the Beaudesert Shire Council (S10) submitted that:
- "When authorising the disposal of public records the Archives are reviewing records which have already been declared as being no longer vital to the agency.*
- That is to say, those records are no longer vital for the administrative, fiscal or legal requirements for the management of that agency's business.*
- From this perspective Archives should concentrate on future historical research needs as well as the needs of accountability."*
- 3.7 In the Co-ordinated Response from the Queensland Public Service (S20) it was submitted that: *"... when authorising disposal of public records, the Archives should have regard both to the present needs of accountability and to future historical research needs."*

- 3.8 The Mulgrave Shire Council (S37) likewise submitted that: "... when authorising the disposal of public records archives should have regard to the present needs of accountability and future historical research needs."

#### ANALYSIS AND COMMENT

- 3.9 At the Commission's public seminar Mr C. Hurley, Senior Archivist, Public Records Office, Victoria, alluded to the historical development of archives legislation:

*"In this country in particular archives legislation began with statutory provisions designed to prevent the destruction of government records until the state and national libraries had a chance to evaluate them for historical research purposes.*

*... This role was largely custodial.*

*... Gradually this role has developed into what ... can be called a regulatory role" (EARC 1991b, p.40).*

- 3.10 It is necessary to consider whether that regulatory role should be focussed solely on identification and preservation of public records, or whether archives should also be a mechanism for accountability.

- 3.11 Concerning the development of the regulatory role of archives, Mr Hurley said:

*"Increasing likelihood that records will now be used to hold the record creator to account through external scrutiny raises the question whether the record creator can be left as the sole judge of what records are created, how they are maintained and how they shall be kept.*

*The archive's regulatory role has developed through legislation basically through two means: first, the archives has a final determination on the retention and destruction of records; second, it has a power to set standards in records management practices in government agencies.*

...

*... because the power to regulate disposal and records management through archives law remains the only such regulation which is general in its application, its significance has grown as record creators have become increasingly subject to external scrutiny and accountable through their records for the actions and decisions which are there recorded" (EARC 1991b, p.40).*

- 3.12 Mr Hurley acknowledged that when the Commonwealth legislation was being drafted:

*"...there was still a view that the responsibilities of the Archives Authority should be confined solely to the purpose of ensuring that historical records survive for research purposes" (EARC 1991b, p.40).*

- 3.13 It is arguable that the responsibility for making and retaining adequate documentation is the responsibility of ministers and chief executives of government agencies and that failure to fulfil this responsibility is one for which they should be called to account through existing mechanisms of accountability, the Parliament, the Ombudsman and so on, rather than insert another official and another mechanism into the accountability chain.



- 3.14 Dealing with this argument, Mr Hurley (EARC 1991b, pp.42-44) made the following points in his address at the Commission's public seminar:
- (a) The role of archives in regulating the creation, management and preservation of public records is not an exclusive one and is not intended to relieve the chief administrator of any obligations or responsibilities.
  - (b) The regulatory role does not derogate from, or in any way substitute for, other existing or future mechanisms of accountability.
  - (c) The contribution of archives to the accountability of public administration lies in the requirement that agencies submit their records management practices to external scrutiny. This requirement achieves at least three things:
    - (i) it provides an additional safeguard for the public interest in record retention;
    - (ii) it establishes routine procedures for documenting the decisions which have been taken through the archives disposal schedules and destruction authorities so that if any question of what was authorised later arises it can be settled by reference to those records; and
    - (iii) it provides record creators with some measure of protection from undue political influence in the process of keeping and destroying records.
  - (d) Archives procedures establish a norm from which actions can and usually will be seen to depart, thus making detection more likely.
  - (e) Good archives and records management practices assist and foster efficient administration.
  - (f) Records creators must be responsible for the efficient administration of their agencies subject to compliance with rules or regulations established by or in accordance with laws enacted to serve the needs of government and the public interest. In the service of accountability, there should be external regulation of records management.

- 3.15 The Commission considers the Archives Authority should have regard to the present needs of accountability, as well as future historical research needs (cll.9 & 26).

#### RECOMMENDATION

- 3.16 **The Commission recommends that archives legislation authorise the Archives Authority to have regard to current needs of accountability as well as future historical research needs when establishing records management standards and authorising disposal of public records.**

## Enforcing Public Records Management as an Accountability Mechanism

### MATTERS FOR CONSIDERATION

- 3.17 After raising the previous issue of disposal of public records, accountability and future historical research needs, Issues paper No.16 (at p.29) invited comment on:

*"... what person or body should be responsible for ensuring that government agencies properly create, maintain, use and preserve public records, and how should this be done?"*

### ARGUMENTS MADE PUBLIC SUBMISSIONS

- 3.18 Very little comment was received by the Commission on this issue.
- 3.19 In its submission to the Commission, the Criminal Justice Commission (CJC) (S13) stated:

*" ... the CJC has an 'anti-corruption' role in offering and rendering advice concerning the detection and prevention of official misconduct; it also investigates complaints of 'official misconduct' and secures the taking of appropriate action in respect thereof. Official misconduct, inter alia, relates to conduct that is not honest or not impartial in connection with an appointment in a unit of public administration. Within this area of concern, the issues of 'accountability' in relation to retaining records and 'access' to records are important.*

...

*It is noted that EARC in the Issues Paper refers to the CJC as one of the bodies that is impeded in carrying out its functions by poor record keeping and the unauthorised or unlawful destruction of records. The experiences of the Fitzgerald Commission and those of the CJC clearly establish this.*

*For reasons that relate to its functions, the CJC certainly supports the view that the Archives should have regard to the present needs of accountability, i.e. 'the audit purpose'. Maintenance of proper records and record systems assists in ensuring public bodies act responsibly and public officials act within the law.*

*It would seem to the CJC that the responsibility for record management is appropriately an archival function, and concentration of all matters connected with archives in one body enhances the abilities of that body to effectively achieve its overall purposes. Therefore, the CJC believes that the Queensland State Archives (or howsoever the body is called) should have the responsibility for ensuring that government agencies create, maintain, use and preserve public records."*

- 3.20 P.D. Wilson (S14) argued, however, in a submission to the Commission that:

*"It seems unbalanced to place in archives legislation a requirement of good contemporary management, namely, that an agency should keep proper records. One might expect that primary requirement to be spelt out a little further to the front of the administration process."*

## ANALYSIS AND COMMENT

- 3.21 At the Commission's public seminar Mr Hurley said in relation to who should be responsible:

*"In a sense, it doesn't really matter ... because whoever carries out that function will be serving the purpose of an archives. If it's not called an archives, it will nevertheless be acting as one" (EARC 1991b, p.22).*

- 3.22 The Commission considers the establishment of an archives authority will mean the creation of a body ideally placed to ensure correct records management practices are observed by government agencies (cl.26). It is recommended that the Archives Authority be conferred with power to establish record management standards (see paras 4.18 - 4.34 below) (see cl.10).

## RECOMMENDATION

- 3.23 **The Commission recommends that archives legislation confer on the Archives Authority power to ensure proper records management practices are carried out, the conferral of such power not to derogate from the powers that other regulatory bodies have regarding enforcement of proper practices in government agencies.**

## CHAPTER FOUR

### PRESERVATION OF PUBLIC RECORDS

#### Introduction

#### 4.1 Issues Paper No. 16 (at p.30) observed that:

*"An archives system has two functions. First, it must take all possible precautions for the preservation of public records of continuing and permanent value and the safeguarding of their essential qualities. Second, it must provide for access to, and the dissemination of, information held in archives."*

#### 4.2 These two functions go hand in hand. The first would be an exercise in futility without the latter; and the second not possible without the effective carrying out of the first.

#### 4.3 This chapter focuses on issues relating to the former of the two functions.

#### Records Creation

##### MATTERS FOR CONSIDERATION

#### 4.4 This topic centres on what information should properly be recorded by government agencies and whether archives legislation should contain specific provisions about such matters.

#### 4.5 In its *Report on Freedom of Information*, the Commission stated that:

*"The Commission considers that the question of what information should properly be recorded by government agencies is an important issue that is fundamental to the effective operation of archives administration, and indeed to any rights of access granted under archives legislation" (EARC 1990c p.37).*

#### 4.6 In Victoria, Western Australia and Queensland respectively, archives legislation contains requirements that government agencies create records (see s.13 *Public Records Act 1973* (Vic.); ss.29 & 30 *Library Board of Western Australia Act 1951* (WA); and s.52 *L&A Act*). Section 52 of the *L&A Act* provides that:

"(1) A public authority shall -

- (a) cause complete and accurate records of the activities of the public authority to be made and preserved;
- (b) take all reasonable steps to implement recommendations of the State Archivist applicable to the public authority concerning the making and preservation of public records.

(2) The duty imposed by subsection (1) -

- (a) in the case of a public authority that is a corporate person, is imposed on the public authority and the chief officer thereof;
- (b) in the case of a public authority that is not a corporate person, is imposed on the chief officer of that public authority.

(3) A person who fails to perform a duty imposed on him by this section commits an offence against this Act and shall be liable to a penalty not exceeding 20 penalty units.

- (4) *The chief officer of a public authority shall have the custody of the public records of the public authority."*

- 4.7 Section 52 requires that complete and accurate records be made and preserved, but does not define "complete and accurate records".
- 4.8 Against this background Issues Paper No. 16 (at p.31) invited comment on: *"What information should properly be recorded by government agencies? Does the existing provision in the L&A Act (s.52) adequately state the obligation of government agencies?"*

#### ARGUMENTS MADE IN PUBLIC SUBMISSIONS

- 4.9 Very few submissions addressed this issue in any detail, most merely commenting that Section 52 of the L&A Act adequately provides for the creation of records.
- 4.10 The Moreton Shire Council (S19) commented that: *"The L&A Act (s.52) adequately states the obligations of government agencies to create and maintain accurate public records."*
- 4.11 The Brisbane City Council's submission (S24) placed an emphasis on Section 52(1)(b) of the L&A Act commenting that: *"The L&A Act (s.52) provides for complete and accurate records of the public authorities to be maintained and preserved in conjunction with the State Archivist."*
- 4.12 The Beaudesert Shire Council (S10) also submitted that section 52 adequately states the obligations of public authorities.

#### ANALYSIS AND COMMENT

- 4.13 Although section 52 of the L&A Act places an onus on public authorities to make and preserve complete and accurate records, and notwithstanding that public authorities are obliged under section 52(2) to implement recommendations of the State Archivist, no clear statutory requirement exists which mandates the creation of specific records.
- 4.14 At the Commission's public seminar on Archives Legislation Mr C. Hurley, Senior Archivist, Public Record Office, Victoria explained that the principle that the record does not lie could no longer be assumed in relation to the records of public administrators:

*"What's changed...is that the record creator can no longer be conceived of as being unselfconscious about the prospect of external scrutiny of the records he creates. It began, I suppose, with the courts. They were once reluctant to call government to account or to order the production of government records. Nowadays they apply a large body of administrative law which subjects many government actions to judicial scrutiny. And this is being formalised by statute through the process of judicial and administrative review.*

*It continued through the establishment of public access rights. This century has seen the establishment of statutory access rights under archives laws, first to records more than 50 years old and now almost universally to records more than 30 years old. Within the last two decades, FOI laws have given the public access to records virtually from the moment of their creation. Royal Commissions and boards of inquiry now routinely call for the records in order to carry out their work. So, no records creator could now be said to be ignorant of the possibility that records can and will be scrutinised for a variety of purposes other than those for which they were created.*

*...Increasing likelihood that records will now be used to hold the record creator to account through external scrutiny raises the question whether the record creator can be left as the sole judge of what records are created, how they are maintained and how they shall be kept" (EARC 1991b, pp.46-47).*

- 4.15 The Commission recognizes that a requirement to cause complete and accurate records to be made could cause confusion where no other guidelines are laid down. For example, does such a provision require that where business is transacted orally, a record should be made of the conversation or, what does such a provision require where transactions have occurred through electronic media?
- 4.16 The Commission considers that although the L&A Act does not currently define "complete and accurate records" such clarification can, where necessary, be given by the introduction of records management standards (cl.27).

#### RECOMMENDATION

- 4.17 **The Commission recommends that:**
- (a) **archives legislation retain a provision similar to section 52 of the L&A Act;**
  - (b) **section 52 of the L&A Act be clarified by the introduction of records management standards.**

#### **Record Management Standards**

#### MATTERS FOR CONSIDERATION

- 4.18 Poor record-keeping impedes the accountability of government and frustrates the historical recording continuum.
- 4.19 If proper record-keeping is to occur, then those persons and public authorities charged with the responsibility of creating and preserving public records must know what is expected of them.
- 4.20 Issues Paper No. 16 (at pp.31-32) explained the objects of introducing records management standards and how standards have been introduced in Victoria. Issues Paper No. 16 also explained the operation of sections 52 and 53 of the L&A Act and then invited public submissions on the following matters:

*"Should archives have the function of creating records management standards, to be observed by all government agencies in Queensland? If so, who should have the power to prescribe those standards? Should there be a provision for Parliamentary review of any such prescription?"*

*Is adequate provision otherwise made in existing provisions of the L&A Act to ensure that government agencies properly maintain, store and use public records?"*

## ARGUMENTS MADE IN PUBLIC SUBMISSIONS

4.21 The large majority of submissions which addressed these issues favoured the introduction of records management standards.

4.22 Addressing all the issues raised on this point by Issues Paper No. 16, and giving examples why standards need to be established, the Coordinated Response from the Queensland Public Service (S20) submitted:

*"... Departments generally support the concept of records management standards, which they see as a much needed reform. Most view State Archives as the most suitable body to prescribe these standards.*

*Without standards, inefficiencies can abound. One Department points out that cases where officers keep documents loose and separate from relevant material in the possession of other officers of the organisation are common. Usually no inventory is kept which confirms the existence of any document not held in the records repository. This does not make for efficient records management practices.*

*With regard to the question of whether the provisions in the existing legislation ensure that Government agencies properly maintain, store and use public records, those Departments which responded did so in the affirmative. However, they point out that non-enforcement of these provisions has led to abuse and failure to conform to requirements."*

4.23 Commenting on the existing situation in Queensland and whether standards should be introduced, the Queensland Branch of the Records Management Association of Australia (S9) submitted:

*"With the exception of isolated agencies there are no documented records management standards for government agencies in Queensland.*

*Queensland State Archives should provide agencies with standards, guidelines and training for the complete records management continuum, i.e. from creation of the record to disposal or preservation.*

*Responsibility for the creation of specific series or classes of records should still rest with the agency."*

4.24 The University of Central Queensland Library (S4) agreed that the existing situation in Queensland is unsatisfactory, commenting that:

*"While guidelines have been set down, they are not implemented for various reasons with the result that access to information is severely impeded and the documents themselves are often badly neglected with little thought of preservation."*

4.25 The need for standards was exemplified in the submission by the Auditor-General (S34) who was concerned about the form of records; their electronic storage; and in particular the admissibility, as evidence in court, of documents which have been "imaged":

*"Audit's concern about the evidentiary aspect of the "imaging technology" issue similarly relates to all forms of electronic records and to what actually constitutes each form of record outlined in Public Finance Standard 401 which generally regulates the retention and disposal of financial documents.*

*This point was illustrated by posing the question as to what constitutes the general ledger within the Queensland Government Financial Management system. Would the ledger be the electronically stored copy on either disk or tape; or should it be either an appropriately produced microfiche or hard-copy report?*

*Bound up with all this is the need to determine what actually constitutes a record for storage and retention purposes. For instance, a ledger could be deemed to be represented by the balances at the end of the period or it could comprise the balances and the detailed transactions from which the balances have resulted.*

*As an extension of these general concerns and from a specific financial record standpoint, given the number of cross-agency strategic systems now in place in the public sector it would seem that there is a need for standards to be developed dealing with acceptable retention practices for specific records."*

- 4.26 G. Acland and P. Taylor (S22) described some of the benefits that would accrue from the establishment of standards:

*"The production of a Code of Records Management Principles is vital to upgrading records management practices. Similar provisions to those incorporated in the Victorian Public Records Act (Sec 12) would provide the legislative basis for the archival authority to influence the records keeping practices of government agencies. As the Issues Paper correctly points out setting standards provides an objective basis upon which to assess the effectiveness of records management systems. The testing of systems will be important not only from the viewpoint of the Ombudsman in investigations of administrative actions but also for FOI, Privacy and Judicial Review legislation. The dividends are better records resources and consequently better government.*

*To empower an archival authority as a standards setting body goes far beyond the traditional functions performed by such bodies. It would enable a profound influence to be exerted throughout the continuum of records...*

*Added benefits to agencies would be improved accountability of activities, speed of response to and accuracy of FOI requests and reduction in expenditure on costly office accommodation used to store obsolete records."*

- 4.27 The issue of who should be responsible for the creation of records management standards was addressed by the Australian Society of Archivists Incorporated (S23). The Society proposed that the power to prescribe standards

*"...be vested through the head of the state archival authority in consultation with the appropriate advisory board/council. It would be expected that this function would be covered in the annual reports of both the archival authority and advisory board/council."*

#### ANALYSIS AND COMMENT

- 4.28 In many jurisdictions archives authorities have introduced records management standards. For example, in 1982 the Public Record Office of Victoria introduced *Guidelines for the Storage of Public Records* (Public Record Office of Victoria, 1982). Indeed, the *Public Records Act 1973* (Vic.) requires the Keeper of Public Records to prepare such standards (s.12) and makes the officer in charge of a public office responsible for ensuring that such standards are observed within that public office (s.13).
- 4.29 In his address to the Commission's seminar on Archives Legislation, Mr C. Hurley, Senior Archivist, Public Record Office, Victoria described the ways in which the records management standards set by the Public Record Office assist open and efficient public administration in Victoria:

*"A few years ago, the Ombudsman asked us to set a standard under section 12 of the Victorian Act on the filing of correspondence to establish, as he called it, a benchmark that he could use when his investigations were thwarted by inadequate documentation. His difficulty was not a want of power to deal with agencies' poor record keeping but the absence of a standard by which to call them to account, and it was to the archives legislation that he looked to remedy that deficiency" (EARC 1991b, p.42).*



- 4.30 Proper records management standards would provide the foundation for an objective test of the proper management of public records by a government agency.
- 4.31 The Commission considers record management standards should clearly state the obligations of government agencies in relation to records management practices and constitute a minimum standard all government agencies are obliged to observe (cll. 26, 27 & 30).
- 4.32 The Commission further considers that open access to records is an issue relating to records management; therefore, the provision of effective access, especially to electronic records, should be dealt with in the records management standards (cl.26).
- 4.33 As to which body should be responsible for the creation of the standards, the Commission considers that the Archives Authority, with the advice of the proposed Queensland Archives Advisory Council, is best placed to establish such standards (cl.26).

#### RECOMMENDATION

- 4.34 **The Commission recommends that:**
- (a) **archives legislation provide that the Archives Authority shall establish standards for the efficient management of public records and shall train, guide and assist public officers in applying these standards to records under their control;**
  - (b) **archives legislation provide that the officer in charge of a government authority shall be responsible for carrying out within that government agency, a program of records management in accordance with standards established by the Archives Authority.**

#### **Appraisal and Authorised Destruction**

##### MATTERS FOR CONSIDERATION

- 4.35 This issue focusses on who should be responsible for drawing up destruction schedules, and how such a person or body should be insulated from political or other pressure in relation to the destruction of records.
- 4.36 As pointed out earlier in this Report (para.3.2), under the L&A Act (s.55) the State Archivist has responsibility for authorising destruction of public records. However, as was also pointed out (para.3.2), the State Archivist is subject to the direction of various persons.
- 4.37 After addressing the independence of archives in authorizing destruction of records in other jurisdictions, Issues Paper No. 16 (at p.33) invited public submissions on:

*"With whom should rest the responsibility of drawing up destruction schedules? How should this person or body be insulated from political or other pressure in relation to the destruction of records?"*

## ARGUMENTS MADE IN PUBLIC SUBMISSIONS

- 4.38 Approximately one third of the submissions received considered these matters. The submissions were unanimously in favour of independence of the persons or bodies responsible for appraisal and destruction of records, but differed as to whom those bodies or persons should be answerable.
- 4.39 The Brisbane City Council (S24) argued that destruction of records should be a consultative and approval process:

*"The Manager of the agency's records in consultation with representatives from all departments within the agency should develop the destruction schedule. The schedule should then be submitted to the Queensland State Archives for approval. The Records Manager would be responsible for the enforcement of the approved retention schedule. If this process is followed then there should be no need for intervention or involvement from outside political or other pressure groups."*

- 4.40 The CJC (S13) were of a similar view, arguing that: *"... the responsibility of drawing up destruction schedules should rest with the Archives Authority but in close consultation with the particular public authority concerned."*
- 4.41 The Australian Council of Archives (S27) argued that: *"... the ultimate decision about which records should be retained and which destroyed should rest with the recommended Advisory Body."*
- 4.42 The clear principle that was evident in the submissions was that whoever had responsibility for appraisal and destruction should be independent and free from direction. The rationale for this was made clear in the submissions by the Deputy Director General (Services) of the Administrative Services Department (S29) and the Library Board of Queensland (S15). The Library Board gave an outline of the current legislation and its problems:

*"Under the existing Libraries and Archives Act 1988 no public records may be disposed of without written authorization from the State Archivist under s.55. However s.51(2) states that:*

*'The State Archivist-*

- (a) shall be appointed under, and shall hold office subject to, the Public Service Act 1922-1978;*
- (b) subject to directions from Minister, the Board and the Director and State Librarian, shall manage the Queensland State Archives and supervise the discharge of its functions.'*

*Because there appears to be some conflict between these two sections of the Act, an opinion was sought from the Crown Solicitor by the Director General of the Department of the Premier, Economic and Trade Development. The following advice was provided:*

*'The short point about which there appears to be a difference of opinion is whether in performing the function referred to in section 55(1)(a)(i) of the aforesaid act, the State Archivist can be subject to direction from the Minister, the Board or the Director and State Librarian. I have examined the provisions of the aforesaid Act. In my opinion, the State Archivist is so subject to the possibility of direction as mentioned in the preceding paragraph.'*

*This makes it clear that under the existing legislation the State Archivist can be directed from the political level to destroy records."*

- 4.43 The Deputy Director General (Services) of the Administrative Services Department (S29), after referring to the same issue, suggested how this problem could be overcome:

*"To achieve any genuine freedom from the possibility of undue political interference, the sole power of giving authorization for the disposal of public records should be given to a Board which would be a statutory body established under the new Archives legislation. It should be illegal to destroy or otherwise dispose of any public record without written authorization from this Board. The Board should have rights of recovery where records are improperly held and the right to prosecute for unauthorized disposal where appropriate. The Board should also have the power to delegate authority to approve disposal of records to the State Archivist. In addition, the Board could have power to advise the State Archivist on matters relating to archives and public records generally."*

#### ANALYSIS AND COMMENT

- 4.44 The issue of who should be responsible for the authorisation of records destruction is closely related to the issues of archives as an accountability mechanism (see paras 3.1 - 3.16) and establishment of an independent archives authority (see paras 7.2 - 7.8). If the statutory body or person controlling archives lacks independence, in the sense of being free from direction, there will always be the possibility that political pressure will be brought to bear to approve, inter alia, which records should be preserved and which records will be destroyed. The effect of this would be that archives would cease to be a mechanism for accountability and a haven for the heritage of the State.
- 4.45 Under Section 24 of the *Archives Act 1983* (Cwlth), disposal or destruction of records may only take place with the permission of the Archives or in accordance with a practice or procedure approved by the Archives. The *Archives Act 1983* (Cwlth) gives the Commonwealth Archivist a great deal of independence in the administration of that Act, and does not contain a provision for ministerial direction (cf. s.51(2) L&A Act). While section 5(1) of the *Archives Act 1983* (Cwlth) establishes the Australian Archives within a ministerial department, it does not enable the Minister to direct the Australian Archives to decide in a particular way a matter committed to the discretion of the Australian Archives by the legislation.
- 4.46 Section 8(8) of the *Archives Act 1983* (Tas.), expressly excludes "any responsibility, duty or power relating to the destruction or disposal of records" from the operation of Section 8(7) which provides that:
- "in carrying out his responsibilities and duties, and in exercising his powers, under this Act, the State Archivist is subject to the control and direction of the State Librarian and through him the Minister".*
- 4.47 The Commission considers that in order to properly fulfil its function as preserver of public records the Archives Authority should not be subject to direction where the Authority is exercising its power in relation to the destruction or disposal of records (cl.11).
- 4.48 The Commission further recognizes, however, that to invest the Archives Authority with sole power to authorise destruction of public records may lead to problems and prove unworkable.

- 4.49 For example, because of the all embracing nature of the definition of public record, real or apparent conflict may develop with other legislation - that is, that other legislation may provide that documents may be destroyed by a person authorised under that Act.
- 4.50 To overcome this problem the Commission considers that the Archives Authority be invested with sole power to destroy public records only to the extent that other legislation does not specifically provide for the destruction of such records (cl.31).
- 4.51 The other question that arises so far as administrative workability is concerned, is whether the Archives Authority needs to vet each and every record before it authorises its destruction?
- 4.52 The Commission recognizes that the number of records that come up for destruction would be too great for the Authority to inspect each and every one. To overcome this, the Commission considers that the Archives Authority should have power to delegate its authority to:
- (a) authorise destruction of records; and
  - (b) prepare destruction schedules (cll.13 & 31).

#### RECOMMENDATION

- 4.53 **The Commission recommends that archives legislation provide that:**
- (a) **except as provided in any other Act, the Archives Authority be conferred with power to decide on the disposal of public records;**
  - (b) **in the exercise of that power, the Archives Authority not be subject to direction, Ministerial or otherwise;**
  - (c) **the Archives Authority be conferred with power to delegate its authority to authorise disposal of records;**
  - (d) **the Archives Authority be authorized to delegate the preparation of record destruction schedules.**

#### **Other Authorised Methods of Disposition - Transfer of Public Records**

#### MATTERS FOR CONSIDERATION

- 4.54 Issues Paper No. 16 (at p.34) observed that:

*"One method of 'disposal' provided for in the L&A Act is 'transfer' (s.55(8)). Accordingly, it is possible for the State Archivist to authorise the transfer of public records as a means of disposal. In effect, this means that public records not required as archives may be transferred into private hands or to other institutions, such as the John Oxley Library."*

- 4.55 After drawing attention to section 55 of the L&A Act, and highlighting that the primary purpose of preserving public records is to facilitate the use of those records by the government agencies that created them and the public, Issues Paper No. 16 invited submissions on:

*"Should archives legislation provide that public records which are not required as archives may be deposited elsewhere, in preference to destruction, on the condition that adequate safeguards for access and privacy be maintained?" (p.35).*

#### ARGUMENTS MADE IN PUBLIC SUBMISSIONS

- 4.56 The University of Central Queensland Library (S4) addressed the issue raised in Issues Paper No. 16 and outlined the current practice in Queensland:

*"This University Library already has custody of some public records not required in State Archives, and with its consent. In view of this situation, we support the proposal that public records not required as archives may be deposited elsewhere, in preference to destruction, on the condition that adequate safeguards for access and privacy be maintained. The libraries and archives of tertiary institutions and other permanently established libraries, open to the public and under professional care, should be accepted as suitable depositories for public records not required as archives. The records may be duplicates, contain information of a regional nature or be of no administrative significance."*

- 4.57 The Brisbane City Council (S24) and the Coordinated Response from the Queensland Public Service (S20) both submitted that once a record is identified as having no enduring value it should be destroyed.

- 4.58 The Australian Society of Archivists Incorporated (S23) in their submission went wider than just referring to records no longer required as archives. The Society commented that:

*"Public records should remain in the custody and control of the agency which produced them until such time as they are either destroyed or handed over to the custody and control of the archives. There should be no exceptions to this rule. This does not preclude the lodgement of any public records (including archives in some cases) with another body under "place of deposit" arrangements such as are already found in other archives legislation. The point is that the records are lodged in the "possession" of the place of deposit. In law, custody and control remains with the archives and thereby their character as public records is retained. Should the place of deposit fail, the archives steps in and resumes possession. These arrangements are necessary to preserve the principle of inalienability."*

#### ANALYSIS AND COMMENT

##### Transfer of Public Records Not Required as Archives

- 4.59 In fulfilling its functions, one of the objectives of the Archives Authority will be to prevent records passing out of official custody. Where, however, records are no longer required as State archives, and would normally be destroyed, it may be preferable to place those records in private hands; provided, of course, adequate safeguards for access and privacy can be written into the terms of transfer.

- 4.60 When speaking of transfer of records from the custody of archives, the Queensland State Archivist has stated that, unless certain stringent conditions ensuring proper custody of the records can be met, she is opposed to the transfer of records from the custody of archives (McGregor, unpublished).
- 4.61 Whilst it is arguable that an archives authority should have a wide discretion to lodge records elsewhere in approved places, those records should remain under the control of an Archives Authority so that:
- (a) it can resume custody if conditions of deposit are breached or the institution winds up;
  - (b) the continuing public interest in the records is protected in perpetuity.
- 4.62 The Commission considers it is not realistic to demand that unless held by the Archives Authority, all public records should be destroyed. However, in recognizing this, the Commission considers custody should only be given to others where safe custody can be guaranteed along with the rights of access which would normally apply to the records (cl.22).
- 4.63 The Commission further considers that such records should remain subject to the inalienability provision recommended and, that if at any time the records should be considered not in safe custody or not accessible, the Archives Authority should have the right to retrieve them (cl.22).

Should Place of Deposit Arrangements be Limited to Records Not Required as Archives?

- 4.64 The Commission agrees with the comments made by the Australian Society of Archivists Incorporated and considers that there is no reason why arrangements with respect to the deposit of records no longer required as State archives should not also apply to records permanently required as archives.
- 4.65 For example, an archives authority may wish to lodge permanent archives records with:
- (a) another archives authority for technical reasons (eg. because the other archives authority has better film or computer storage);
  - (b) another archives authority as part of an arrangement to smooth over the consequences of administrative change (eg. reaching a sensible division of records relating to matters such as divorce, Aborigines, or company registration which passed from the States to the Commonwealth); or
  - (c) "in-house" archives (eg universities, Parliament) or "regional" archives or "joint repositories" (eg. in remote locations where an Archives Authority itself is not able to provide facilities).

## RECOMMENDATION

- 4.66 **The Commission recommends that archives legislation provide that:**
- (a) **permanent and non-permanent archival records may be deposited elsewhere other than with the Archives Authority;**
  - (b) **such records may always be retrieved by the Archives Authority; and**
  - (c) **such records are subject to the same access as other archives.**

**Other Authorised Methods of Disposition - Sale of Public Records**

## MATTERS FOR CONSIDERATION

- 4.67 Issues Paper No. 16 drew attention to the fact that the "sale" of public records constitutes a disposal under section 55 of the L&A Act, thus allowing the State Archivist to authorise the sale by government agencies of public records not required for archival purposes.
- 4.68 In view of this, Issues Paper No. 16 invited submissions on whether archives legislation should allow for the sale of public records not otherwise required for retention as archives.

## ARGUMENTS MADE IN PUBLIC SUBMISSIONS

- 4.69 The submissions which addressed this issue did not support the sale of public records.
- 4.70 The Brisbane City Council (S24) submitted that the sale of public records without consultation with the public agency could lead to problems for that agency.
- 4.71 The extent of the problems that could arise if sale were allowed was highlighted by P.D. Wilson (S14):

*"Any market so established [ie. by the sale of public records] would provide an environment for dealing in stolen records and an encouragement to potentially corrupt public servants to 'lose' public records in their custody."*

## ANALYSIS AND COMMENT

- 4.72 The issue of the sale of public records is also related to inalienability, but unlike the issue of transfer to alternative custody, the sale of records requires title to pass from the State. To that extent, the sale of public records is incompatible with an inalienability provision.
- 4.73 If the sale of records by the Archives Authority were permitted, it would perhaps encourage and facilitate trade in public records. The Authority would have great difficulty in preventing the loss of public records into private hands.

- 4.74 The Commission considers the sale of public records would be incompatible with the scheme recommended in this Report (cl.25). This is not to say, however, that sale of copies of records should not occur where appropriate.

#### RECOMMENDATION

- 4.75 **The Commission recommends that archives legislation should not permit the sale of public records.**

#### **Recovery of Public Records**

##### RECOVERY WITHIN QUEENSLAND

- 4.76 Section 56 of the L&A Act currently provides for the recovery of public records which are still within Queensland. This provision complements and reinforces an inalienability provision. Similar provisions are found in the archives legislation of other Australian jurisdictions and would appear to be adequate.

##### RECOVERY OUTSIDE QUEENSLAND

- 4.77 This matter was not specifically raised as an issue by Issues Paper No. 16, but merely raised "*for the attention of those who may more properly address it*" (para.5.42).
- 4.78 The Commission considers it would be in the interests of fostering interstate relations and preserving Queensland's heritage to include reciprocal recovery arrangements in archives legislation (cl.39).

#### RECOMMENDATION

- 4.79 **The Commission recommends that:**
- (a) **archives legislation retain a provision similar to section 56 of the L&A Act;**
  - (b) **archives legislation confer power on the Archives Authority to enter into reciprocal recovery arrangements between Queensland and the Commonwealth and the other States and Territories.**

#### **Unauthorised Disposition/Failure to Observe Archival Practices**

##### INTRODUCTION

- 4.80 Issues Paper No. 16 (at p.38) observed that: "*The protection of public records from unauthorised disposition is central to the effectiveness of archives legislation.*"
- 4.81 The protection of public records is concerned not only with prohibited or unauthorised disposition, but also with the exercise of proper records management practices.



- 4.82 It remains to consider, then, what practices should be employed to ensure security in records management.

#### RIGHTS OF INSPECTION

##### Matters for Consideration

- 4.83 At present in Queensland the State Archivist, or any person acting on his or her behalf, is conferred with rights of inspection to ensure that public records are being preserved and protected (L&A Act ss.53(1) & 55(2)).
- 4.84 In other jurisdictions, archives authorities are commonly vested with a right of inspection.
- 4.85 In view of the prospect that the Parliament and the courts would fall within the proposed definition of public authority, and the rights of inspection under the L&A Act, Issues Paper No. 16 called for public submissions on whether archives legislation should confer rights of inspection and whether such rights should apply to the Parliament and the courts.

##### Arguments Made in Public Submissions

- 4.86 The public submissions which addressed this issue were unanimous that the State archivist or his or her delegate should have rights of inspection.
- 4.87 Typical of the general support for rights of inspection was the submission made by the Australian Institute for the Conservation of Cultural Material (Inc) (S18):

*"...the Act should empower the State Archivist or delegate with the right to inspect public authorities premises and advise and instruct on preservation issues of storage, maintenance, handling and records creation."*

- 4.88 The Coordinated Response of the Queensland Public Service (S20) and the Beaudesert Shire Council (S10) were of the view that rights of inspection should be conferred, but that such rights should be restricted to whether records management standards were being complied with. They both submitted that it was not necessary for the Archivist to have access to hard data of any agency's current records.
- 4.89 A number of submissions argued that the records of the Parliament and the courts should be subject to rights of inspection.
- 4.90 The staff of the QSA (S12) submitted that:

*"The State Archivist or delegate should be empowered with the right to inspect records held by public authorities and to advise and instruct on preservation issues such as storage, maintenance, handling and materials used in records creation. This right should extend to all public records so designated, including the records of State Parliament and the courts."*

- 4.91 A. Sandell (S6) agreed that the records of the Parliament and the courts should be open to inspection.
- 4.92 P.D. Wilson (S14) disagreed that such rights should be absolute, submitting that the inspection of the records of Parliament and the courts could be arranged by mutual agreement.

#### Analysis and Comment

- 4.93 On the issue of the right to inspection it has been stated that:

*"The legal link between records management and the Archives is formed by giving the latter a right of inspection, not only regarding the disposal of records, but, in principle, of all records management functions and operations involved with current and semi-current records" (Ketelaar 1985, p.110).*

- 4.94 The Commission recognizes that if the Archives Authority does not have the right to inspect, it will not be able to fulfill its records management responsibilities. Therefore, the Commission considers that the Authority should be conferred with a right to inspect public records.
- 4.95 The Commission does not agree with the Co-Ordinated Response from the Queensland Public Service and the submission by the Beaudesert Shire Council that it would not be necessary for the State archivist to have access to hard data of an agency's current records. What information is contained in a record will determine whether it is a "complete and accurate" record. Therefore, if the Archives Authority is to fulfill its functions it will need to be able to inspect and consider the substance of material contained within the record.
- 4.96 The Commission also does not agree with the submissions of A. Sandell and the staff of the QSA that the records of the Parliament and the courts should be subject to full and open inspection. Matters of the utmost sensitivity are constantly being dealt with by these institutions, and, therefore, it would be inappropriate that any of them be subject to spontaneous inspection.
- 4.97 If the Parliament and the courts were subject to plenary powers of inspection, issues relating to the separation of powers would also arise. This would be so notwithstanding the constitution of the Archives Authority as an independent body, because the role that the Authority would be carrying out would essentially be a function of the executive government. The prospect, therefore, even though remote, for interference with the other arms of government would be a real one and thus should be avoided.
- 4.98 The Commission considers, therefore that rights of inspection should not extend to the records of the Parliament, the courts and the Governor, in his official capacity, except after consultation with the administrative officer of the agency concerned, whose agreement to the inspection should not be unreasonably withheld (cl.37). If agreement is unreasonably withheld the matter should be included in the annual report of the Archives Authority.

## REMEDIES/PENALTIES

### Matters for Consideration

- 4.99 Issues Paper No. 16 (at pp.39-40) described six alternative remedies that may be available where a statutory authority or person has failed to fulfil a duty imposed under the L&A Act.
- 4.100 One situation not mentioned in Issues Paper No. 16, but deserving of special mention, is the responsibility placed on the chief executive officer of a public authority.
- 4.101 Currently, the L&A Act makes the chief executive officer of a public authority responsible for the proper creation and management of public records (s.52(2)). Section 52 (3) then provides that:

*"A person who fails to perform a duty imposed upon him by this section commits an offence against this Act and shall be liable to a penalty not exceeding 20 penalty units."*

- 4.102 Issues Paper No. 16 invited submissions on whether archives legislation should explicitly provide that, in addition to, or as an alternative to, having committed a criminal offence, a public servant who fails to comply with a requirement of archives legislation also commits a breach of discipline.

### Arguments Made in Public Submissions

- 4.103 The Coordinated Response from the Queensland Public Service (S20) expressed the various views given by the Departments:

*"A number of Departments consider that failure to comply with a requirement of archives legislation should constitute a criminal offence. In such cases, the decision as to whether to refer the matter to the Police should be left to the State Archivist. Some of these Departments argue that a public servant who commits such an offence should also be considered to have committed a disciplinary offence."*

*One Department puts the view that only deliberate failure to comply should constitute a criminal offence. Unintentional non-compliance would be more constructively overcome through a training and counselling programme."*

*One Department which holds that failure to comply with archives legislation should definitely not be a criminal offence argues that should an offence provision be deemed necessary it should relate to a breach of regulations and not to a breach of the criminal law. This breach of regulations could adequately be investigated by the Archives Authority. Further, deliberate destruction of documents by public officials should be deemed to be official misconduct and should be a matter for investigation by the Criminal Justice Commission."*

- 4.104 The Australian Society of Archivists Incorporated (S23) dealt with the issue of whether the chief executive officer of a public authority should be subject to a provision similar to section 52(2) and (3) of the L&A Act:

*"It is reasonable that the general obligation to keep full and accurate records rests with the principal officer of the public agency or authority, and that the principal officer should be held accountable for any failure to meet this or any other obligation imposed under standards issues by the archives. The ASA does not believe neglect of these obligations should be an offence."*

4.105 The Queensland Branch of the Records Management Association of Australia (S9) and the Australian Council of Archives (S27) submitted that failure to comply with archives legislation should be either a criminal or a disciplinary offence depending on the circumstances and the nature of the offence.

4.106 In its submission to the Commission, the CJC (S13) stated:

*"The CJC believes that it is essential to establish firmly in the minds of all public servants the importance of complying with the requirements of archive legislation, and therefore any steps that can be taken to strengthen the remedies for failure to do so should be taken.*

*Undoubtedly there will be occasions when it is more appropriate to deal with a failure to comply on the basis of it being a criminal offence, whilst at other times the incident would be more appropriately dealt with as a disciplinary matter. The two should be alternatives."*

### Analysis and Comment

4.107 The Commission agrees with the Co-Ordinated Response from the Queensland Public Service that where there has been unintentional non-compliance with statutory obligations it would be more constructive to institute a training and counselling programme. This will especially be the case in the early days after the creation of records management standards.

4.108 The Commission does not agree, however, with the contention made in the third paragraph of the Queensland Public Service's response that failure to comply with archives legislation should not be a criminal offence.

4.109 To the contrary, the Commission agrees with the submissions made by the Records Management Association of Australia, the Australian Council of Archives and the CJC, and considers that where an officer or employee of a public authority fails to fulfil any duty imposed by archives legislation, or by any management standard established by the Archives Authority under the draft Bill, the contravention should be dealt with either as an offence or as a breach of discipline. Where the conduct amounts to a breach of discipline, the matter should be dealt with pursuant to any law concerning discipline of employees or officers applicable to that officer or employee. For example, if an employee is employed pursuant to the *Public Service Management and Employment Act 1988* (Qld), any breach of the draft Bill or standards created under the draft Bill should be dealt with as a breach under the *Public Service Management and Employment Act 1988* (Qld).

4.110 On the issue of whether the chief executive officer should be guilty of an offence for failure to ensure complete and accurate records are kept, the Commission agrees with the submission of the Australian Society of Archives Incorporated, and considers it would be unreasonable to retain a provision similar to section 52(2) and (3) when it would clearly not be possible for the chief executive officer of a public authority to ensure compliance with all records management standards recommended by the Archives Authority.

## RECOMMENDATIONS

4.111 **The Commission recommends that:**

- (a) **archives legislation provide that the Archives Authority be conferred with power to inspect public records, save in respect of the Parliament, the Courts and the Governor acting in his official capacity;**
- (b) **archives legislation provide that where an officer or employee of a public authority fails to fulfill any duty imposed under archives legislation, or any management standard established under that legislation, the contravention be dealt with either as an offence or a breach of discipline. Where the conduct amounts to a breach of discipline, the matter is to be dealt with pursuant to the law concerning discipline of employees or officers applicable to that employee or officer.**

**Identification of Persons to Charge in Relation to the Commission of an Offence**

## MATTERS FOR CONSIDERATION

- 4.112 Where there has been failure to comply with archives legislation, or records management standards, it would be appropriate to charge an identifiable person with the commission of an offence - disciplinary or otherwise. However, it is not always the case in such instances that the person who committed the offence can be easily identified.
- 4.113 Issues Paper No. 16 invited submissions on the question of how difficulties in identification should be addressed where the identity of a person who committed an offence under archives legislation is not known.

## ARGUMENTS MADE IN PUBLIC SUBMISSIONS

- 4.114 The nub of the problem in this area, and perhaps the best solution to it, was highlighted by the Coordinated Response from the Queensland Public Service (S20):

*"Departments agree that identification of the officer who has committed an offence under the archives legislation can be problematical. Files are shared by officers, and no one officer would have responsibility for each of the records placed on a file, nor control over the movement of the file. Some Departments suggest that where the officer at fault cannot be identified the State Archivist should use discretionary powers to deal with the matter and also work together with the agency towards improving the agency's records management system, through better staff training and awareness for example."*

- 4.115 The Brisbane City Council (S24) was of the view that: *"The Records Manager/Officer responsible for records management or archivist for the organisation should be held accountable for any breach of the Archives legislation."*

## ANALYSIS AND COMMENT

- 4.116 As outlined at paragraph 4.101, under section 52(2) and (3) of the L&A Act, if the public authority fails to cause complete and accurate records of the activities of the authority to be made, then the chief executive officer will shoulder the responsibility for that failure.
- 4.117 This would seem to place a too onerous a burden on the chief executive officer where an unidentified officer within the agency has been the cause of the failure to produce the records.
- 4.118 The Commission does not agree with the submission of the Brisbane City Council and considers that the only person who should be charged with an offence is the person who allegedly committed the offence. This should not, however, be seen as removing the chief executive officer's managerial responsibility for completeness and accuracy of records.

## RECOMMENDATION

- 4.119 **The Commission recommends that only a person who allegedly commits an offence, and not the chief executive officer with ultimate responsibility, be charged with the offence.**

**Investigation**

## MATTERS FOR CONSIDERATION

- 4.120 The current provisions of the L&A Act do not identify an appropriate person or body to conduct an investigation into the alleged commission of an offence under that Act. Issues Paper No. 16 (at pp.41-42) described how such a matter is handled in practice:

*"Section 70 provides that proceedings in respect of an offence may be brought upon the complaint of the State Librarian or other authorised person. The authorisation of a particular person to bring a complaint to initiate proceedings in respect of the alleged commission of an offence is not, however, the authorisation of that person to conduct an investigation into the alleged commission of an offence.*

*...In practice, the State Librarian currently investigates an alleged failure to comply with a requirement of the L&A Act. If libraries and archives legislation are to be separated, however, it could be inappropriate for the State Librarian to continue to investigate such matters. One alternative could be for the Queensland State Archives to be provided with investigative staff who could investigate a matter which is referred to, or comes to the attention of, the Queensland State Archives. Where appropriate, such investigative officers may then refer the matter to the Police, the Criminal Justice Commission or the Parliamentary Commissioner. In addition, where such a matter involves administrative mismanagement by a government agency, details of the matter may be included in the annual report of the Queensland State Archives."*

- 4.121 Against this background Issues Paper No. 16 (at p.42) raised the following issues for comment:

*"What person or body should properly investigate failures to fulfil duties imposed by archives legislation? Should that particular person or body be specifically nominated by archives legislation?"*

*What powers of investigation should that person or body possess, and what investigative procedures should that person or body be authorised to pursue?"*

## ARGUMENTS MADE IN PUBLIC SUBMISSIONS

- 4.122 In its submission on which would be the appropriate investigative body the CJC (S13) submitted:

*"Whilst it is accepted without question that the Archives Authority would be the repository of expertise in matters relating to archives; it would not necessarily be so that those experts would have expertise in investigatory techniques. To add investigatory staff to the authority would seemingly incur unnecessary expense when investigatory skills would be available elsewhere, such as from the CJC and the Queensland Police Service.*

*To add yet another investigatory authority to the field without excluding the jurisdiction of others would only confuse the issue. Exclusion of such bodies as the CJC, which has built up an expertise in dealing with matters of 'official misconduct', would seem to be a waste of resources. It would seem appropriate that the Archives Authority have power to carry out a preliminary investigation and then forward their 'complaint' to the CJC or the Queensland Police Service for further investigation. Action can be taken:*

- . for alleged official misconduct - by the Misconduct Tribunal*
- . for alleged criminal activity - by the Queensland Police Service*
- . for a disciplinary breach - by the Department from which the offender came.*

*After all knowledge or suspicion of the disposal of 'public records' may, in any event, necessitate the principal officer of a public body to report the matter to the CJC pursuant to s.2.28(2) of the CJ Act.*

*Whichever alternative is adopted, the CJC suggests that the appropriate authority be stipulated in the legislation."*

- 4.123 The Australian Council of Archives (S27) submitted that investigations for failure to fulfil obligations imposed under archives legislation should be referred to a third party named in the legislation.
- 4.124 The Australian Society of Archivists Incorporated (S23), the Moreton Shire Council (S19), the Beaudesert Shire Council (S10) and the Queensland Branch of the Records Management Association of Australia (S9) all submitted that power to investigate failure to fulfil duties under archives legislation should be vested in the State Archivist.

## ANALYSIS AND COMMENT

- 4.125 In his address to the Commission's public seminar on Archives Legislation, Mr C. Hurley, Senior Archivist, Public Record Office, Victoria made the following comments in relation to the investigation of the commission of offences:

*"You have got the problem of investigation. Sometimes people talk about a kind of archives police to go in pursuit of evidence and offences. I don't believe that should be done. I think it is a task for the police. The only difficulty being that the police, of course, being a government agency could themselves be the offenders in some cases. But my experience in Victoria at any rate is that the police are amongst the best agencies in looking after their records. Partly, I suspect, because they don't want to be found out committing an offence.*

*Perhaps a more difficult decision is who takes the decision to prosecute. Is it to be left to the police? Is it a decision for someone like a Director of Public Prosecutions? Should the archives have a role in deciding whether or whether not to prosecute?*

*There is a famous instance in Victoria, which you might have even heard of up here, called the Nunawading affair, in which a statutory officer, the Chief Electoral Officer, had the decision whether to prosecute. In that particular case amongst those who might have been prosecuted were government members, and people close to the governing party. Now, without canvassing the rights or wrongs of what happened there, or the politics of it, the perception is that that statutory officer came under great political pressure in the exercise of his statutory duties. And Electoral Officers tend to have a degree of independence within the system that most archives, whether they aspire to it or not, don't have. So merely having the power to prosecute is not necessarily the answer to the problem. Even having a high degree of independence is not necessarily the answer to the problem" (EARC 1991b, pp.43-44).*

- 4.126 The comments by the CJC and Mr Hurley highlight the several problems associated with the dichotomy in the nature of offences. That is, not only in respect of what conduct will constitute a particular type of offence, but also with respect to which body should investigate different types of offences.
- 4.127 The Commission agrees with the submission by the CJC that it would be inappropriate to add another investigatory body to the field by recommending that an investigative branch be set up in the QSA. Investigative expertise resides with those bodies mentioned by the CJC; each is proficient in their respective areas, and each is capable of applying such expertise to breaches of statutory archival requirements.
- 4.128 Therefore, to set up an investigatory branch in archives would lead to an unnecessary duplication and wastage of archival resources which could best be applied elsewhere.
- 4.129 On the other hand, the Commission does not consider that failure to fulfil obligations under archives legislation can be investigated by those external bodies to the exclusion of the QSA.
- 4.130 The role for the Archives Authority is in the early stages of inquiry - that is, inspecting whether archival practices are being followed (see paras. 4.83 - 4.98). Where such inspection takes place any failure to fulfil obligations under archives legislation will be identified and it will then be possible to recommend an investigation by the appropriate authority.
- 4.131 The Commission considers that:
- (a) An incident which relates to mismanagement or misbehaviour in public administration should be referred to the chief executive officer of the relevant government agency. If further action is necessary the matter should be referred to the Ombudsman or the CJC for investigation.
  - (b) An incident which relates to official misconduct (which may include alleged offences) should be referred to the CJC for investigation and, where necessary, further action.
  - (c) An incident which relates to the commission of a criminal offence should be referred to the Queensland Police Service. If charges can be laid, then the Director of Prosecutions should decide whether to prosecute.



## RECOMMENDATIONS

4.132 **The Commission recommends that:**

- (a) **archives legislation provide that where an incident relates to mismanagement or misbehaviour in public administration the matter be referred to the chief executive officer of the relevant government agency. If further action is necessary the matter should be referred to the CJC or the Ombudsman;**
- (b) **archives legislation provide that where an incident relates to official misconduct referral be made to the CJC for investigation;**
- (c) **archives legislation provide that where an incident otherwise relates to the commission of a criminal offence the matter be referred to the Queensland Police Service.**

## CHAPTER FIVE

### A RIGHT OF ACCESS TO ALL PUBLIC RECORDS

#### Introduction

- 5.1 This chapter covers rights of access to public records under archives legislation, and integrating those rights of access with access under FOI legislation.
- 5.2 When Issues Paper No. 16 raised the issues dealt with in this chapter, it had been recommended by the Commission that rights of access under FOI legislation to documents which do not relate to the personal affairs of the applicant should be confined to documents which were brought into existence not earlier than 5 years before the commencement of the legislation. Many submissions on topics dealt with in this chapter were made on the assumption that the period of retrospectivity would therefore be limited to 5 years. The FOI Bill introduced into Parliament on 5 December 1991, and since the publication of Issues Paper No. 16, provides for unlimited retrospectivity, and submissions on some topics covered in this chapter must therefore be considered in light of that difference.

#### Records to which Right of Access Applies

##### MATTERS FOR CONSIDERATION

- 5.3 In Issues Paper No. 16 (at p.44) the Commission raised the following issue:
- "Given that it has been recommended that FOI legislation govern access to current public records, should there be a complementary right of access to non-current records, whether these latter records are held by the Queensland State Archives or by some other government agency?"*

##### ARGUMENTS MADE IN PUBLIC SUBMISSIONS

- 5.4 In the submissions on this topic, there was overall support for a general right of access, though expressed in a variety of ways.
- 5.5 For example, the University of Central Queensland Library (S4) said:
- "In the open access period, all records, whether in State Archives or in any State institution, should be accessible. Otherwise, failure to transfer could be deliberately used to prevent access."*
- 5.6 James Cook University of North Queensland (S11) took the following view:
- "Without a general right of access government agencies will not come to terms with making their records available to the public. Records would only be released at the request of an individual. The Archives Act will not be effective without a right of access clause."*
- 5.7 The Queensland Branch of the Records Management Association of Australia (S9) took the view that:
- "Proposed FOI legislation already provides for agencies to recall non-current records where such records are required to complete a response to an application."*

*Given that the bulk of non-current records fall into the category beyond the FOI limit of 5 years retrospectivity, no general access to these records should be provided until they qualify as 'open access' records under archives legislation.*

*If such access was to be given to non-current records, archives resources would not be able to cope with the potential demand."*

- 5.8 The Beaudesert Shire Council (S10) expressed its view to similar effect.

#### ANALYSIS AND COMMENT

- 5.9 Under existing archives legislation in Queensland a number of inefficiencies and barriers to accessing older records are obvious:

- (a) Access is granted subject to discretionary restrictions or conditions imposed by the chief executive officer of the public authority responsible for the record (reg.21 L&A Regs);
- (b) Access is also subject to the discretion of the State Archivist (reg. 21 L&A Regs);
- (c) The State Archivist's discretion to grant access to public records can only be granted if the records are in the possession of the QSA;
- (d) There is only a very limited right of appeal in respect of a decision by the chief executive officer of a public authority restricting, prohibiting or imposing conditions on access (rr.24 & 25 L&A Regs).

- 5.10 Issues Paper No. 16 (at p.43) recognized that:

*"There is a public interest in allowing access to information held by government. Open government requires that individuals have access to information on which government decisions and actions are based. In addition, information privacy rights demand that individuals know what information about them is held by government, how that information is used and that information is able to be corrected if it is inaccurate, out of date, or misleading."*

- 5.11 The Commission considers that it is in the public interest that all public records, save in respect of exemptions to be mentioned later in this Report, be open for public access after the effluxion of the archival period.
- 5.12 However, it has also been recognized that there will be instances where it will be prudent for certain public records not to be centrally located (see Records of Local Authorities, paras 2.81 - 2.85; Decentralisation, paras 6.13 - 6.29; and Transfer of Public Records not Required as Archives, paras 4.54 - 4.66).
- 5.13 The Commission has already suggested in this Report that all public records should be inalienable (refer to paras 2.100 - 2.113.) and what the functions of an archives authority ought to be (refer to paras 2.15 - 2.31).
- 5.14 In accordance with these recommendations, the Commission considers that rights of access provided under archives legislation should apply to all records in the open access period (ie. after the expiration of the 30 year period of restricted access), save in respect of specific statutory exemptions (see paras 5.71 - 5.86), regardless of whether they have been transferred to archives. Clause 32 of the draft Archives Bill provides for this.

## RECOMMENDATION

- 5.15 **The Commission recommends that archives legislation provide that rights of access under archives legislation apply to all public records regardless of where they are kept.**

**Archival Period**

## MATTERS FOR CONSIDERATION

- 5.16 As to what is an archival period, Issues Paper No. 16 (at p.48) observed:

*"Public records held by archives are available for public access from the commencement of the open access period applicable to that record. An open access period commences after the expiration of a stipulated period during which a public record is unavailable for public access. This period is known as the 'archival period'."*

- 5.17 In the draft Archives Bill appended to this Report, the term "period of restricted access" is used to refer to the archival period.
- 5.18 Issues Paper No. 16 then commented that the selection of an archival period is a matter of choice. The Senate Committee chose a period of 30 years and provided 3 reasons for doing so:
- (a) 30 years is the archival period adopted in most British Commonwealth countries;
  - (b) material is supplied by Australia's defence allies on the understanding that it will not be released within the 30 year period; and
  - (c) once documents have reached the age of 30 years, there are few that need to be withheld for a longer period, and *"...the public should be able to expect that most documents will be available for perusal when they have reached a predetermined age"* (Senate Standing Committee 1979a, para.33.14).
- 5.19 B. Cox, quoted in attachment A to a submission by H. Stokes and R. Summerrell (S30), explained that the third of these reasons provides the major premise for the 30 year rule:

*"The 30-year rule is based on the premise that the great bulk of Commonwealth records are suitable for public release at that age and this has certainly been supported by experience gained since the proclamation of the Archives Act in 1984. Furthermore, most material requiring exemption beyond the age of 30 years is likely to be found within a limited range of records such as those dealing with welfare, defence or security matters. In consequence, we are able to release many groups of records on the basis of an examination of a small sample of files or folios."*

## ARGUMENTS MADE IN PUBLIC SUBMISSIONS

- 5.20 Opinion was fairly evenly divided (in those submissions which dealt with this issue) between those who considered that a uniform 30-year period was appropriate, and those who did not.

## 5.21 C. Buckley (S5) commented:

*"I would suggest that the 30 year embargo is largely an anachronism. The time constraints involved for having a record available do not require such inordinate time and the matter of damage to an individual is applicable whether we consider 30 days or 30 years."*

## 5.22 The submission of the Moreton Shire Council (S19) reflected a view expressed in a number of submissions:

*"As there is no substantive reason to change, the archival period for public records should remain at 30 years and 65 years in respect of personal and staff files."*

## 5.23 The Australian Society of Archivists Incorporated (S23) was, however, of the view that:

*"The standard access period for open access public records can be either 25 or 30 years. The ASA would be supportive of a 25 year period, or earlier if appropriate in some classes of records."*

## 5.24 H. Stokes and R. Summerell also attached to their submission (S30-Attachment B) a short paper on the 30 year rule which concluded that it has in general worked satisfactorily at the Commonwealth level.

## ANALYSIS AND COMMENT

## 5.25 The Commission believes that the arguments for retention of a 65-year period of restricted access to personal and staff files will be satisfactorily addressed by the proposed exemption provisions in so far as they relate to information concerning the personal affairs of a person (see para.5.77 below).

## 5.26 The Commission considers the archival period in Queensland should be 30 years (cl.4 - "period of restricted access"). This archival period would have benefits in consistency of availability to the extent that it would apply to all types of public records and would conform with archival periods of most other Australian jurisdictions.

## RECOMMENDATION

5.27 **The Commission recommends that archives legislation provide for a 30 year period of restricted access for all public records.****Commencement of Archival Period**

## MATTERS FOR CONSIDERATION

## 5.28 Two options were open to the Commission as to when the archival period should be deemed to commence:

(a) from the date of creation of the record;

or

(b) from the date of the last dealing with the record.

- 5.29 Issues Paper No. 16 (at p.50) identified the current position in Queensland and a problem that might be encountered with option (b):

*"Under the L&A Act and the L&A Regulations, public records are open for access 30 years from the date of the 'last dealing' of that public record, or 65 years in relation to personal or staff files. The term "last dealing" is not defined by the Act or Regulations, yet it may be loosely interpreted as 'any action upon the file'. An FOI application made in respect of a public record could, therefore, constitute a 'dealing'."*

- 5.30 The problem therefore is that an FOI application could be interpreted as a "last dealing" with the record. This would have the effect of unmeritoriously extending the archival period of the record.
- 5.31 The yardstick commonly used in the archives legislation of other Australian jurisdictions is that the open access period is measured from the end of the calendar year during which a record came into existence (eg. s.3(7) of the *Archives Act 1983* (Cwlth) (cl.4).

#### ARGUMENTS MADE IN PUBLIC SUBMISSIONS

- 5.32 A majority of the public submissions which addressed this point were in favour of the archival period commencing from the date of the last dealing with the record.
- 5.33 The submission of Moreton Shire Council (S19) expresses that view in a manner generally representative of the opinion expressed by the other submissions:

*"The archival period should begin from the date of "last dealing" as it is this date that the record ceases being a "current" record."*

- 5.34 Several submissions, however, - eg. P.D. Wilson (S14), Queensland Historians Institute (S28) and H. Stokes and R. Summerell (S30) - argued for commencement from the date of creation of the record, on the basis that this was administratively the most convenient system.

#### ANALYSIS AND COMMENT

- 5.35 Notwithstanding the opinions to the contrary noted above, the Commission considers that in the interest of conformity with other states and the Commonwealth, and so as to avoid the problem that could be caused by FOI applications, archives legislation should provide that the archival period run from the date of creation of the record.
- 5.36 Furthermore, the date on which the document ceased being a "current record" is in many cases less readily ascertainable than the date of creation, which is therefore a much more convenient basis on which both administrators and researchers may operate.

#### RECOMMENDATION

- 5.37 **The Commission recommends that archives legislation provide that the archival period run from the date of creation of the record.**

### **Integrating Rights of Access**

- 5.38 Having established generally what records will be available for access and after what period, it remains to consider how rights of access under archives legislation should be integrated with rights of access under FOI legislation.
- 5.39 The first step in this process is to establish when the Archives Authority should have possession of the records.

### TRANSFER OF RECORDS TO ARCHIVES

#### Matters for Consideration

- 5.40 It was highlighted in Issues Paper No. 16 (at p.50) that "[i]f the Archives Authority is to make records available for public access ...once they reach..." the end of the period of restricted access "...it may be necessary for government agencies to transfer their public records to archives at some time prior to the open access period ..."
- 5.41 At the Commonwealth level, section 27 of the *Archives Act 1983* (Cwlth) requires Commonwealth institutions to transfer to the Australian Archives records no longer required by that institution, or records that have been in existence for 25 years. In the light of this, Issues Paper No. 16 (at p.50) asked whether archives legislation should include a requirement that government agencies transfer their records to the QSA once they are no longer needed by that agency, and otherwise, after a fixed period of time. If so, what should be the length of that fixed period?

#### Arguments Made in Public Submissions

- 5.42 A number of submissions received by the Commission agreed with mandatory transfer after 25 years. The Beaudesert Shire Council (S10) submission provides a good example of the response: "*The suggestion of 25 years, which will allow a buffer of 5 years for processing and arranging for open access is considered adequate.*"
- 5.43 Boonah Shire Council (S17), however, disagreed, arguing that: "*... statutory time limits requiring 'transfer' of documentation would seem to hinder Council's effective use of archives.*"

#### Analysis and Comment

- 5.44 The Commission considers that a general requirement (subject to exceptions) to transfer records to archives after 25 years is reasonable.
- 5.45 It also considers that the 5 year buffer period will provide adequate time for those public authorities seeking to exempt records under the exemption provisions recommended by the Commission. That is, it will give the public authority 5 years after transfer of documents to the Archives Authority in which to certify that a document should not be available for open access (cl.28).

## RECOMMENDATION

- 5.46 **The Commission recommends that archives legislation require that unless otherwise specifically provided for, all public records be transferred to the Archives Authority after 25 years from date of creation of the record.**

## SOME TECHNICAL INTEGRATION ISSUES

- 5.47 Access to records under FOI legislation is procedurally different from access under archives legislation. These differences were outlined in Issues Paper No. 16 (at p.44):

*"Under FOI legislation (and in some jurisdictions, under privacy legislation), there is a statutory right of access to a public record upon a specific request by an applicant, subject to a number of exemptions necessary to protect certain public and private interests. In effect, therefore, a particular public record is not available for access or inspection until a request has been lodged and a decision made, in relation to that record, that the public interest lies in providing access rather than maintaining confidentiality.*

*Under archives legislation, as it has been enacted in other Australian jurisdictions, there is a general statutory right to inspect public records in the open access period held by archives. Such records would necessarily have been cleared for access prior to the time at which they became generally available for public access, and may consequently be freely inspected in public search rooms established for that purpose. Archives legislation, therefore, operates so as to allow the release of public records for general inspection by the public in advance of any request for access."*

- 5.48 FOI legislation in Queensland (if enacted in the form of the current FOI Bill 1991 (Qld)) will, except in respect of records subject to exemptions contained in Division 2 of Part 3 and records of persons and bodies contained in clauses 11 and 12, provide a general right of access to public records.
- 5.49 Access to records can thus be achieved in the 30 year archival period, irrespective of whether the records have been transferred to the Archives Authority under the recommended mandatory transfer rule in archives legislation (cl. 17(2) & 21 of the FOI Bill 1991 (Qld)).
- 5.50 In the open access period under archives legislation, these rights under FOI legislation will continue subject to minor variation (cl. 17(2) FOI Bill 1991 (Qld)).
- 5.51 The variation is contained in clause 22 of the FOI Bill 1991 (Qld) which provides that access to documents under FOI may be refused to:
- (a) *a document that is reasonably open to public access (whether or not as part of a public register) in accordance with another enactment, whether or not the access is subject to a fee or charge; or*
  - (b) *a document that is reasonably available for purchase by members of the community in accordance with arrangements made by an agency; or*
  - (c) *a document that is reasonably available for public inspection in the Queensland State Archives or a public library; or*
  - (d) *a document that-*



(i) *is stored for preservation or safe custody in the Queensland State Archives; and*

(ii) *is a copy of a document of an agency; or*

(e) *adoption records maintained under the Adoption of Children Act 1964."*

- 5.52 The purported effect of this provision is that an FOI application, so far as archives legislation is concerned, may be refused where the document is "reasonably available" for inspection in the QSA.
- 5.53 However there could be a possible conflict between the operation of clauses 22 and 24 of the FOI Bill 1991 (Qld) and the access provisions of a draft Archives Bill.
- 5.54 In this regard a nexus should be established between clause 22(c) of the FOI Bill 1991 (Qld) and the access provisions of the draft Archives Bill to establish that a record to which access is granted by the QSA in terms provided for in the draft Archives Bill is "reasonably available" within the meaning of the FOI Bill 1991 (Qld). This is to preclude argument under FOI as to whether public access given by QSA constitutes reasonable availability under FOI. It is suggested that the best and simplest way of doing this would be to substitute for the notion of "reasonably available" in paragraph 24(1)(b) of FOI Bill 1991 (Qld) the concept of "available in accordance with" the scheme of access established by the draft Archives Bill.
- 5.55 The Commission considers that once the archives legislation is framed, clauses 22(c) and 24(1)(b) of FOI Bill 1991 (Qld) could be amended by deleting the words "reasonably available for public inspection" and substituting "available for public inspection under the Archives Act" (Schedule).
- 5.56 The Commission also considers that the FOI Bill 1991 (Qld) will need to be amended regarding access to documents under clauses 11 and 12 after the archival open access period begins (Schedule). The reasons for this are discussed at paras 5.82 - 5.85.

#### RECOMMENDATIONS

- 5.57 **The Commission recommends that**
- (a) **Clauses 22 and 24 of the FOI Bill 1991 (Qld) be amended so as to remove doubt as to when records will be available under archives legislation;**
  - (b) **The FOI Bill 1991 (Qld) be amended so as to be applicable to persons or bodies mentioned in clauses 11 and 12 of that Bill at the commencement of the open access period.**

EXEMPTIONS FROM ACCESS TO PUBLIC RECORDS UNDER ARCHIVAL LEGISLATION

Need for Exemptions

*Matters for Consideration*

5.58 Issues Paper No. 16 (at p.52) observed that:

*"Legislation which creates rights of access to public records commonly provides that records containing certain specified kinds of information may be exempt from mandatory access. Such exemption provisions attempt to balance the public interest in providing a right of access to information held by government against the need to protect certain other public and private interests."*

5.59 The competing arguments for and against access are brought sharply into focus when it is suggested a document should be exempt. On the one hand it is argued that open government and public interest require that documents be available. On the other hand it is argued that to reveal documents that are still the subject of matters of sensitivity is to seriously prejudice the efficient and effective workings of government.

5.60 After a document has come into existence there will be a point in time when it loses its confidentiality (*Att.Gen. v Jonathan Cape Ltd.* [1975] 3 WLR 606 per Lord Widgery at p.619).

5.61 This point in time, when a document loses its confidentiality, may occur, for purposes of the present discussion, in the archival period or during the open access period.

5.62 If it is still confidential at the end of the archival period, then it is important that it remain exempt from access. Alternatively, if it is not still confidential, then it will be in the public interest that it be available for access.

5.63 The point of this discussion has been to demonstrate that whilst a document may initially fall within one of the categories of exemption recommended, it may have, through the effluxion of time, lost its confidential quality.

*Arguments Made in Public Submissions*

5.64 The submissions received by the Commission broadly agreed that certain documents should remain exempt from access during the open access period.

5.65 Experience at the Commonwealth level supports the proposition that after 30 years some documents remain sensitive and should be exempt from access. In their submission to the Commission, H. Stokes and R. Summerell (S30) described the Commonwealth situation:

*"Our experience in administering an open period of 30 years suggests that although the great majority of records can be released after this time a significant number of sensitivities remain. Statistics related to the application of the Archives Act exemption categories illustrate this....Where these exemptions have been challenged before the Administrative Appeals Tribunal (AAT) the Tribunal in almost every instance has upheld the validity of the exemptions claimed."*

5.66 J. Blake (S7) commented that:

*"[I] Agree with the general theme of the Commonwealth provisions [section 6.63] however such exemptions must "run out" after the passage of time. I believe that there should be a limit to the exemption."*

5.67 The Australian Council of Archives (S27) prefers a more flexible approach than one involving definition of exempt categories:

*"The Council does not favour the definition of exempt categories of document in the new archives legislation and instead recommends that the determination of access to archival documents be decided by the State Archives in consultation with the creators of the records and with its Advisory Body."*

### *Analysis and Comment*

5.68 The Commission agrees with the majority of submissions on this point that certain records should, in the public interest, remain exempt from access during the open access period (cl.32). The question is, of course, which documents should remain exempt?

5.69 It believes that some definition of the bases for exemption is necessary as a means of safeguarding the general right of access.

### RECOMMENDATION

5.70 **The Commission recommends that archives legislation provide that:**

- (a) **open access not be available for exempt records; but that**
- (b) **all public records, save in respect of exemptions, be available for open access at the end of the archival period.**

### Exemptions

#### *Matters for Consideration*

5.71 Issues Paper No. 16 (at p.54) observed:

*"The extensive exemptions provided in FOI legislation represent an attempt to strike a balance between the public interest in providing access to current public records and the need to protect certain public and private interests (see cl.3 of the draft FOI Bill). The exemptions from access to public records contained in the draft FOI Bill may, therefore, provide a guide for the determination of exemptions which may be necessary to withhold certain non-current public records from access."*

5.72 The exemptions contained in the FOI Bill 1991 (Qld) are set out in Division 2 of Part 3 of the Bill. The rationale for those exemptions is set out in the Commission's *Report on Freedom of Information* (EARC 1990c pp. 45-106).

5.73 The *Archives Act 1983* (Cwlth) delineates eleven separate grounds on which a public record may be withheld from open access; by and large, these exemptions closely follow some of the exemptions set out in the *Freedom of Information Act 1982* (Cwlth).

*Arguments Made in Public Submissions*

- 5.74 There was little in the way of specific input on this issue in the public submissions.
- 5.75 P. D. Wilson (S14) was of the view that: "*Exemptions should reflect and preferably parallel the FOI exemptions.*"
- 5.76 H. Stokes and R. Summerell (S30) stated:

*"We have found that the grounds of exemption set out in the Commonwealth Archives Act have adequately covered all the types of information which have needed to be exempted. ...[S]ome categories, notably the security and personal affairs exceptions have been used more than others. Some have not been used at all."*

*Analysis and Comment*

- 5.77 The Commission considers that Queensland archives legislation should follow the Commonwealth model in this respect. The exemption provisions contained in Division 2 of the FOI Bill 1991 (Qld) which should continue to be available after 30 years are:
- (a) Matter affecting relations with other governments (cl.38);
  - (b) Matter relating to law enforcement or public safety (cl.42);
  - (c) Matter affecting legal proceedings (cl.43);
  - (d) Matter affecting personal affairs (cl.44);
  - (e) Matter relating to trade secrets and business affairs (cl.45);
  - (f) Matter communicated in confidence (cl.46); and
  - (g) Matter affecting financial or property interests (cl.49).
- 5.78 In the above paragraph and the following paragraph, the references to clauses are to clauses in the FOI Bill.
- 5.79 The exemption provisions contained in Division 2 of the FOI Bill which should not continue to be available after 30 years are:
- (a) Cabinet matter (cl.36);
  - (b) Executive Council matter (cl.37);
  - (c) Matter relating to investigations by the Parliamentary Commissioner or audits by the Auditor-General (cl.39);
  - (d) Matter concerning certain operations of agencies (cl.40);
  - (e) Matter relating to deliberative processes (cl.41);
  - (f) Matter affecting the economy of the State (cl.47);
  - (g) Matter to which secrecy provisions of enactments apply (cl.48);

- (h) Matter disclosure of which would be contempt of Parliament or contempt of court (cl.50).
- 5.80 The Commission considers there are two reasons for not extending these exemptions beyond 30 years.
- 5.81 First, by the time the archival period has elapsed the public interest in not allowing access to the documents would have diminished over time to the point of being outweighed by the public interest in permitting open access. Second, the types of matter dealt with in these provisions are of such a nature that it would clearly be in the public interest, after the expiration of the 30 years, that such documents be available for access.
- 5.82 Other records which the Commission considers should be exempt from open access are the records of bodies identified in clauses 11 and 12 of the FOI Bill 1991 (Qld).
- 5.83 Under the broad definition of "public record" recommended in this Report (at paras 2.46 - 2.89), the records of the persons and bodies contained in clauses 11 and 12 of the FOI Bill 1991 (Qld) will be public records. Therefore, they will, without being specifically excluded, be open for access after the expiration of the archival period.
- 5.84 The FOI Bill 1991 (Qld) specifically excludes the persons and bodies mentioned in clauses 11 and 12 from the operation of that Bill. The rationale for these exclusions is set out in the Commission's *Report on Freedom of Information* (EARC 1990c pp.107-130).
- 5.85 The Commission considers that whilst the records of such persons and bodies ought to be subject to the general provisions of archives legislation, any such documents which remain sensitive and deserving of exclusion should not be available for open access. The Commission considers, however, that once such documents are no longer of a sensitive nature they should be available for access.

#### RECOMMENDATION

- 5.86 **The Commission recommends that the FOI Bill 1991 (Qld) be amended to provide that the only categories of exemption applicable to any document at least 30 years old are those mentioned in clauses 38, 42, 43, 44, 45, 46 and 49 of the FOI Bill 1991 (Qld).**

#### PROCESSES RELATING TO EXEMPTION CLAIMS

##### Matters for Consideration

- 5.87 The most difficult question relating to the integration of rights of access under FOI legislation and rights of access under archives legislation relates to the actual administrative procedural steps required in relation to deciding whether, in respect of each document more than 30 years old, open access should be granted or an exemption should be claimed. The alternative means of arriving at this decision have varying implications for archival resources, a matter of great significance.

5.88 In Issues Paper No. 16 (at pp.45-48), the Commission set out three possible models for dealing with this problem. These are summarized as models 1, 2 and 3 below. In the course of considering this problem further, the Commission identified a fourth possible model (model 4 below).

5.89 The four possible models are as follows:

Model 1: The Commonwealth Arrangement

- (a) Records remain closed from open access until 30 years after date of creation.
- (b) Records are mandatorily transferred to archival authority 25 years after date of creation.
- (c) Access under FOI legislation for documents less than 30 years old.
- (d) When introduced, FOI legislation to be of limited retrospectivity and the "access gap" closes with the effluxion of time.
- (e) Grounds for exemption from access under archives legislation are generally similar to grounds for exemption under the FOI legislation, but these are different in some respects.
- (f) Closure decisions (exemption from open access) are made on a document by document basis. That is, each record is examined.
- (g) Rights of appeal to the Administrative Appeals Tribunal exist under both FOI and archives legislation.

Model 2: Building on the existing system

- (a) Open access after 30 years.
- (b) Mandatory transfer after 25 years.
- (c) FOI access for documents less than 30 years old, or not available under archives legislation.
- (d) The access gap is closed immediately.
- (e) Similar grounds for exemption under both FOI and archives legislation.
- (f) Closure decisions made on a series/class basis.
- (g) All appeals under FOI legislation.

Model 3: Extending the retrospective operation of FOI legislation

- (a) FOI legislation is fully retrospective.
- (b) Access by FOI request.

- (c) Consideration on a document by document basis.
- (d) Appeals under FOI legislation.

Model 4: Modified Combination of Models 1 and 3

- (a) Records remain closed from open access until 30 years after date of creation.
- (b) Records are mandatorily transferred to archival authority 25 years after date of creation.
- (c) Access under FOI legislation for documents less than 30 years old.
- (d) FOI legislation is fully retrospective and therefore there is no chronological gap in access rights.
- (e) Changes to be made to the ambit of FOI legislation in respect of documents more than 30 years old (eg. declaring clauses 11 and 12 of the FOI Bill 1991 (Qld) not to apply to documents more than 30 years old, or to documents in the possession of the Archives Authority).
- (f) FOI exemptions to be qualified in respect of documents more than 30 years old.
- (g) Closure decisions to be made on a document by document basis.
- (h) Appeals under FOI legislation.

Arguments Made in Public Submissions

- 5.90 Of the submissions which made reference to this topic, there seemed to be a general tendency to favour Model 2 above, the major reason for this preference appearing to be the resource problems clearly inherent in either Model 1 or Model 3 because of the document by document examination process. The Staff of QSA (S12) were particularly concerned about resource implications.
- 5.91 Model 2, however, had some disadvantages, even in the eyes of some of those who preferred it. For example, the University of Central Queensland Library (S4) commented:
- "Despite a preference for Model No. 2, it is not desirable that access to records through the Archives Legislation be more restrictive than through the Freedom of Information legislation. We would, therefore, recommend that the exemption provision be applied on a record by record basis in preference to exempting a series of records."*
- 5.92 It should also be borne in mind that the submissions were made in circumstances in which it had been recommended that retrospectivity of FOI be limited to 5 years before the commencement of the FOI legislation (leaving an access gap under Model 1) whereas full retrospectivity is currently proposed in the FOI Bill.

- 5.93 H. Stokes and R. Summerell (S30) however, point to a major problem with Model 2:

*"If the Act prescribed that whole classes of information were to be exempted for specified periods of time this would remove the discretion to release information in those classes even where it was clearly innocuous. Such a provision would result in a substantial increase in the amount of information exempted."*

In Attachment B to their submission they put the view that a provision for block exemption might be seen as unduly restrictive for records that are at least 30 years old.

- 5.94 The Library Board of Queensland (S15) made the following observations:

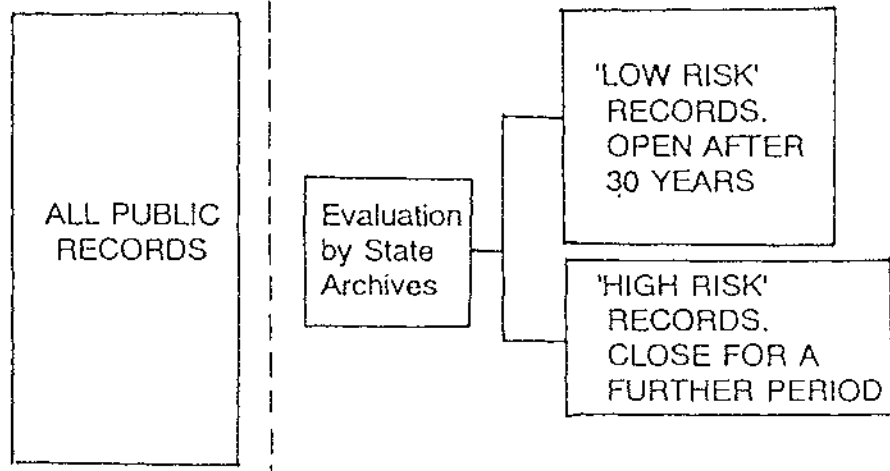
*"The procedures for records held at State Archives (i.e. in general those over thirty years old) are very different. When a series of records is processed, a decision is made about whether it should be open for public access or closed for a further number of years. That decision is generally made about the whole series which may consist of a single document or a hundred shelf metres of records. No attempt is made to individually read and clear every line of every page of every document. The resources required to do this would be astronomical. Instead the series is spot checked here and there by experienced archivists to get a general idea of whether the records are 'high risk' or 'low risk'. If it is apparent that there is a high risk that release of the records would impinge on rights of privacy (e.g. medical information) or break laws on disclosure of information (e.g. adoption information) or cause other such problems, then the series will be checked in greater detail and, where appropriate, a further closure period applied. If the series is 'low risk', then the whole series will be open for public access after thirty years.*

*Once the decision is made to release that series, then anyone may walk into the public search room at State Archives and have immediate access. There is no question of completing a written application and waiting up to 45 days for each document to be read, assessed against a set of exemptions, and cleared. Access is immediate and is available to all. This is possible because, the records are over thirty years old and by that time, the sensitivity of the records has declined greatly. After thirty years the bulk management techniques which are required to deal with such vast masses of records at a reasonable cost to the taxpayer can be applied with minimal risk of causing problems.*

*So essentially the procedure for public access which the Library Board is recommending is as follows:*

RECORDS UNDER 30  
YEARS OLD - ACCESS  
UNDER THE FOI ACT

RECORDS OVER 30 YEARS OLD  
- ACCESS UNDER THE ARCHIVES  
ACT





Some important points to make about this recommendation are:

*The vast majority (perhaps 80% or more) of records over thirty years old are likely to come into the low risk category. So most records would be available after thirty years.*

*Where records over thirty years remain closed for a longer period, a person may still apply to the relevant department and if the records do not come into any of the exempt categories under the Archives legislation, access would be granted.*

*Resources are not wasted on document level clearance of low risk records which make up over 80% of the total.*

*This system avoids the inevitable costs and delays involved in the alternative model where 100% of records over thirty years old must be read and cleared on application by researchers.*

*The Library Board feels strongly that whatever provisions the new archives legislation may make for public access to records over thirty years old, it is essential that the process of access clearance at series level (rather than at document level) must be maintained for the vast majority of records. If the government chooses to bring in a system of access clearance which requires all documents of whatever age to be individually read and cleared, then it must be prepared to provide an extra twenty or so staff to do this work, and it must be prepared to accept the complaints of researchers faced with delays of weeks or months to access the kinds of records they previously would have had immediate access to. And some decision would have to be made about whether records over thirty years old which are currently open would now have to be closed, and then access cleared on application, in order to be consistent with the new law."*

### Analysis and Comment

- 5.95 At the Commission's public seminar on Archives Legislation, Mr S. Zifcak a former research Director with the Victorian Legal and Constitutional Committee discussed that Committee's evaluation of the first three models. Of the first model, he said:

*"The Committee considered that the Commonwealth model provided a practical and effective means of integrating access to current and historical records. It provides, in the words of the Director-General of Archives, 'a clearly-defined, consistent, and accountable scheme for the management of all Commonwealth archival records'. Historical researchers have been well-served by the creation of the open access period which allowed them to search material of interest to them, almost without restriction. Such restrictions as there were, could be tested on appeal. The access gap between the FOI Act and the Archives Act has progressively been being closed. Those seeking access to current records could still do so under the provision of the Freedom of Information Act" (EARC 1991b, p.63).*

- 5.96 In respect of Model 2, he said:

*"This model differs from the first in three ways: first, the examination of records to decide whether they should remain closed after the 30 year period is conducted on a consignment basis, category by category, rather than assessment being done on a document by document basis.*

*Secondly, the freedom of information system is retained beyond 30 years to provide a system of appeal against ministerial closures.*

*Thirdly, the retrospectivity period is extended to 30 years to close immediately the access gap between the two acts" (EARC 1991b, p.64).*

5.97 Mr Zifcak said that the third model was by far the simplest:

*"The clear advantage of this model is its legislative simplicity. It brought with it, however, several major disadvantages which led quickly to its rejection.*

*... having read the Queensland FOI Bill yesterday, there is an aspect of that Bill ... which makes the Queensland system potentially quite like model 3 in that there is no fixed retrospectivity period. All documents will immediately become available under Queensland's FOI legislation which will run again in parallel with the library and archives legislation. But technically, a document created in 1904, for example, will become available under the provisions of the Freedom of Information Act.*

*... In considering the models the committee rejected the third quite early in its deliberations. Why was that so, given that it was so neat? The answer lies in the differing purposes of archival and freedom of information legislation ...*

*For archival researchers a system of access which depended on them identifying precisely the records which they require, and which involved the levying of charges, was quite unsuitable. Researchers need to browse, to establish interconnections between documents. Quite frequently they don't know what they are looking for before it's found, or even that they've been looking for it until they've found it. In this context a requirement that they specify in advance what material they seek is untenable, and to charge them for every inspection, as one is charged under most freedom of information legislation for requests, could become prohibitively expensive.*

*Further, the FOI access system would result in very significant delay ...*

*Preservation goals may also be prejudiced. Applicants under FOI legislation are entitled to see and, in most cases, handle original documents. The heavy and uncontrolled usage of such documents could damage them irreparably.*

*... The Committee turned its attention to the first two. It was rightly impressed by the Commonwealth model. Conceptually it was splendid. It did, however, have two important practical problems which model 2 sought to overcome. These were, first, that it was expensive; and, secondly, that there had been extensive delays in the assessment of documents for closure.*

*Both these problems were related to the fact that information was cleared for access basically on a document by document basis. Such a system is highly labour intensive and, given the volume of documentation which must each year be considered, presented archival staff with major logistical and workload difficulties.*

*Model 2, by contrast, sought to overcome these problems by proposing that decisions on the suitability of documents for access or closure be made on a consignment basis. This meant that when documents were transferred from departments, the archival authority would make their decision on document status according to the category of the documents rather than on a document by document basis. It was estimated that this would permit the automatic clearance of almost 80 per cent of transfer documents.*

*Closure by consignment, however, has one very important drawback. It meant that many documents which could have been open to scrutiny would instead be closed because they fell within a particular category or box for closure ... So, a person who found that the documents he or she needed had been taken out of circulation could request access to them under the FOI Act. Once this was done, they would be considered individually to determine whether or not exemptions apply.*

*...*

*The second model had a number of other advantages. It did not create parallel systems of appeal, but put all appeals through the FOI system. It provided that the gap between archives and FOI legislation be closed as quickly as possible. Officers under both acts would be protected against legal action. Finally, the committee accepted costings provided to it by the Keeper of Public Records, which demonstrated that in the medium term, a very substantial proportion of the costs of moving to the 30 year rule would be recouped through improved record storage in archival depositories resulting from mandatory transfer.*

*The Committee, therefore, concluded that the advantages gained in the adoption of model 2: advantages in cost savings, in records management improvement, and increased access to records, in more just closure, review and appeal procedures, are such that its implementation was strongly recommended" (EARC 1990b, pp.64-65).*

- 5.98 The Commission's consultant on the archives review, Mr. C. Hurley, has put forward a number of arguments about why a separate access system should be established under archives law as well as making a number of recommendations to put such a system into effect. His comments appear at Appendix B.
- 5.99 The major difficulties with Model 2 are:
- (1) It denies immediate open access after 30 years to a significant number of documents in respect of which, on closer examination, there may be no justifiable basis for such denial.
  - (2) Access under FOI legislation to documents denied open access under archives legislation would be attended by all the disadvantages described in respect of Model 3.
  - (3) There is no clear basis for defining classes of documents which would attract Ministerial exemption certificates in such a way that the classes would be sufficiently broad to prevent open access to documents which should remain exempt under FOI law, but not so broad as to deny open access to a significant number of documents which should not be exempt.
  - (4) The model would involve a two-tier system of exemption: first a class exemption, then (if applicable) exemption under FOI law for individual documents. This may be confusing and unnecessarily complex.
- 5.100 It may be argued that Model 2 may destroy the concept of the open access period and make it difficult for researchers to operate. The estimate reported by Mr Zifcak of "... *automatic clearance of almost 80 per cent of transfer documents ...*" (EARC 1991b, p.65) may alleviate that concern to some extent, but it may be of little comfort to researchers interested in documents of a kind falling within the other 20 per cent.
- 5.101 With respect to the comments of the Library Board of Queensland cited at paragraph 5.94 it may be possible, as a matter of administrative practice, to identify readily large groups or categories of "low risk" documents which will not attract FOI exemptions. These can therefore be quickly cleared for open access. However, to transform this into a legislative scheme could lead to delay or inhibition of access to other documents initially placed in a "high risk" category but in reality no more deserving of exemption under FOI law. Such administrative categorization would best be done at or before "transfer" time (i.e. 25 years after creation of the record).
- 5.102 To the extent that the perceived preferability of Model 2 over Model 1 lies in the immediate closing of the access gap, that factor will not be operative under FOI legislation offering unlimited retrospectivity.

- 5.103 Accordingly, the Commission considers that records should not receive blanket closure within the open access period merely because they fall within a particular class of document, but should only receive exemption on a document by document basis (cl. 4 & 32 & Schedule). This should not, however, be taken as discouraging agencies from declaring, without a document by document examination, groups or series of documents to be available for open access.
- 5.104 Adoption of Model 4 would, in the Commission's view, attain the advantages of Model 3 - exemptions constituting a sub-set of FOI exemptions and, regardless of document age, one system for processing challenges regarding closure of documents - without the accompanying disadvantages as described by Mr Zifcak. Clauses 4 and 32 of the draft Archives Bill, and the Schedule thereto, achieve this integration.
- 5.105 Model 4 would also satisfactorily address the concerns expressed by Mr Hurley in Appendix B. The advantage of Model 4 over Model 1 is that all the exemptions to the right of access are set out in the one piece of legislation (the FOI legislation) and are subject to challenge through the same process under the same legislative provisions.
- 5.106 The Commission considers that in the interests of administrative efficiency appeals against refusal of access to public records should be brought under FOI legislation. This would be for all categories of exemption, the full range applying to documents less than 30 years old and the limited range which the Commission recommends should apply to documents at least 30 years old. To facilitate this, FOI legislation should be modified so that the categories of exemption listed in paragraph 5.79 above cease to apply to any document after it has been in existence for 30 years, and the provisions of the FOI Bill 1991 (Qld) apply to clauses 11 and 12 after the archival period ends. Notification by the Archives Authority that a public authority has certified a particular document to be exempt should be treated as a refusal by that public authority to grant access to that document pursuant to FOI legislation, and a person seeking access should then have the right to appeal under the FOI legislation (see cl.4 and Schedule). Fees and charges should not be imposed in respect of such processes after the end of the archival period. That would be consistent with the spirit of open access.
- 5.107 A schematic diagram outlining the elements of the preferred model appears at the end of this chapter.

#### RECOMMENDATION

- 5.108 **The Commission recommends that archives legislation provides that:**
- (a) **the only records exempt from open access after the expiration of the period of restricted access should be those provisionally certified as exempt records;**
  - (b) **a person wishing to make a challenge as to whether a record is an exempt record do so as an appeal under the FOI Bill 1991 (Qld).**

### **Who Should Make the Decision Regarding Exemption?**

- 5.109 Factors favouring leaving the decision regarding exemptions to be made by the Archives Authority are:
- (a) Documents will come into that Authority's possession five years before the open access period.
  - (b) There is currently a large volume of documents in the possession of the QSA which will require processing at the commencement of any new archives legislation embodying a system of open access plus exemptions.
  - (c) There is a possibility that exemption claims by the Archives Authority would be less numerous and more reasonable than if such matters were left in the hands of the originating agency.
- 5.110 Factors favouring the originating agency as the body to decide which documents to claim exemption for are:
- (a) That agency will be able to make a better assessment of the possible adverse effects of allowing open access to a document.
  - (b) The burden of the task of processing the existing backlog of documents already more than 30 years old will be distributed across a number of agencies, not imposed on a single agency.
  - (c) In the event of an appeal, the process of advancing the case for maintaining the exemption would be simpler.
- 5.111 The few public submissions which concentrated on this issue tended to the view that the Archives Authority, being in possession of the record at the time access is sought, should make the prior decision regarding exemption.
- 5.112 On balance, the Commission considers that the processing of documents for possible exemption claims should be the function of the originating agency, not the Archives Authority (cl.4 - "exempt record").
- 5.113 This will ease resource problems for the Archives Authority and although that will be achieved by relocating the problem to agencies, it will be fragmented and therefore more easily dealt with.

### **RECOMMENDATION**

- 5.114 **The Commission recommends that archives legislation provide that the decision to claim exemption should be made by the public authority in possession of the document before its transfer to archives.**

### **The Backlog of Materials Currently More than 30 Years Old**

- 5.115 There is a large volume of material currently in existence which is more than 30 years old, which would be subject to "open access" in the event of archives legislation enabling such, and which would need to be examined with a view to considering possible exemptions.

- 5.116 To cope with this administrative problem, the Commission considers that the open access provision of the draft Archives Bill should not have effect until 4 years after its commencement in respect of documents that would have been open to access at the commencement - that is, documents at least 30 years old. For these documents, access should remain available under the L&A Act during the period of transition. This would have the effect of leaving a way of access open to documents and at the same time allow the affected agencies a buffer period in which to decide which documents should be exempt under the draft Archives Bill (Schedule).
- 5.117 Another problem that will be faced by public authorities required to transfer records to archives under the draft Archives Bill, will be the volume of documents which will require transfer upon the draft Bill coming into effect. The Commission considers it would not be reasonable to expect a public authority to transfer all the records required to be transferred at the commencement of the draft Archives Bill, to have considered all the documents which will become due for access after the commencement of the draft Archives Bill and at the same time to have decided which should be exempt. To overcome this problem, the Commission considers that the transfer and open access provisions should not come into effect until 12 months after the commencement of the draft Archives Bill (cl.2 & Schedule).
- 5.118 During the period of transition, current access rules would continue to apply (Schedule - Transitional Provisions).

#### RECOMMENDATION

- 5.119 **The Commission recommends that:**
- (a) **archives legislation provide that, for records which otherwise would be available for open access at the commencement of the draft Archives Bill:**
    - (i) **open access under the draft Archives Bill not be available until 4 years after commencement of the Bill;**
    - (ii) **access to these records within this 4 years be available in accordance with the provisions of the L&A Act and the L&A Regs;**
  - (b) **archives legislation provide that the transfer and open access provisions of the draft Archives Bill not come into operation until 1 year after the commencement of the Bill.**

#### Accelerated Access

- 5.120 The Senate Committee has said on this matter:

*"Accelerated access is a procedure by which whole categories of documents of any age can be made available to the public in general. It is a procedure that can lessen the rigour of both the thirty-year rule and the exemptions in the Freedom of Information Bill; to that extent we implore the insertion of this procedure in the Archives Bill" (Senate Committee 1979a, p.350).*

- 5.121 The L&A Regs currently provide that a public authority may instruct that immediate access may be given to specified records upon transfer. Such immediate access is currently given to the records of wound-up companies and to school admission registers.
- 5.122 Most submissions that dealt with this matter favoured allowing accelerated access in appropriate cases. The Brisbane City Council (S24) considered FOI access sufficient.
- 5.123 The Commission considers that while the FOI Bill is fully retrospective, accelerated access nevertheless importantly allows documents of little or no sensitivity to be released for public access prior to the expiration of 30 years (cl.33).

#### RECOMMENDATION

- 5.124 **The Commission recommends that archives legislation provide for accelerated access to public records where appropriate.**

#### Special Access

- 5.125 Currently, the L&A Regs provide that an exception may be made to the general open access periods of 30 and 65 years in the case of bona fide research conducted by a person authorised in writing by the chief executive officer of the relevant public authority (reg.22 L&A Regs).
- 5.126 Section 56(2) of the *Archives Act 1983* (Cwlth) provides, in legislative form, for special access arrangements which existed prior to the commencement of that legislation. That provision operates to allow access to Commonwealth records to a person "*notwithstanding that the Commonwealth records concerned are not otherwise available for public access under this Act*" (s.56(2) *Archives Act 1983* (Cwlth)). Special access may, therefore, be provided to records not yet available for open access or which would otherwise be withheld from access by virtue of exemption provisions contained in the *Archives Act 1983* (Cwlth).
- 5.127 Where special access is granted under the *Archives Act 1983* (Cwlth), conditions may be imposed on that access, such as the requirement that a manuscript prepared following research of archival material by way of special access be submitted to the Archives Authority for clearance prior to publication (s.56(3)).
- 5.128 The tenor of public submissions on this issue was the same as for accelerated access.
- 5.129 The Commission considers that archives legislation in Queensland should, where the State Archivist, or a person authorised by him or her, considers it appropriate, allow for specified public records (whether exempt or otherwise) to be made available to a person prior to those records becoming generally available for open access (cl.33).
- 5.130 Archives legislation should also contain a provision similar to section 56(3) of the *Archives Act 1983* (Cwlth) allowing the State Archivist to impose conditions on a grant of special access (cl.33).

## RECOMMENDATION

- 5.131 **The Commission recommends that archives legislation provide in a provision similar to section 56 of the *Archives Act 1983* (Cwlth) for special access.**

**Protection of Staff of the Queensland State Archives**

- 5.132 Issues Paper No. 16 (at p.57) observed that:

*"Currently, the L&A Act does not protect the staff of the Queensland State Archives, or other public servants, from legal action which may arise out of the release of information in public records. That is, it does not afford protection in respect of the release, in good faith, of public records, where the release of those records may constitute a defamatory publication, a breach of confidence, or give rise to a criminal action or a personal liability."*

- 5.133 Section 57 of the *Archives Act 1983* (Cwlth) provides statutory protection to a person giving access to records in the ordinary course of administration of the Act.
- 5.134 Likewise, most FOI legislation provides for such protection. Indeed, this Commission has recommended that FOI legislation in Queensland contain these protections (see EARC 1990c, paras. 4.51 - 4.64 and cll. 102 - 104 FOI Bill).
- 5.135 The public submissions dealing with this issue favoured such protection.
- 5.136 The Commission considers there is little reason why officers of the Archives Authority should not receive the same protection (cl.44).

## RECOMMENDATION

- 5.137 **The Commission recommends that archives legislation provide protection from liability for persons giving access to records under archives legislation, similar to that provided for persons under clauses 102 - 104 of the FOI Bill 1991 (Qld).**



**TIME CHART OF ACCESS PROVISIONS - MODEL 4**

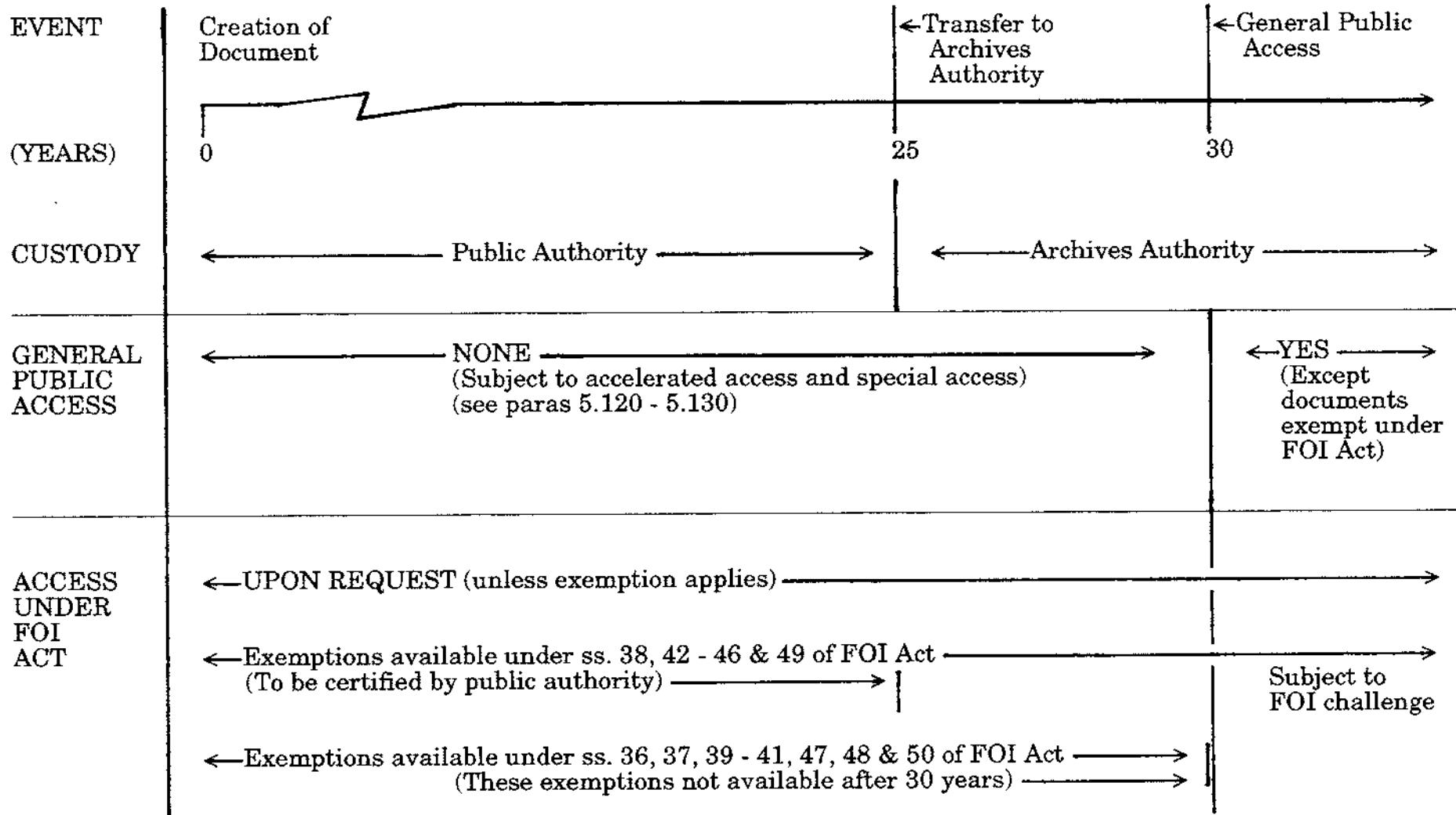


Fig. 1

## CHAPTER SIX

### PROVIDING ACCESS SERVICES

#### Archival Reference Services

##### MATTERS FOR CONSIDERATION

- 6.1 Issues Paper No. 16 outlined the three basic requirements for an archival reference service (for researchers present in person and for remote users):
- (a) trained staff, knowledgeable about the records held by archives and their potential use for research purposes;
  - (b) "finding aids" that will disclose essential information about the administrative location, organisation and content of records held by archives (Oakes & McCausland 1987, pp.160-172); and
  - (c) facilities for the use and reproduction of records (Rhoads 1983, p.11; and Hinchey & McCausland 1987, pp.202-218).
- 6.2 At present, reference services are not adequately provided by the QSA because of physical and financial constraints.
- 6.3 This issue is largely tied to the issue of the provision of services to regional areas and the decentralisation of archives repositories. These matters were addressed at length in many submissions received by the Commission. The matter of the provision of archival services to regional areas will be examined in relation to the present issue; the decentralisation of archival holdings will be discussed below at paragraphs 6.13 to 6.29.

##### ARGUMENTS MADE IN PUBLIC SUBMISSIONS

- 6.4 The Library Board of Queensland (S15) said in its submission:

*"If public access to information in government records is limited to those who are able to visit the State Archives during weekday working hours, then clearly a large section of the population is at a disadvantage. There is a pressing need for State Archives to reintroduce a research service by mail.*

*Again, this is essentially a matter of resources. There are two options. The government may choose to provide funds for staff to be appointed to provide this service free to the public. Alternatively, the research service could be provided on a commercial basis with the cost of the extra staff needed being met out of the revenue generated."*

- 6.5 In their submission to the Commission's review, the Staff of the QSA (S12) summarised the research services currently provided by the QSA:

*"Because of limited resources and the massive increase in the number of people conducting research at State Archives over the last ten years, the written research service once provided has been stopped. Consequently, people who live outside Brisbane are severely disadvantaged.*

*A recent survey of our public clients revealed that 57% of respondents had a medium to high need for a written research service. It was made clear in the survey that this service, if offered, would be on a user pays basis."*

- 6.6 The University of Central Queensland Library (S4) submitted in relation to the needs of regional researchers:

*"A particular difficulty in accessing public records in the State Archives is faced by country enquirers. Guidance can be by mail but a personal visit is required. When travel and accommodation expenses need to be met, delays experienced in Archives are very expensive and disadvantage non-metropolitan users. Resources should be made available to publish more material in the model of the Queensland Public Records Historical Resource Kit. It should also be possible for non-metropolitan users to request material in advance of arrival so that delays are minimised.*

*In order to provide services to country users that approaches equity with metropolitan users, reference services to remote users would not be charged."*

- 6.7 Similarly, the James Cook University of North Queensland (S11) described the research needs of its staff and students:

*"Professional historians and students enrolled for history and politics honours and higher degrees at the James Cook University are identifiable and regular users of the Queensland State Archives. Over the past twenty years more than one hundred staff and students from the Department of History and Politics have pursued research at the Dutton Park repository. Honours students rarely make more than two visits, higher degree students make several visits over considerable periods of time and staff are regular users...*

*It is desirable that country and interstate users, having given prior notice in writing of an intended visit, be afforded preferential service. Travel to archives in Brisbane and subsistence while researching in the Archives can prove to be very costly, particularly for 'bona fide' research students."*

#### ANALYSIS AND COMMENT

- 6.8 The strong response on this issue indicated to the Commission that present reference services are inadequate.
- 6.9 The Commission considers that reference services should be a primary service provided by an archives authority. To be able to provide these services the Archives Authority needs to be adequately funded.
- 6.10 The Commission also recognizes, however, that open access may lead to misuse of reference services. To alleviate the potential for misuse of the reference service the Commission considers charges for photocopying should be introduced (refer to paras 7.44 - 7.51).

#### RECOMMENDATION

- 6.11 **The Commission recommends that sufficient funding be provided to the Archives Authority to enable it to provide an effective reference service.**

#### **Dissemination of Information**

- 6.12 How and where records should be collected and accessed provided one of the most vexing issues for the Commission. Ultimately, resources will determine the capacity of a State-wide archival system to meet the needs of its users. The effective management of the available resources, however, will determine the efficiency of the system.

## DECENTRALIZATION

Arguments made in Public Submissions

6.13 This issue was addressed at some length by many of the submissions received by the Commission.

6.14 P.C. O'Brien (S1) suggested:

*"That consideration be given to multi faceted repositories in regional centres. Because of the decentralised nature of Queensland and the distances between major cities and the expense incurred in travelling to Brisbane to conduct research, archives relating to regional centres such as Cairns and Townsville should be held in those places."*

6.15 The Capricornia Collection Society (S3) was of a somewhat similar view:

*"Centralised archives in Brisbane is not the most efficient and equitable way in which access to public documents can be provided for those with the greatest interest in them. The development of three branches of the Titles Office and three registries of the Supreme Court acknowledge the need which people living in Central and North Queensland have for ready access to information concerning them. For the same reasons, regional branches of the Queensland Archives need to be created in the major service centres rather than being locked away in Brisbane where it is difficult for those needing access to the records to read them."*

6.16 The Rockhampton and District Historical Society (S16) were of the view that: *"Centralising of archives and other facilities in Brisbane is not an equitable way to service the State and the Society is much opposed to any further centralisation."*

6.17 Similarly, the University of Central Queensland Library (S4) described the way in which students and staff of the University were disadvantaged by centralised archives:

*"Our view is that of a regional university where staff and students experience the disadvantages of isolation from sources of information, especially government information. A centralized archives authority in Brisbane is not to our advantage and we would strongly recommend that consideration be given to regional repositories."*

6.18 After acknowledging its status as a public authority, and expressing its concerns about having to transfer its records to State archives, the University of Queensland (S21) commented that:

*"...there are obvious practical advantages in having those records continuously available where they will be most used for official purposes or for research and will be available for academic and community access."*

6.19 The Boonah Shire Archives (S8) wrote:

*"Certainly it is agreed that State Archives have qualified staff and superior storage facilities but is it really envisaged that all the history of Queensland including all local history be housed in one establishment?"*

- 6.20 As described by James Cook University of North Queensland (S11), however, this issue is not a new one:

*"In 1984 James Cook University in its submission to the Committee of Review of the State Library of Queensland noted the difficulty for people in north Queensland in gaining access to archival records. The University suggested that consideration be given to decentralising the State Archives through the establishment of regional archives centres.*

*It argued that it would be appropriate to establish regional archives centres and that one of these should be located in Townsville, probably in close proximity to James Cook University of North Queensland. While, initially, the role of the regional centres would be to facilitate collecting by the central archives and to liaise with agencies, in the medium term it would be necessary to establish staffing and facilities for the use of locally held collections. In the longer term it may be appropriate to return records already held in Brisbane to the region to which they relate.*

*The Committee of Review responded by rejecting the regional centre concept and recommended that a five-year copying program be established to 'provide copies of relevant State Archive material for placement in regional centres'. It recommended regional input on the choice of records from interested parties. As far as we are aware, no action has yet been taken to implement such a plan."*

- 6.21 In its submission, the Library Board of Queensland (S15) recognised the need to provide State-wide archival services:

*"Under the **Libraries and Archives Act 1988**, the State Archives has a responsibility to provide services to government and public clients throughout the State, not just in Brisbane or south east Queensland. It is a matter of great concern to the Library Board of Queensland that resources provided to State Archives are inadequate to ensure equality of service throughout Queensland. There are no regional repositories outside Brisbane. There are no full time field staff, although archivists do very occasionally do field work where funds permit. There is no provision for copying programs so that copies of records can be held locally. And due to lack of funds, the research service by mail is now very limited. As a result, clients outside south east Queensland are not receiving the same level of service as those within that area ...*

...

*It is an issue of great concern to State Archives, and to its many government and public clients, that all public records in its custody are located in Brisbane. This presents considerable difficulties for government clients wishing to store and recall records in their own locality, and for researchers wishing to have access to government information about their own locality. On the existing resource base, it has been impossible for State Archives to establish regional repositories. This is an expensive option and it may be difficult to resource regional repositories for some years to come. One alternative which has been raised would be to designate existing tertiary institutions as regional repositories. Although this would be a great deal less expensive, there are a number of problems with this approach."*

- 6.22 The Library Board then outlined its objections to the deposit of public records outside the QSA. These objections were along the lines of those held by the State Archivist which were set out in Issues Paper No. 16 (at para.5.30).

- 6.23 Nevertheless, the Library Board of Queensland (S15) concluded that:

*"In principle ... the appropriate way for the State Government to provide for the needs of government and public clients outside south east Queensland is to establish a number of regional repositories.*

*In order to reduce the expenditure necessary for the establishment of such repositories, it would be worth exploring options such as joint facilities with federal and local government. If funds are not available in the near future for the establishment of regional repositories, as a temporary measure it may be possible to designate appropriate tertiary institutions as regional repositories on a contractual basis provided that the following conditions are met.*

*State Archives is provided with the resources to make grants to designated institutions to assist them to meet the necessary standards for storage, processing and use of public records.*

*records are 'on loan' only and may be withdrawn at any time.*

*decisions on selection of records for deposit are made by Queensland State Archives.*

*there are no access restrictions or requirements on the records.*

*appropriate storage conditions are provided for permanent records.*

*a formal contract outlining the terms of deposit is agreed."*

#### ANALYSIS AND COMMENT

- 6.24 The Commission considers that the collection and preservation of public records is paramount. It also considers, however, that inability, whether by geographical constraints or otherwise, to access public records is a matter of utmost seriousness. Ideally, a solution which accommodates both the collection and preservation requirements, and the access requirement, should be found.
- 6.25 The Commission considers that the option which best meets these requirements is the establishment of regional repositories (cl.21).
- 6.26 However, if insufficient financial resources dictate that the establishment of such institutions is not possible, then the Archives Authority should be given power to establish joint facilities with other bodies and to set minimum standards for the holding of records outside central archives (cl.21).
- 6.27 The inalienability provision and the provision for the establishment of "records management standards" should assist in this regard.
- 6.28 In all cases, the Archives Authority should be required to keep a central register. Clause 23 of the draft Archives Bill provides for this.

#### RECOMMENDATIONS

- 6.29 **The Commission recommends that:**
- (a) **archives legislation provide for the establishment of regional repositories;**
  - (b) **if financial restraints preclude the establishment of such repositories, archives legislation confer power on the Archives Authority to establish joint facilities;**

- (c) the archives legislation provide that wherever public records are held they are subject to the records management standards set by the Archives Authority;
- (d) archives legislation require the Archives Authority to keep a record of all public records regardless of where they are kept.

#### COPYING PROGRAMMES

#### Arguments Made in Public Submissions

##### 6.30 Boonah Shire Archives (S8) made the following suggestions:

*"With modern copying techniques why not encourage societies and individuals to have their worthwhile historical material copied, and forward either the original or a copy to State Archives? (John Oxley Library has used a similar programme to increase the storage and use of old photographs.)"*

*"Possibly in the future State Archives could consider a mobile photocopying unit to travel throughout Queensland thereby obtaining at least a cross-section of the State's local history. Our experience indicates that most people will co-operate if they can retain the original or a copy."*

##### 6.31 The Library Board of Queensland (S15) addressed the issue of copying programmes in its submission:

*"State Archives holds records of state and local government from all over Queensland. These records are selected for permanent preservation because they are of long term significance to Queensland. However, they may also be of particular importance to individual regions or localities. Researchers living in those areas naturally wish to have easy access to such records without having to travel long distances. As such records cannot be in two places at once, the obvious answer is for them to be copied. The originals can then be stored at the State Archives which is able to provide the necessary climatically controlled storage conditions, and copies can be provided locally for use by researchers."*

*"In the case of local government records in particular, there is a strong case for copies of records to be available locally. Unfortunately, most local authorities do not have adequate funds to be able to undertake such projects, although they may be able to contribute to the cost. There is therefore a need for the provision of funds for the ongoing microfilming of records of local or regional interest. This project could be co-ordinated and administered by State Archives."*

Similarly, in response to a question at the Commission's public seminar on Archives Legislation about the copying of public records, the State Archivist Ms L. McGregor gave the following reply:

*"I think it is appropriate that, for regional records, copies be held in both places. Again, this is a resource issue, it costs money to duplicate records, and that's really where the problem is. There is no program under our budget that provides for this and I would suspect that most local governments don't provide for it under their budget. That's really what the issue is, it's money. I think we're all agreed it's a good idea, but somehow we have to fund it" (EARC 1991b, p.93).*

## 6.32 J.W. Gillam (S25) put the following view:

*"It is imperative that the documents deposited at the State Archives are microfilmed and catalogued soon after they are lodged and the original documents stored in safe place with minimum access. The multiple microfilmed copies should be distributed such that -*

- (a) *a master copy is stored off-site as security. What if the State Archives building is totally destroyed by a bomb or something similar.*
- (b) *a copy if available for the Archives use - to answer queries from government bodies etc.*
- (c) *a copy is forwarded to the Authority or body that supplied the original documents. This will enable them to carry on their business without requiring referral to the Archives to see the original document. This would also reduce the storage space requirements of the originator.*
- (d) *a copy is available for Archives' client usage if the documents contained on the microfilm have been classified 'OPEN ACCESS'.*
- (e) *a copy if made available for local history society usage if a town or shire council has deposited some of their historical records such as old Rate Books."*

## ANALYSIS AND COMMENT

6.33 A copying programme would raise copyright issues where copyright in documents is held otherwise than by the State. Where copyright is held otherwise than by the State, the Commission considers that copies of such records should not be given. However, access should not be refused outright and should be given in another form (cl.34).

6.34 The Commission considers that the establishment of regional repositories would alleviate the need for an extensive copying programme, but nevertheless considers that a copying service should be made available (cl.9).

## RECOMMENDATION

6.35 **The Commission recommends that archives legislation provide that the Archives Authority make available copying services at places where public records are kept.**

## OTHER METHODS OF DISSEMINATION OF ARCHIVAL MATERIAL

Issues Paper No. 16 (at p.58) described further ways in which archival material may be disseminated:

*"Information contained in archives may be disseminated in a number of ways. These include the formulation of description programs and finding aids, the publication of selected public records held by archives, public exhibitions of archival records, and public relations programs about the role of archives and the public records contained therein..."*

*An example of the publication of selected records by the Queensland State Archives is the Queensland Public Records Historical Resource Kit which was designed to cater for the needs of genealogical researchers, particularly researchers in remote areas. Once again, however, the provision of services such as the publication of the Resource Kit is dependent upon sufficient physical, personnel and financial resources ..."*



6.36 In their submission to the Commission, the Staff of the QSA (S12) stated:

*"In an effort to disseminate information, State Archives has produced three parts of a Queensland Public Records Historical Resource Kit over the past few years. The Kit is made up of microform copies of some of the most heavily used series of records and has been purchased by many local authorities and state libraries. The production of further parts of the Kit has ceased due to lack of resources. With greater funding, further parts of the Kit could be produced thus allowing a more extensive dissemination of information contained in the records held at State Archives.*

*Archival information could also be disseminated throughout the state via displays, exhibitions, seminars, public lectures, publications/kits designed for special target groups (e.g. schools), and publicity programs to promote the role and importance of State Archives."*

6.37 The Commission considers that the Archives Authority should use whatever means it considers appropriate for the dissemination of information throughout the state (cl.9).

#### RECOMMENDATION

6.38 **The Commission recommends that archives legislation confer power on the Archives Authority to use whatever means it considers appropriate for the dissemination of archival material throughout the State.**

## CHAPTER SEVEN

### ADMINISTRATION OF ARCHIVES

#### **Nature of the Archives Authority and its Administrative Location**

- 7.1 The need to establish an independent archives authority has been discussed throughout this Report. The nature of the authority and where it should be located administratively now need to be considered.

#### NATURE OF THE ARCHIVES AUTHORITY

##### Matters for Consideration

- 7.2 Issues Paper No. 16 (at p. 61) described the nature of the New South Wales Archives Authority:

*"The New South Wales Archives Authority was established under the Archives Act 1960 (NSW) as an independent statutory corporation with managerial powers. Two important factors flow from this situation.*

*First, as has been discussed previously (see para.5.19), the Archives Act 1960 gives the Archives Authority the right to decide whether a public record should be preserved as a state archive. In practice, the Authority's professional staff carry out the work of inspecting, scheduling and appraising records referred for disposal and make recommendations to the Authority. It is the Authority, however, which exercises its power under the Act to make the final decision on what records should be kept. The Authority therefore acts as an important insulator against any political or administrative pressure to approve the destruction of records.*

*Second, appointments could be made to the board of an archives authority so that its membership will reflect the varied interests in preserving archives, in managing public records and in facilitating public sector efficiency and profitability. An authority could, for example, contain a current or former member of the judiciary and of Parliament among its members, representing their respective arms of government, in recognition of the doctrine of the separation of powers (see paras 3.38-3.44 where the issue is raised of whether the records of these arms of government should be included within the definition "public records"), and a representative of local government in recognition of the delegation of power from the State. In addition, genealogists, historians, archivists, administrators and the public will all have different views on the types of public records which should be retained as archives. A representative membership of an archives authority allows for a comprehensive canvassing of views."*

##### Arguments Made in Public Submissions

- 7.3 Most of the submissions which addressed this point were firmly in favour of the QSA being administered by an independent statutory authority. For example, the University of Central Queensland Library (S4) said:

*"Constitution as a statutory authority, as in New South Wales, would allow the Authority to be free of political and administrative pressure. A Board would obviate the need for an advisory body. This would report annually to the Parliament on the administration of Archives and on the compliance of other government agencies with the legislation; and so be seen to be accountable. The Authority would be funded by direct appropriation by the legislature."*

7.4 The Staff of QSA (S12) submitted:

*"We ... see a need for State Archives to be independent from government departments so that independent decisions can be made about the disposal of public records. Under the Libraries and Archives Act 1988, the State Archivist can be directed by superior officers to destroy records. Some protection from political pressure would occur if State Archives was established as a statutory authority and if an advisory board was created to make disposal decisions. There would still be problems associated with a small organization operating as a separate unit e.g. the provision of personnel and accounting services."*

Analysis and Comment

- 7.5 The Commission considers that an archives authority should be established in Queensland along the same lines as the NSW Archives Authority. It should be independent of a government department and constituted as a statutory corporation and independent agency within a ministerial portfolio. Clause 11 of the draft Archives Bill 1992 provides for this. The relevant minister should be responsible for ensuring adequate resources for the Authority, but be unable to direct it as to its administration of the archives legislation.
- 7.6 Unlike the NSW Archives Authority, however, the Archives Authority in Queensland should be constituted by a membership of three persons: a chairperson, the State Archivist, and the State Librarian. The chairperson should be a person of considerable standing in that he or she should be familiar with archives, have extensive management experience and be familiar with public sector practices. Composition of the Archives Authority along the lines outlined will ensure that the Authority has the breadth of experience necessary for the implementation and administration of the new archives legislation (see cll.3, 6 & 7).
- 7.7 The Commission further considers that the establishment of the independent Archives Authority should not adversely affect the current employment terms and conditions of officers and employees of the QSA. This involves issues which go beyond the ambit of this Report and require consultation with the PSMC and other organisations. The necessary provisions should be added to the draft Archives Bill.

RECOMMENDATIONS

- 7.8 **The Commission recommends that:**
- (a) **archives legislation provide for the establishment of an independent archives authority, such authority to be constituted as a statutory corporation and independent agency within a ministerial portfolio;**
  - (b) **archives legislation provide that the Archives Authority not be subject to external direction, whether ministerial or otherwise;**
  - (c) **archives legislation provide that the Archives Authority be constituted by a chairperson, the State Archivist, and the State librarian;**
  - (d) **archives legislation contain transitional arrangements for existing staff.**

## Advisory Council

### MATTERS FOR CONSIDERATION

- 7.9 At present the QSA is overseen by the Library Board of Queensland. In view of the Commission's recommendation that archives and libraries legislation be separated it would be inappropriate for the Library Board of Queensland to continue its administration of the Archives Authority.
- 7.10 Because the Authority would be free from departmental and ministerial direction a need may exist for an advisory committee.

### ARGUMENTS MADE IN PUBLIC SUBMISSIONS

- 7.11 The Records Management Association of Australia (Queensland Branch) (S9), Beaudesert Shire Council (S10) and Moreton Shire Council (S19) expressed in identical terms the view that there should be an advisory council:

*"To allow an independent view to be provided to the Minister and a wider community interest on public records management issues.*

*The advisory council should be composed of professionals with significant practical experience from the following disciplines:*

- . *Archives Management*
- . *Records Management*
- . *Public Sector Management Commission*
- . *Local Government Administration*
- . *Financial Management*
- . *Human Resource Management*

*The advisory council should be established to provide a consultative/advisory role to the Minister."*

- 7.12 The Co-ordinated Response from the Queensland Public Service (S20) said:

*"There is some support for the establishment of an advisory council to provide executive assistance for the administration of the Archives. This would allow an independent view to be provided to the Minister and a wider community interest on public records management issues. The council should be composed of professionals with significant practical experience from such disciplines as archives and records management, financial management and human resource management. Representatives of Local Government administration and the Public Sector Management Commission should also be included. One Department makes the point that representatives from both the public and the private sectors should be included on the council."*

- 7.13 The University of Queensland Libraries (S31) were also of the view that an Advisory Council should be established and that the Council's responsibilities should extend to the expression of the needs of academic and private users of archives.
- 7.14 At the Commission's public seminar on archives legislation, Mr J. Cross, Principal Archivist of the Archives Authority of NSW, recommended that archives legislation provide for an advisory council.

7.15 As to the composition of such an advisory council, he said:

*"Archivists need friends, not acquaintances, people who are obliged, willing and able to support them when they come under political or any other sort of pressure. Whether those people do so in an advisory or a management capacity probably doesn't matter. I do think it matters that at least one of them be a Supreme Court judge. In the public sector a Supreme Court judge is the equivalent of a 15 inch naval gun: you don't have to fire it, you just make a lot of noise closing the breach"* (EARC 1991b, p.13).

#### ANALYSIS AND COMMENT

- 7.16 The Commission considers that an advisory council should be established. Whilst of the view that for purposes of operational efficiency, the governing body of the Archives Authority should be small, the Commission recognises, that there is a need for input and advice from a wide range of persons concerned with public records. The establishment of an advisory council would bring this about. Clause 15 of the draft Archives Bill 1992 provides for this.
- 7.17 The Commission considers that the important principles that should underpin the composition of an advisory body are diversity and independence. Therefore, the advisory council should contain representatives from each of the three branches of government. Additionally, it should contain representatives selected from a pool of specified people/interests including local government authorities, historians, record managers, family history, public administration, etc.
- 7.18 Clause 16 of the draft Archives Bill 1992 provides for diverse and independent membership.
- 7.19 Because the Archives Authority would have the role of archives administration, and because of the need for it to maintain independence, the functions of the Archives Advisory Council should merely be to provide policy advice and act as insulator for the Archives Authority (cl.18).

#### RECOMMENDATIONS

- 7.20 **The Commission recommends that:**
- (a) **archives legislation provide for the establishment of an Archives Advisory Council;**
  - (b) **archives legislation provide that the Archives Advisory Council consist of representatives from each of the three branches of government and representatives from bodies including: local government, historians, record managers, public administration and family history.**

### **Accountability**

- 7.21 The Commission considers archives legislation should require that the Archives Authority prepare and furnish to the Minister, and to Parliament, an annual report on the compliance of government agencies with the statutory duties imposed by archives legislation (cl.14). The minimum requirement should be that such a report be furnished annually. Where the authority is of the opinion that a matter is of sufficient public interest, however, it should be able to request that the Minister additionally bring that matter to the attention of Parliament.
- 7.22 Reports presented to Parliament detailing instances of non-compliance with statutory obligations under archives legislation should recommend that Parliament ensure appropriate action by the responsible Minister to remedy the situation.
- 7.23 Such requirements would ensure that archives legislation would be enforced effectively as it would be more difficult for statutory bodies to ignore the duties imposed by the legislation.

### RECOMMENDATION

- 7.24 **The Commission recommends that archives legislation require the Archives Authority to submit annual Parliamentary reports.**

### **Resources**

### MATTERS FOR CONSIDERATION

- 7.25 Issues Paper No. 16 (at pp.64-65) described how under its present operating conditions and resource constraints, the QSA faces great difficulties in meeting its current responsibilities under the L&A Act. These constraints result in the inadequate provision of many services including the inability to:
- (a) provide more than a minimum reference service for remote users and access to its holdings for more than a very limited number of metropolitan users;
  - (b) provide adequate bulk, centralised storage for the non-current records of all government departments;
  - (c) appraise government records to ascertain whether they should be kept permanently or should be destroyed (for one notable exception, see Queensland State Archives 1989b);
  - (d) monitor the records management practices of government agencies to ensure that public records are stored adequately, and that government agencies are familiar with their obligations under the L&A Act;
  - (e) preserve and bind public records;
  - (f) deliver records management and preservation services to regional areas; and

(g) explore revenue raising activities.

7.26 Issues Paper No. 16 acknowledged that a number of these constraints would be addressed with the opening of a new archives building in 1993. Other issues, however, could only be addressed if the QSA was provided with sufficient funding to enable it to establish efficient administration and work practices and was able to levy charges where appropriate. Accordingly, Issues Paper No. 16 (at p.65) asked how the current resource constraints of the QSA should be addressed.

#### FUNDING BY GOVERNMENT

##### Arguments Made in Public Submissions

7.27 At the Commission's public seminar on Archives Legislation, the State Archivist, Ms L. McGregor, spoke about "... money, or rather, the lack of it":

*"The Goss Government has made a strong commitment to the provision of archival services in Queensland with the decision to go ahead with the construction of a major new building for archives at Runcorn.*

*This building, to cost over \$24 million, represents a major upgrading of facilities. Storage space for records will be more than double the existing capacity. Special environmental conditions will be provided for microfilm, film, computer tapes and discs. Storage for paper records has been designed to maximise their lifespan through controlled conditions of temperature and humidity and filtering of ultraviolet light. The building will also provide excellent facilities for the public with a large public search room and finding aid room, a separate area for the use of microfilm, interview rooms, exhibition area and a large conference lecture room.*

*The building does represent a major commitment by the Goss Government for preserving and making available the documentary heritage of the State. The new building provides a wonderful opportunity for the enhancement of existing services and the development of new services to meet the needs of our clients.*

*However, to get onto the matter of funding, in order to capitalise on the opportunities provided by the new legislation and a major new building, there needs to be a parallel investment in the quality and effectiveness of archival and records management services in Queensland. And it is here that I foresee the greatest difficulty in transforming ideals into reality. How are the new responsibilities and potential new services to be funded? Most of the State Archives' operations are community service obligations and are funded through consolidated revenue appropriations. In the current economic climate it's proving very difficult to get the necessary increases in budget just to manage our existing operations. During the next financial year, that is 1992-93, we will be moving into the new building and will experience substantial increases in operational costs, electricity, telephones, cleaning, security, building maintenance, etcetera.*

*On top of that, extra staff will be needed to increase the rate of intake and processing of records so as to take full advantage of the new building. Our clients have made it clear that they want a range of services which we are not presently providing, or which we are providing in only a very limited fashion. And the new legislation is likely to give State Archives additional responsibilities. All this has to be funded in some way" (EARC 1991b, pp.89-90).*

- 7.28 The Library Board of Queensland (S15) addressed the issue of resources at length in its submission to the Commission. The general thrust of its comments in relation to resources was summarised at the beginning of its submission:

*"... new archives legislation will not, by itself be sufficient to ensure that the public records of Queensland are properly protected and provided for. The new legislation must be accompanied by a substantial increase to the State Archives resource base. An important step in this direction has already been achieved with the provision by the State Government of a major new building due for completion in late 1992. This needs to be accompanied by the provision of additional staff and funds, if the opportunities presented by the new building and the passage of new legislation are to be fully realised."*

- 7.29 In the body of its submission the Library Board of Queensland described the QSA's current sources of funding:

*"State Archives is funded through Consolidated revenue. State Archives budget submission for 1991/92 identified a need for an additional \$823,000 over and above last year's budget. This included 12 new staff positions, a number of reclassifications, and funding for a number of programs designed to enhance services. This would allow State Archives to go some substantial way towards rectifying the inadequacies identified in the PSMC Report to restructure the organisation and to prepare for the move to the new building. In the longer term, some further increases would be required in subsequent years to allow for the maximum utilization of the new building."*

*The appropriation provided for State Archives for 1991/92 is \$1,002,000. Effectively this is the same as last year with an allowance for inflation. The additional \$823,00 requested was not approved. As a result, many of the programs identified for the next five years will have to be deferred or abandoned and there is serious concern about the Archives capacity to deliver the same standard and range of services to the public and to government as last year."*

*State Archives primary role is that of identifying, preserving and making accessible the public records of Queensland which have enduring value for legal, historical or administrative reasons. Funding of this activity is essentially a government responsibility and it will always be so ..."*

- 7.30 At the Commission's public seminar, Ms L. McGregor when speaking of the need for greater funds, said: *"... there must be a major increase in our consolidated revenue funding. This is our major source of income and it always will be"* (EARC 1991b, p.90).
- 7.31 Reasons for government inertia in relation to increases in funding, and, more importantly, reasons why that inertia must be overcome, were highlighted at the Commission's public seminar by Ms G. Acland, University Archivist and Co-ordinator, Records Management, University of Queensland. Speaking of a pragmatic approach to archival ideals, she said:

*"I have long held the view that in this country at least, resources will never be adequate for the successful operation of the traditional archival mission. We should simply accept that fact and get on with the job required."*

*In 1987, the then Governor of Western Australia, His Excellency Professor Gordon Reid, lamented:*

*'Sadly, archives do not mean votes, and that has been one of the tragedies of modern public administration.'*



*And since then, the economic rationalists have gained greater control over the public purse-strings. However, Queensland has now put the spotlight on accountable government. One of the measures of accountable government is public access to, and opportunities for the review of, the decisions of government" (EARC 1991b, p.84).*

- 7.32 The Coordinated Response from the Queensland Public Service (S20) contained the following statement:

*"Departments agree that the State Archives should take a pro-active and authoritative role in managing the public records of Queensland. This will not be achieved without a significant boost to the resources available for archives management in this State."*

- 7.33 Submissions similar in effect to the above submissions were received from the University of Central Queensland Library (S4), the Records Management Association of Australia Queensland Branch (S9), Beaudesert Shire Council (S10), the staff of QSA (S12), P.D. Wilson (S14), and the Australian Society of Archivists Incorporated (S23).

### Analysis and Comment

- 7.34 The construction of the new archives building and the implementation of changes recommended in this Report will go a long way to enabling the Archives Authority to carry out its functions. For the Archives Authority to be totally effective, however, there must be, not only in the short term, but also in the years ahead as the size of government administration increases, an increase in the operational funding of archives by the government.
- 7.35 The Commission considers that if the Archives Authority is to fulfill its function, there must be a commitment by the government to substantially increase the yearly operational funding of the archives.

### RECOMMENDATION

- 7.36 **The Commission recommends that the Archives Authority be given an increase in the annual operational funding presently provided to the QSA by the government to enable the new Authority to properly carry out its enhanced functions.**

### CHARGES BY ARCHIVES

### Matters for Consideration

- 7.37 As an alternative to direct funding from consolidated revenue, the Archives Authority could charge for the services it provides under a user pays system. At one end of the archival continuum, the Archives Authority could charge government agencies (government clients) for the housing, preserving, destroying etc of their records. At the other end of the continuum, the Archives Authority could also charge persons (public clients) for access to the public records it holds.

- 7.38 At the Commission's public seminar on Archives Legislation, Ms G. Acland, University Archivist and Co-ordinator, Records Management, University of Queensland indicated that there could be problems with operating archives on a user-pay basis when she said: *"It is difficult, even for a pragmatist, to find any convincing arguments that archives can be exploited economically except at the most simplistic levels or in the marginal areas"* (EARC 1991b, p.85).
- 7.39 The Commission agrees with this assessment, and considers that the role of an archives authority dictates that only a small number of services it provides may be delivered on a commercial basis. An archives authority preserves and collects records which relate to the rights and duties of the State and of individuals. Many activities related to that collection and preservation are not undertaken in respect of any individual client, but on behalf of the State and its citizens.
- 7.40 It remains now to consider what services or activities carried out by the Archives Authority should be carried out on a user-pays basis.

### Arguments Made in Public Submissions

#### *Government clients*

- 7.41 In its submission to the Commission, the Library Board of Queensland (S15) examined services currently provided by the QSA which could potentially be provided on user pays basis:

*"However, there is a small component of services provided by State Archives directly to government which could be run on a 'user pays' basis. These include storage of temporary records, destruction of records, some conservation consultancy and treatment work, and a possible records management consultancy. It is highly unlikely that these services could generate a profit. However, the imposition of charges would have a major effect in encouraging public authorities to dispose of obsolete records, thereby ensuring substantial cost savings to government. At present, there is no incentive to dispose of such obsolete records. It is in the area of SAVINGS rather than in profit generation that the economic benefit of a charging system would be felt.*

*Operating some of these services to government on a 'user pays' basis would also be one way to partially offset State Archives costs."*

- 7.42 At the Commission's public seminar on Archives Legislation the State Archivist, Ms L. McGregor, indicated there is a place for the levying of charges against government clients and that non-pecuniary benefits could accrue from such an impost:

*"However, given the many competing calls on consolidated revenue funding, it is not unreasonable for government to expect State Archives to offset its expenditure wherever appropriate through a user pays regime. In relation to our government clients, it is intended to introduce charges for the storage of temporary records - that's temporary records only, not permanent records - the issue and delivery of records, and other associated records management services. This will have the double benefit of raising revenue and at the same time encouraging government agencies to look more realistically at appraisal of records and destruction of those which are no longer required.*

*I say again it is not intended that there will be any charge for the storage of permanent records by State Archives. I might just mention that because most of the records that we presently hold are permanent records. Effectively that means that very few departments will find themselves up for charges for records which are currently in our custody, but it does mean that in the future, if you're transferring temporary records, there will be a charge for that" (EARC 1991b, p.90).*

7.43 The Deputy Director-General (Services) Administrative Services Department (S29) proposed that:

*"A system of charges for the storage and retrieval of semi-current and non-current records needs to be introduced as a mechanism for forcing public authorities to appraise their records, identify the permanent and the temporary categories, prepare disposal schedules defining retention periods for temporary records, and carry out regular disposal procedures in accordance with approved schedules. The revenue generated by such a system is essentially a transfer of funds within Government. The true value of the system lies in the cost savings to Government through the disposal of obsolete records. By imposing charges on the storage of temporary records, and particularly by imposing even greater charges on unappraised records, public authorities will be forced to accept responsibility for improving records management practices and for making realistic decisions about the costs and benefits of retaining records."*

*Public Clients*

7.44 At the Commission's public seminar, the State Archivist Ms L. McGregor questioned Dr J. Stokes, Director, Access and Client Services, Australian Archives about charges imposed by the Australian Archives in respect of public access:

*"MS L. MCGREGOR:*

*Lee McGregor, from State Archives. Jim, could you comment on the costs of providing public access to government information and on whether you have any user pay arrangements in place to help fund that?*

*DR J. STOKES:*

*No, we don't have a user pays - apart from photocopying charging - this is an issue we've obviously given a lot of thought to. There's nothing intrinsically wrong with users contributing to costs. On the other hand if you have a cost structure so formidable you put 99 per cent of your users out of business it's rather counter-productive. And the whole problem with archival operations is to find some system whereby the users might contribute to some extent without just driving them away altogether.*

*I think, by its nature, archival research tends to be extensive. You have to look at a lot of records often to find the bit of information you're looking for so that any system of trying to charge people per file that they see and particularly trying to charge people the cost of actually examining those files would end up being so prohibitive you might as well burn the whole place down and go away and start up in some other line of business because nobody could afford to use your services.*

*I think probably the only prospect for charges would be some sort of national park entry type thing of, say, an annual search ticket charge or something like that regardless of how much you use the services, which would be a contribution but there's no way it would cover the real cost of storing and making available the records. It's just a classic case of community service obligation really. Then there are differing views of the community as to just how much money should go into it" (EARC 1991b, p.58).*

7.45 The Capricornia Collection Society (S3) expressed the view that:

*"Regional remote users are already disadvantaged in their access to government information and to impose discriminatory fees for service to them would compound their disadvantage."*

7.46 A.W. Skimin, Chief Executive Officer, Archives and Historical Studies, Department of Defence (S35) put a similar view:

*"Any charges should be applied in an equitable and non-discriminatory manner. Remote users are already disadvantaged by their distance from the Archives. A charge on remote users for services available to other users free of charge would be discriminatory and compound their disadvantages."*

### Analysis and Comment

The Commission considers that the Archives Authority, acting as an independent statutory corporation, should have the power to levy costs against government clients for a limited range of services. Charges should not, of course, be imposed for services essential to the collection and preservation of long term public records (cl.10).

7.47 The Commission considers that the power of the Archives Authority to levy charges should be seen as part of the management powers of the Authority. Therefore, the power to levy charges should be incorporated as part of the power conferred on the Authority to create records management standards (cl.10).

7.48 In his introduction to the Commission's public seminar on archives legislation, the then Chairman of the Commission, Mr T. Sherman, gave some idea of the purpose of collecting and preserving public records and who may be the users of those records when he stated:

*"The proper keeping of records and the proper disposal of such records, I believe, is crucial to good public administration and I believe it's becoming more important as the various accountability mechanisms recommended by this Commission are being implemented. Records, after all, are the life-blood of institutions whether they are public or private. The reason they are the life-blood of institutions is that they contain information and information is at the base of everything that we do, either in public or private life.*

*Records, in particular, I believe are important because they form an important basis for all government decision-making and decision-making in the public service. They record, or at least they should record, the content of decisions. Records provide precedents and guidance for future conduct. If you don't have proper records and good access to records, you run the grave risk of reinventing the wheel. Records, after all, and still in spite of modern telecommunications, form the main basis of our communications with others.*

*For government agencies, of course, records constitute the communications coming in from those whose lives and interests we affect and they also constitute the communications going out to those people. And as I've already said, they form an important foundation, I believe, for accountability, and last but certainly not least in the archival context, they are crucial for research conducted by scholars and experts" (EARC 1991b, pp.3-4).*

- 7.49 The important point to note is that there should be access to the information (cl.34). Any impediment to such access is self defeating considering the purpose of archives. Therefore, any system of charges at the access end of the archival continuum which would inhibit free and open access to public records should be resisted. This applies not only to where access to records is requested in person, but also to where applications for information are made through the archival reference service.
- 7.50 Whilst the Commission considers that no charges should be levied for access to public records, it considers that it would not be inappropriate that photocopying charges and the like be levied. These charges should apply in respect of both individuals conducting their own research in the public search room and those requesting information through the remote reference service. This should serve to ensure that those who use the reference service restrict their enquiries to the bare minimum and are precise about the information they request.

#### RECOMMENDATIONS

- 7.51 **The Commission recommends that:**
- (a) **as part of the power to create records management standards archives legislation confer power on the Archives Authority to charge the Authority's government clients;**
  - (b) **archives legislation not confer power on the Archives Authority to levy charges against people seeking access to public records; except that the Authority should have power to levy charges for copies of records made and supplied.**

## CHAPTER EIGHT

### SUMMARY AND RECOMMENDATIONS

- 8.1 In this Chapter the Commission summarises its conclusions; describes the major features of the draft Archives Bill which it has recommended; and consolidates its recommendations.

#### Conclusions

- 8.2 The Commission considers that archives legislation in the form of the draft Archives Bill should be enacted in Queensland as soon as practicable. Such legislation will provide an independent mechanism to ensure that the essential records of Queensland's history are created and preserved for the benefit of the present and future generations.
- 8.3 The main features of the archives legislation recommended in this Report are:
- (a) The present QSA be reconstituted as a new independent statutory corporation with functions and powers relating not only to the collection and preservation of public records of ongoing value, but also to the proper management of public records by government agencies, and the provision of public access to those records. The statutory authority ("the Archives Authority") proposed will be independent of Ministerial direction, have wide ranging functions of training, guidance and enforcement in relation to records management, to provide public access to records of a certain age held by the Archives Authority and to collect and preserve records having value as historical records or otherwise having value as part of Queensland's or Australia's heritage;
  - (b) The Archives Authority will consist of only three members, but will be assisted in relation to policy and advisory matters by a Queensland Archives Advisory Council consisting of a range of people with wide experience in various facets of public life in Queensland;
  - (c) The Archives Authority will have responsibility for the administration, management and control of the QSA which may, in addition to a central repositories, consist of regional repositories and joint facilities operated in conjunction with local authorities or other bodies. In appropriate cases, arrangements may also be made for public records to be placed in repositories outside the State archives. In all circumstances, the Archives Authority will retain the right to regain custody and control of public records. In addition a central register of archival materials will be maintained;
  - (d) The draft Archives Bill provides for property in public records to vest in the Crown or a relevant authority and for the sale of public records to be prohibited;
  - (e) A central function of the Archives Authority will be to establish record management standards governing the making, management, preservation and destruction of public records. These standards will include an obligation on public authorities to make complete and accurate records of their operations;

- (f) The draft Archives Bill requires the transfer of public records from public authorities to the Archives Authority 25 years after their coming into existence, and for those records to be open to public access 30 years after their coming into existence unless exempt under the proposed FOI legislation;
- (g) Exemptions which may be claimed by a public authority in respect of a particular document (by way of certificate issued in respect of each particular document prior to the expiration of the 30 year period of restricted access) will be governed by the provisions of the proposed FOI legislation. A small number of amendments to the proposed FOI legislation are recommended to facilitate this. Challenges to the claims for exemption will also be governed by the provisions of the proposed FOI legislation;
- (h) The enlarged archives administration responsibilities imposed upon the proposed Archives Authority will require resources additional to those currently available for the QSA, and the Commission accordingly recommends that an appropriate increase in resources be granted to the new Authority upon its establishment;
- (i) The proposed Archives Authority will, under the draft Archives Bill, also have the power to receive or have custody of non-public records of significance to Queensland's historical and cultural heritage. Private arrangements concerning the conditions on which the Archives Authority may hold such records and make them available to members of the public may be entered into between the Authority and the owners of such records.

### **The Draft Archives Bill**

8.4 Appendix A of this Report contains the draft Archives Bill recommended (subject to para. 7.7) for enactment by the Commission in accordance with the principles set out in this Report. The substantive provisions are:

Clause 2 - Commencement. Under subclause (1) all provisions of the draft Archives Bill, except those in Part 5 relating to access to public records, will commence on a day to be decided by the government following assent to the legislation. The effect of subclause (2) is to provide that provisions in Part 5 concerning access will begin to apply to public records twelve months after the date on which the legislation commences to have effect. The reason for this is to give the Archives Authority and public authorities a twelve month period in which to adjust to the introduction of the legislation in respect of documents less than thirty years old at the commencement of the legislation.

Clause 3 - Objects. This provision sets out the objects of the draft Archives Bill, being essentially to provide a system and framework for ensuring that public records and other archival materials are made, managed and preserved so as to retain as complete and accurate a record as possible of Queensland's heritage for the benefit of future generations.

Clause 4 - Definitions. Subclause (1) provides a series of definitions of terms central to the legislation. Key concepts dealt with here are:-

"period of restricted access" - a period of thirty years from the date of the creation of a record; the term governs the point in time at which a public record will be open to public access under Part 5;

"public authority" - this term covers all persons or bodies who are intended to be made subject to the legislation. It covers the governor in his/her official capacity (but see definition of public record); the legislative assembly; the executive council; a Minister of the Crown (but see definition of public record); court registries (but not the private papers of judges' eg. judges' notes or draft judgements); departments of State; local authorities; and a broad range of persons or bodies having connections with the public sector by virtue of being established by or under legislation or regulations or receiving financial support from the government.

"record" - this gives a very broad scope to the legislation, covering everything that has some informative content; a non-exhaustive list of examples are given.

"public record" - this brings within the ambit of the legislation any record made or kept by any public authority for any purpose.

Subclause (2) of Clause 4 is simply concerned with the status of documents transferred from one public authority to another public authority taking over the functions of the first.

Clause 5 - Application of the Act in special cases. Constitutional sensitivity surrounds correspondence between the Governor and the Monarch or the Governor-General or other Governors. Accordingly the legislation provides that such correspondence will not be subject to the legislation except by the consent of the Governor, who presumably will not give consent without having consulted the other party to the correspondence. Subclause (2) enables regulations to be made governing arrangements with other governments involved in joint operation of an inter-governmental authority.

Clause 6 - Establishment of the Authority. This clause establishes the Archives Authority as a body corporate.

Clause 7 - Members of the Authority. This clause provides for the Archives Authority to be constituted by a chairperson, the State Archivist and the State Librarian and makes other formal provision for the membership of the Authority.

Clause 9 - Functions of the Authority. This clause makes comprehensive provision for the functions of the Authority in keeping with the objects of the legislation set out in clause 3. It confers upon the Archives Authority functions necessary for preservation and accessibility of Queensland's historical records.



Clause 10 - Powers of the Authority. This clause provides the Archives Authority with a full range of powers necessary to enable it to perform its functions.

Clause 11 - Ministerial direction. This clause provides for the independence of the Archives Authority from ministerial direction in relation to the preservation and destruction of documents.

Clause 12 - State Archivist. This clause further defines the status of the State Archivist who is to be the chief executive officer of the Archives Authority.

Clause 13 - Delegation. Because the Archives Authority can operate effectively only through its own officers or employees, or other natural persons (eg officers or employees of other public authorities) it is necessary to provide, through this clause, for the Authority to have power to delegate any of its powers provided for by the legislation.

Clause 14 - Annual report. This clause requires the Archives Authority to furnish an annual report to the minister between 30 June and 31 October in each year on such matters as compliance with the legislation and requires the Minister to table that report in Parliament.

Clause 15 - Establishment of Advisory Council. This clause provides for the establishment and composition of the Queensland Archives Advisory Council to provide policy advice to the Archives Authority and the Minister. The members of the Council are to be persons with wide experience in various facets of public sector activity in Queensland. It is expected that the Council will consult closely with the members of the Archives Authority.

Clause 18 - Functions of the Advisory Council. This clause sets out the functions of the Queensland Archives Advisory Council, namely to provide advice to the Archives Authority or the Minister on archives administration, to provide a forum for discussion of archives issues, and to consider matters referred by the Authority or the Minister and make recommendations on them.

Clause 19 - The Queensland State Archives. This clause provides for the continuation of the QSA, as modified by the legislation.

Clause 20 - Administration of the State Archives. Responsibility for the administration, management and control of State Archives is conferred upon the Archives Authority by this clause.

Clause 21 - Regional Divisions of the State Archives. The effect of this clause is to provide for regional repositories, being divisions of the State Archives; and for other facilities being the joint responsibility of the Archives Authority and any appropriate local authority or body. Record management standards prescribed by the Archives Authority will, under arrangements for such joint administration and control, apply to such jointly controlled and administered facilities.

Clause 22 - Custody of Records outside the State Archives. In some cases it may be convenient, and may promote public access to public records and other archival materials, for the Archives Authority to place public records or other archival materials in the custody of some other body or person. Subclause (1) provides for this. To cater for the possibility that records or materials in the custody of such outside bodies may expose such records and materials to the risk of harm, subclause (3) provides for immediate taking or resumption of the custody and control of such records and materials by the Authority should circumstances warrant such action. Subclause (2) requires that any such arrangement must provide for management of public records according to record management standards set by the Authority.

Clause 23 - Central register of archival materials. In order to facilitate the Archives Authority's task of keeping track of public records held either within or outside the State Archives, this clause requires a comprehensive register of such material to be maintained.

Clause 24 - Property in public records. This clause provides that property in public records vests in the Crown or the appropriate public authority and cannot be alienated from the Crown or such authority, but provides that property interests in public records acquired lawfully before the commencement of the legislation are not to be effected.

Clause 25 - Sale of public records. This clause prohibits the sale of public records. The purpose of this clause and clause 23 is to ensure that the full body of public records required for a comprehensive historical record of Queensland history is not fragmented by allowing public records to pass into hands of private citizens.

Clause 26 - Standards. This clause requires the establishment of record management standards to be imposed upon public authorities. These standards will provide the means by which the Archives Authority will be able to make detailed provision for the making, management, preservation and destruction of public records in a manner which applies the objects of the legislation and the functions of the Authority to various sets of circumstances arising in public administration.

Clause 27 - Public authority to make and preserve adequate records. This clause imposes a statutory duty upon each public authority to comply with the record management standards set by the Archives Authority. It was not considered practical or effective to make the public authority itself liable to a criminal penalty for failure in this regard, it being felt that the taking up of such matters in the Archives Authority's annual report would be a more appropriate sanction for non-complying public authorities and their senior management. This would not, however, relieve individual officers of a public authority from criminal or disciplinary sanctions in respect of non-compliance with standards.

Clause 28 - Transfer of records to the Authority. This clause compels the transfer of public records to the Archives Authority's custody after a record has been in existence for twenty-five years. This will provide a five year "breathing space" before the record becomes available for public access, to allow the public authority to assess the record for possible exemptions from public access.

Clause 30 - Standards governing destruction or disposition. Not all public records will be of any historical significance such as to warrant their permanent retention. The evaluation of public records for the purpose of deciding whether to retain them permanently or to destroy or otherwise dispose of them must be conducted carefully and strictly in accordance with appropriate standards. This clause provides for the establishment of such standards by the Archives Authority and requires that Authority to assist public authorities in application of the standards to records under their control.

Clause 31 - Destruction etc of public records. Subclause (1) provides that unauthorised destruction, damage or disposition of a public record is a criminal offence and subclause (2) sets out the circumstances in which destruction or disposal of public records would be authorised.

Clause 32 - General principles of access. Subclause (1) lays down general principles governing access to public records, these being that before a public record is thirty years old, unless the Archives Authority decides to allow unrestricted access to a record in its custody, access is to be obtained under the proposed FOI legislation; and that where a document is more than thirty years old access to it by the public is to be available unless the record is an exempt record (as to which see clause 4). Subclause (2) operates on the basis that before a record is thirty years old the public authority which made or kept it will have considered whether to claim an exemption for it under the proposed FOI legislation, and if appropriate, will have certified it as an exempt record. Where a person seeking access to such a certified exempt record through the Archives Authority is refused access by the Authority on the basis of its certification by the relevant public authority as an exempt record, subclause (2) deems that public authority to have refused access to that document for the purposes of the proposed FOI legislation. The purpose of drawing the provisions in this way is to keep all the exemption and appeal provisions under a single scheme, that being the one contained in the proposed FOI legislation. Appropriate amendments to the proposed FOI legislation are set out in the schedule to this archives legislation.

Clause 33 - Discretionary access. Subclause (1) provides for what might be called "accelerated access". This prevents the thirty year "period of restricted access" from being a rigid and inflexible straight jacket and allows for the possibility of general public access to some documents less than thirty years old. Subclause (2) provides that where a public authority has certified a record to be an exempt record, there is nevertheless a discretion to allow access to that exempt record. This may be conveniently called "special access" and differs from the "accelerated access" in that it applies only to records certified as exempt records and applies regardless of the age of the record. Subclause (3) provides for the imposition of conditions upon both "accelerated access" and "special access" in order to protect the public interest, or the reputation of living persons.

Clause 34 - Forms of access. Subclause (1) provides a general right of public access to non-exempt public records after the period of restricted access (ie. thirty years). Subclause (2) sets out various ways in which access may be given. Subclause (3) gives a member of the public the right to choose the form in which he desires access to be given, but subclause (4) provides that access may be given in some form other than that nominated by that member of the public if the nominated form of access would interfere unreasonably with the operations of the State archives or a public authority's operations, would be detrimental to the preservation of the record, would infringe copyright, or would be inappropriate due to the physical nature of the record. Subclause (5) permits the Archives Authority to impose reasonable conditions upon access and to impose a reasonable charge for provision of a copy of the record. Subclause (6) provides that where public access is denied because of concerns about security or preservation of a record, but it is practicable to provide a copy without prejudice to those matters, then a copy must be provided.

Clause 37 - Right of inspection. This clause gives the Archives Authority entitlement to full and free access at all reasonable times to all public records in the custody of public authorities. This is to enable the Archives Authority to perform its functions relating to the making, management and preservation of public records by public authorities, and to audit the compliance by public authorities with the record management standards established by the Authority. Subclause (5) qualifies the powers of an authorised person with respect to the Governor's official establishment, the Legislative Assembly, and the courts, but subclause (6) does not allow the consent of such bodies to the exercise of those powers to be unreasonably withheld.

Clause 41 - Powers of the Ombudsman and the Criminal Justice Commission. This clause provides that where an incident relates to mismanagement or misbehaviour in public administration, the Ombudsman or the CJC may investigate allegations concerning the incident. This is to ensure that any incident which might involve an offence against, or a breach of duty under, the proposed legislation (including perhaps the conduct of an officer or employee or the Archives Authority itself) may be referred to an independent external authority with the resources and capability to investigate such matters comprehensively. Where a matter has been referred to the CJC for investigation, and its subsequent investigation reveals conduct capable of amounting to "official misconduct" under the *Criminal Justice Act 1989* (Qld), that Commission will then be in a position to undertake appropriate proceedings.

Clause 42 - Offences and breaches of discipline by officers and Employees. There may be circumstances in which conduct, although technically capable of constituting an offence against the proposed legislation, may be more appropriately dealt with simply as a breach of discipline. Subclause (1) provides that in such cases there be the option of dealing with the matter as a breach of discipline rather than an offence. Given that a higher standard of proof applies in relation to charges of an offence against the proposed legislation, this option means that the less serious or less clear cut cases will not necessarily go unpunished altogether. Where disciplinary proceedings are appropriate, whether as a result of a choice under

subclause (1) or because of negligence, incompetence or some other conduct not capable of amounting to an offence under the proposed legislation, subclause (2) imposes upon the chief executive officer of the relevant public authority a duty to ensure that such disciplinary proceedings are taken and, where appropriate the conduct is punished in an appropriate fashion. This is part of the managerial responsibility of a chief executive officer of a public authority in relation to the making, management and preservation of public records. The performance of public authorities and their chief executive officers in this regard will be the subject of reports by the Archives Authority under the proposed legislation.

Clause 43 - Acquisition of records from private sources. Subclause (1) empowers the Archives Authority to enter into arrangements to acquire or take custody of non-public records of significance to Queensland's history. This would include the personal and political papers of Ministers, these not being the subject of the other provisions of the draft Bill. As records to which this clause applies are essentially private records, and as, particularly in the case of personal or political records of a Minister, it would be beneficial to encourage persons to make such records available to the Archives Authority, it is desirable to give such persons the right or the opportunity to impose conditions upon these records being made available to the Authority.

Clause 44 - Protection for civil liability. Subclause (1) provides protection against civil or criminal action for the officers or employees of public authorities or the Archives Authority in respect of the giving of access to a record in accordance with the proposed legislation. The same protection is not, however, given to the person obtaining access to a record in respect of anything that such a person might do with the content of the record to which access was given. Subclause (3) extinguishes any civil liability which might otherwise have been incurred by the Archives Authority, a public authority or any officer or employee thereof for any honest and non-negligent act or omission under or for the purposes of the proposed legislation, but such liability attaches instead to the State (see subclauses (3) and (4)).

Clause 46 - Access to Records Apart from the Act. This clause provides that the proposed legislation is not to be construed as limiting otherwise existing rights of access to records.

Clause 47 - Regulations. This clause enables the Governor to make regulations for the purposes of the proposed legislation.

## Schedule

### Amendments of Libraries and Archives Act 1988.

The amendments to sections 1, 5, 21, 22, 23, 25, 71 and 72 of the *Libraries and Archives Act 1988* (Qld), as set out in the Schedule of the draft archives Bill are formal amendments to give effect to the separation of archives legislation from legislation dealing with public libraries. In addition the whole of Part V of the *Libraries and Archives Act 1988* (Qld) is repealed, this being necessary because the proposed legislation covers the same issues dealt with in that part in a considerably more extensive fashion.

## Amendment of Freedom of Information Act 1992.

Clauses 11 and 12 - It is necessary to amend clauses 11 and 12 of the FOI Bill 1991 (Qld) because in its current state that Bill provides that it not apply to the bodies referred to in clause 11 and 12. It is the intention of the proposed legislation to make records of such bodies open to public access after thirty years and the schedule gives effect to this intention by providing for a new subsection in each of the abovementioned provisions.

FOI Exemptions - The most difficult and most important respect in which the proposed legislation must be integrated with the FOI legislation is the exemptions from access which will continue to be available in respect of documents even after thirty years. This has in many respects been made somewhat easier by the unlimited retrospectivity of the FOI Bill 1991 (Qld). As with the *Archives Act 1983* (Cwlth), the exemptions to be made available in respect of documents more than thirty years old are a more limited group of exemptions within the groups of exemptions dealt with in the FOI legislation. These are the exemptions covered by sections 38, 42-46 and 49 of the FOI legislation. The most convenient way of providing that those exemptions will continue to apply after a document has been in existence for more than thirty years, and that the other exemptions in the FOI legislation will not apply after that time, is to provide in the FOI legislation that those exemptions which will not continue to apply after thirty years (ie. sections 36, 37, 39, 40, 41, 47, 48 and 50) shall cease to apply to a document after the expiration of thirty years from the date of its creation. The schedule achieves this by providing for the insertion of a new section 51A in the FOI legislation.

## Consolidation of Recommendations

### CHAPTER TWO Nature of Archives

- 8.5 **The Commission recommends that archives legislation be separated from libraries legislation** (para. 2.14).
- 8.6 **The Commission recommends that:**
- (a) **archives legislation set the functions of the Archives Authority in wide terms similar to those in Section 5 of the *Archives Act 1983* (Cwlth) (see Appendix F);**
  - (b) **archives legislation confer such powers as set out in section 6 of the *Archives Act 1983* (Cwlth) (see Appendix F) and, additionally, broader records management powers including power to set minimum standards for the management of public records in Queensland, and powers relating to public rights of access to records held by the Archives Authority** (para. 2.31).

8.7 **The Commission recommends that archives legislation contain a definition of "record":**

(a) **similar to the definition of "record" in Section 3(1) of the *Archives Act 1983* (Tas.):**

**"a document or object that is, or has been, made or kept by reason of any information or matter that it contains or can be obtained from it or by reason of its connections with any event, person, circumstance, or thing"; and**

(b) **which includes a non-exhaustive list of examples of records (para. 2.45).**

8.8 **The Commission recommends that:**

(a) **archives legislation contain a definition of "public record" similar to that of "Crown record" contained in section 3(1) of the *Archives Act 1983* (Tas.);**

(b) **paragraph (a) of the definition be modified to confine it to documents in which the public authority has retained property;**

(c) **the introductory words of the section, "Crown record", be modified to read "public record";**

(d) **paragraphs (a) and (b) be modified by replacing the word "Crown" with the words "public authority"; and**

(e) **paragraph (b) be modified by adding at the end of the paragraph the words, "or in accordance with established practice".**

**The Commission further recommends that:**

(a) **archives legislation contain a definition of public authority which includes -**

(i) **a definition of public authority similar to that contained in Section 5(1) of the L&A Act, save in respect of paragraph (a) which should be modified to accommodate paragraph (g) of the definition of "unit of public administration" in section 1.3(1) of the *Electoral and Administrative Review Act 1989* (Qld);**

(ii) **the Parliament;**

(iii) **the Governor acting in his official capacity;**

(iv) **those bodies contained in clause 9(1) of the FOI Bill 1991 (Qld);**

(b) **the Parliament and courts be excluded from provisions relating to the power of entry and inspection in relation to records management practices;**

(c) **correspondence between the Governor and the Monarch, or the Governor-General, be exempt from archives legislation, pending consultation in respect of arrangements regarding the applicability of archives legislation to such material (para. 2.89).**

- 8.9 The Commission recommends that archives legislation authorise the Archives Authority to reach agreement with the archives bodies of other governments as to retention, archival storage and access in relation to inter-governmental authorities' records, and that where appropriate the provisions of such agreement be sanctioned by regulations (para. 2.98).
- 8.10 The Commission recommends that:
- (a) archives legislation provide that public records are inalienable;
  - (b) archives legislation provide specially for the retention and protection of public records held in or on any form of electronic media (para. 2.112).
- 8.11 The Commission recommends that the Archives Authority have the right to receive records of non-governmental bodies such as corporate bodies, trade unions, educational institutions, religious institutions, political organisations and the private papers of certain individuals (para. 2.133).
- 8.12 The Commission recommends that:
- (a) archives legislation in Queensland contain provisions relating to the collection and preservation by the Archives Authority of the records of a Minister, other than a record that is of a personal or political nature or that is under the control of a government institution, similar to the provisions of the *National Archives of Canada Act 1987* (Can.);
  - (b) archives legislation in Queensland include a similar provision to section 6(2) of the *Archives Act 1983* (Cwlth);
  - (c) archives legislation provide that no arrangement entered into for the storage and preservation of personal or political records shall have effect, after 75 years, from the death of the person delivering the records, to the extent that such arrangement precludes public access to those records after that time (para. 2.154).

### CHAPTER THREE Archives and Public Records Management

- 8.13 The Commission recommends that archives legislation authorise the Archives Authority to have regard to current needs of accountability as well as future historical research needs when establishing records management standards and authorising disposal of public records (para. 3.16).
- 8.14 The Commission recommends that archives legislation confer on the Archives Authority power to ensure proper records management practices are carried out, the conferral of such power not to derogate from the powers that other regulatory bodies have regarding enforcement of proper practices in government agencies (para. 3.23).



## CHAPTER FOUR Preservation of Public Records

- 8.15 **The Commission recommends that:**
- (a) **archives legislation retain a provision similar to section 52 of the L&A Act;**
  - (b) **section 52 of the L&A Act be clarified for by the introduction of records management standards (para. 4.17).**
- 8.16 **The Commission recommends that:**
- (a) **archives legislation provide that the Archives Authority shall establish standards for the efficient management of public records and train, guide and assist public officers in applying these standards to records under their control;**
  - (b) **archives legislation provide that the officer in charge of a government authority shall be responsible for carrying out within that government agency, a program of records management in accordance with standards established by the Archives Authority (para. 4.34).**
- 8.17 **The Commission recommends that archives legislation provide that:**
- (a) **except as provided in any other Act, the Archives Authority be conferred with power to decide on the disposal of public records;**
  - (b) **in the exercise of that power, the Archives Authority not be subject to direction, Ministerial or otherwise;**
  - (c) **the Archives Authority be conferred with power to delegate its authority to authorise disposal of records;**
  - (d) **the Archives Authority be authorized to delegate the preparation of record destruction schedules (para. 4.53).**
- 8.18 **The Commission recommends that archives legislation provide that:**
- (a) **permanent and non-permanent archival records may be deposited elsewhere other than with the Archives Authority;**
  - (b) **such records may always be retrieved by the Archives Authority; and**
  - (c) **such records are subject to the same access as other archives (para. 4.66).**
- 8.19 **The Commission recommends that archives legislation should not permit the sale of public records (para. 4.75).**
- 8.20 **The Commission recommends that:**
- (a) **archives legislation retain a provision similar to section 56 of the L&A Act;**
  - (b) **archives legislation confer power on the Archives Authority to enter into reciprocal recovery arrangements between Queensland and the Commonwealth and the other States and Territories (para. 4.79).**

**8.21 The Commission recommends that:**

- (a) archives legislation provide that the Archives Authority be conferred with power to inspect public records, save in respect of the Parliament, the Courts and the Governor acting in his official capacity;
- (b) archives legislation provide that where an officer or employee of a public authority fails to fulfill any duty imposed under archives legislation, or any management standard established under that legislation, the contravention be dealt with either as an offence or a breach of discipline. Where the conduct amounts to a breach of discipline, the matter is to be dealt with pursuant to the law concerning discipline of employees or officers applicable to that employee or officer (para. 4.111).

**8.22 The Commission recommends that only a person who allegedly commits an offence, and not the chief executive officer with ultimate responsibility, be charged with the offence (para. 4.119).**

**8.23 The Commission recommends that:**

- (a) archives legislation provide that where an incident relates to mismanagement or misbehaviour in public administration the matter be referred to the chief executive officer of the relevant government agency. If further action is necessary the matter should be referred to the CJC or the Ombudsman;
- (b) archives legislation provide that where an incident relates to official misconduct referral be made to the CJC for investigation;
- (c) archives legislation provide that where an incident otherwise relates to the commission of a criminal offence the matter be referred to the Queensland Police Service (para. 4.132).

**CHAPTER FIVE A Right of Access to All Public Records**

**8.24 The Commission recommends that archives legislation provide that rights of access under archives legislation apply to all public records regardless of where they are kept (para. 5.15).**

**8.25 The Commission recommends that archives legislation provide for a 30 year period of restricted access for all public records (para. 5.27).**

**8.26 The Commission recommends that archives legislation provide that the archival period run from the date of creation of the record (para. 5.37).**

**8.27 The Commission recommends that archives legislation require that unless otherwise specifically provided for, all public records be transferred to the Archives Authority after 25 years from date of creation of the record (para. 5.46).**

- 8.28 **The Commission recommends that**
- (a) **Clauses 22 and 24 of the FOI Bill 1991 (Qld) be amended so as to remove doubt as to when records will be available under archives legislation;**
  - (b) **The FOI Bill 1991 (Qld) be amended so as to be applicable to persons or bodies mentioned in clauses 11 and 12 of that Bill at the commencement of the open access period (para. 5.57).**
- 8.29 **The Commission recommends that archives legislation provide that:**
- (a) **open access not be available for exempt records; but that**
  - (b) **all public records, save in respect of exemptions, be available for open access at the end of the archival period (para. 5.70).**
- 8.30 **The Commission recommends that the FOI Bill 1991 (Qld) be amended to provide that the only categories of exemption applicable to any document at least 30 years old are those mentioned in clauses 38, 42, 43, 44, 45, 46 and 49 of the FOI Bill 1991 (Qld) (para. 5.86).**
- 8.31 **The Commission recommends that archives legislation provides that:**
- (a) **the only records exempt from open access after the expiration of the period of restricted access should be those individually provisionally certified as exempt records;**
  - (b) **a person wishing to make a challenge as to whether a record is an exempt record do so as an appeal under the FOI Bill 1991 (Qld) (para. 5.108).**
- 8.32 **The Commission recommends that archives legislation provide that the decision to claim exemption should be made by the public authority in possession of the document before its transfer to archives (para. 5.114).**
- 8.33 **The Commission recommends that:**
- (a) **archives legislation provide that, for records which otherwise would be available for open access at the commencement of the draft Archives Bill:**
    - (i) **open access under the draft Archives Bill not be available until 4 years after commencement of the Bill;**
    - (ii) **access to these records within this 4 years be available in accordance with the provisions of the L&A Act and the L&A Regs;**

- (b) archives legislation provide that the transfer and open access provisions of the draft Archives Bill not come into operation until 1 year after the commencement of the Bill (para. 5.119).
- 8.34 The Commission recommends that archives legislation provide for accelerated access to public records where appropriate (para. 5.124).
- 8.35 The Commission recommends that archives legislation provide in a provision similar to section 56 of the *Archives Act 1983* (Cwlth) for special access (para. 5.131).
- 8.36 The Commission recommends that archives legislation provide protection from liability for persons giving access to records under archives legislation, similar to that provided for persons under clauses 102 - 104 of the FOI Bill 1991 (Qld) (para. 5.137).

#### CHAPTER SIX Providing Access Services

- 8.37 The Commission recommends that sufficient funding be provided to the Archives Authority to enable it to provide an effective reference service (para. 6.11).
- 8.38 The Commission recommends that:
  - (a) archives legislation provide for the establishment of regional repositories;
  - (b) if financial restraints preclude the establishment of such repositories, archives legislation confer power on the Archives Authority to establish joint facilities;
  - (c) the archives legislation provide that wherever public records are held they are subject to the records management standards set by the Archives Authority;
  - (d) archives legislation require the Archives Authority to keep a record of all public records regardless of where they are kept (para. 6.29).
- 8.39 The Commission recommends that archives legislation provide that the Archives Authority make available copying services at places where public records are kept (para. 6.35).
- 8.40 The Commission recommends that archives legislation confer power on the Archives Authority to use whatever means it considers appropriate for the dissemination of archival material throughout the State (para. 6.38).

#### CHAPTER SEVEN Administration of Archives

- 8.41 The Commission recommends that:
  - (a) archives legislation provide for the establishment of an independent archives authority, such authority to be constituted as a statutory corporation and independent agency within a ministerial portfolio;

- (b) archives legislation provide that the Archives Authority not be subject to external direction, whether ministerial or otherwise;
- (c) archives legislation provide that the Archives Authority be constituted by a chairperson, the State Archivist, and the State librarian;
- (d) archives legislation contain transitional arrangements for existing staff (para. 7.8).

8.42 The Commission recommends that:

- (a) archives legislation provide for the establishment of an Archives Advisory Council;
- (b) archives legislation provide that the Archives Advisory Council consist of representatives from each of the three branches of government and representatives from bodies including: local government, historians, record managers, public administration and family history (para. 7.20).

8.43 The Commission recommends that archives legislation require the Archives Authority to submit annual Parliamentary reports (para. 7.24).

8.44 The Commission recommends that the Archives Authority be given an increase in the annual operational funding presently provided to the QSA by the government to enable the new Authority to properly carry out its enhanced functions (para. 7.36).

8.45 The Commission recommends that:

- (a) as part of the power to create records management standards, archives legislation confer power on the Archives Authority to charge the authority's government clients;
- (b) archives legislation not confer power on the Archives Authority to levy charges against people seeking access to public records; except that the authority should have power to levy charges for copies of records made and supplied (para. 7.51).

**CHAPTER NINE****ACKNOWLEDGEMENTS AND CONCLUDING REMARKS**

- 9.1 The Commission wishes to express its appreciation to all those persons and organisations who provided their views to the Commission. Although the views of some were not specifically referred to in this Report, all submissions, seminar papers and views expressed during the course of consultation procedures, were taken into account. Input from the public, and from government agencies, is crucial to the Commission's review process and the Commission benefited greatly from it.
- 9.2 The Commission also wishes to express its appreciation to the following members of staff who assisted the Commission in the conduct of this review; Mr Maurice Swan (General Counsel), Mrs Julie Copley (Project Officer), and Mr Peter Raffles (Research Officer) assisted by Ms Paula Besford and Ms Lee Anne Ratliff (Administrative Assistants).
- 9.3 The Commission also wishes to express its appreciation to its consultants Mr Chris Hurley, Mr Lindsay Curtis and Mr Peter Bayne, and to Mr Geoffrey Hackett-Jones Q.C. of the South Australian Office of Parliamentary Counsel who prepared the draft Archives Bill.
- 9.4 Finally, this Report was adopted unanimously at a meeting of the Commission held on 12 June 1992. Commissioner Davies, Commissioner Hall, Commissioner Hunter and the Acting Chairman were present at the meeting.



**COLIN A. HUGHES**  
**Acting Chairman**

12 June 1992

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## **Legislation**

- Archives Act 1960* (NSW)
- Archives Act 1983* (Cth)
- Archives Act 1983* (Tas)
- Criminal Code Act 1899* (Qld)
- Criminal Justice Act 1989* (Qld)
- Electoral and Administrative Review Act 1989* (Qld)
- Evidence Act 1977* (Qld)
- Financial Administration and Audit Act 1977* (Qld)
- Freedom of Information Act 1982* (Cwlth)
- Freedom of Information Act 1982* (Vic.)
- Freedom of Information Bill 1991* (Qld)
- Justices Act 1886* (Qld)

*Law no.79-18 (France)*

*Libraries Act 1943 (Qld)*

*Libraries Act 1982 (SA)*

*Libraries and Archives Act 1989 (Qld)*

*Libraries and Archives Regulations 1990 (Qld)*

*Library Board of Western Australia Act 1951 (WA)*

*National Archives of Canada Act 1987 (Can)*

*Oxley Memorial Library of Queensland Act 1946 (Qld)*

*Parliamentary Commissioner Act 1974 (Qld)*

*Protection of Moveable Cultural Heritage Act 1986 (Cth)*

*Public Records Act 1973 (Vic)*

*Public Service Management and Employment Act 1988 (Qld)*



A.1

**APPENDIX A**

**QUEENSLAND**

**ARCHIVES BILL 1992**

**A BILL**

for

**An Act to provide for the making and preservation of public records, and the preservation of other records of archival significance; to allow for access to such records; to establish the Queensland Archives Authority; and for other purposes.**

**ARCHIVES BILL 1992**  
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**SCHEDULE**

**Amendments and Transitional Provisions**

1. Amendment of Libraries and Archives Act 1988
2. Amendment of Freedom of Information Act 1992
3. Transitional provisions

*Archives Bill 1992*

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows:

**PART 1 - PRELIMINARY**

**Short title**

1. This Act may be cited as the *Archives Act 1992*.

**Commencement**

2. (1) This Act, except Part 5, commences on a day to be fixed by proclamation.

- (2) Part 5 commences one year after the date fixed for the commencement of the remainder of the Act.<sup>1</sup>

**Objects**

3. The objects of this Act are to ensure that the essential records of Queensland's history are created and preserved for the benefit of the present and future generations and for that purpose -

- (a) to ensure that complete and accurate records of public administration are made, and preserved, as part of Queensland's heritage; and
- (b) to make appropriate provision for public access to those records; and
- (c) to encourage and contribute to the preservation and management of other archival materials; and
- (d) to establish an independent statutory authority and to confer on it appropriate powers to ensure that appropriate records of the past and the present are made, managed and preserved in accordance with appropriate standards for the benefit of present and future generations, and to confer on it appropriate powers of regulation and enforcement.

**Definitions**

4. (1) In this Act -

**"Advisory Council"** means the Queensland Archives Advisory Council;

**"archival material"** means a record of past events or from which past events or their underlying causes may be discerned or reconstructed and includes all material accepted by the Authority for inclusion in the Queensland State Archives;

**"archival significance"** of a record means its value as a historical record or any other value that it may have as part of Queensland's heritage or Australian heritage;

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<sup>1</sup> Note that for records deposited in the Queensland State Archives before the commencement of this Act, Part 5 does not come into effect until 4 years after the commencement of this Act (See the transitional provisions in the Schedule).

*Archives Bill 1992*

**"authorised person"** means a person authorised in writing by the Authority to exercise the powers of an authorised person under this Act;

**"Authority"** means the Queensland Archives Authority;

**"court"** includes a person acting judicially;

**"exempt record"** means a record, or part of a record, certified by the relevant public authority to be exempt matter for the purposes of the *Freedom of Information Act 1992*;

**"inter-governmental authority"** means an authority established jointly by the Queensland government and the government of the Commonwealth or a State or Territory of the Commonwealth;

**"Ministerial record"** means a record -

- (a) in the possession or under the control of a Minister; or
- (b) in the possession or under the control of a person in his or her capacity as a member of the staff of, or a consultant to, a Minister;

**"period of restricted access"** in relation to a record means the period extending from the date of creation of the record to 31 December of the calendar year in which the 30th anniversary of that date falls;

**"public authority"** means -

- (a) the Governor in his or her official capacity; or
- (b) the Executive Council; or
- (c) the Legislative Assembly; or
- (d) a Minister of the Crown; or
- (e) the registrar or other officer responsible for administration of the records of a court; or
- (f) a commission of inquiry under the *Commissions of Inquiry Act 1950*;
- (g) a body (whether or not incorporated) -
  - (i) that is established for a public purpose by or under an Act; or
  - (ii) that is created by the Governor in Council or a Minister; or
  - (iii) that is supported directly or indirectly by government funds or other forms of government assistance or over which government is in a position to exercise control and is declared by regulation to be a public authority; or
- (h) a department; or
- (i) an inter-governmental authority; or
- (j) a person holding an office established by or under an enactment or an office declared by regulation to be a public office, but not if the office is that of a member, officer or employee of a public authority;

*Archives Bill 1992*

- (k) a local authority; or
- (l) a body or person declared by regulation to be a public authority for the purposes of this Act;

**"public record"** means a record -

- (a) made for the use, or for any purpose, of a public authority (but does not include a record of which the public authority relinquishes control in the ordinary course of its business); or
- (b) kept by a public authority in the exercise of its statutory, administrative or other public responsibilities or for purposes related to the exercise of those responsibilities;

but does not include a Ministerial record unless the record relates to the affairs of a public authority other than a Minister;

**"Queensland State Archives"** or **"State Archives"** means the repositories administered by the Authority in which records are stored;

**"record"** means a document or object that is, or has been, made or kept by reason of any information or matter that it contains or can be obtained from it or by reason of its connection with any event, person, circumstance, or thing and includes, for example -

- (a) a book;
- (b) a map, plan or model;
- (c) a painting or drawing;
- (d) a photograph or film;
- (e) a disc, tape or device from which sounds or visual images (or both) may be reproduced;

**"relevant public authority"**, in relation to a public record, means a public authority that is taken to have possession of the record under section 24(1) of the *Freedom of Information Act 1992*.

(2) If a public authority succeeds to the functions of another public authority, and assumes control of records formerly under the control of its predecessor, this Act applies to, and in relation to, those records as if they were records of the authority that last assumed control of the records and as if that authority and its predecessors were one and the same authority.

**Application of the Act in special cases**

5. (1) This Act does not apply to public records consisting of correspondence between the Governor and the Monarch or the Governor-General or other Governors except by consent of the Governor.

(2) The regulations may restrict or exclude the operation of this Act or of specified provisions of this Act in relation to records of an inter-governmental authority.

**PART 2 - THE QUEENSLAND ARCHIVES AUTHORITY**

**Division 1 - Establishment of the Authority**

**Establishment of the Authority**

6. (1) An authority called the Queensland Archives Authority is established.

(2) The Authority -

- (a) is a body corporate; and
- (b) has a seal; and
- (c) may sue and be sued in its corporate name.

**Members of the Authority**

7. (1) The Authority is to consist of 3 members.

(2) The members of the Authority are to consist of -

- (a) a chairperson appointed by the Governor in Council; and
- (b) the State Archivist; and
- (c) the State Librarian.

(3) The chairperson is to be appointed for a term not exceeding 5 years stated in the instrument of appointment and is on the completion of a term of appointment eligible for reappointment.

(4) The chairperson may resign from office by notice of resignation given to the Minister, and the Governor may remove the chairperson from office for misconduct or for any other proper reason.

(5) The Governor in Council may appoint a deputy to the chairperson or any other member of the Authority to act in the place of the chairperson or that other member -

- (a) during a vacancy in the office; or
- (b) during any period, or all periods, when the chairperson or other member is absent from duty or from the State or is for any reason, unable to perform official duties.

**Meetings of the Authority**

8. (1) The Authority may meet at such times and places as it thinks fit for the conduct of its business but it must meet at least once in each quarter.

(2) At a meeting of the Authority -

- (a) the chairperson (if present) is to preside; and
- (b) a quorum consists of any 2 members of the Authority; and

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(c) a decision in which any 2 members of the Authority agree is a decision of the Authority.

(3) The Authority must ensure that proper minutes are kept of its proceedings.

**Division 2 - Functions and powers of the Authority**

**Functions of the Authority**

9. The functions of the Authority are as follows -

- (a) to promote the careful and effective keeping of records by public authorities so as to ensure that Queensland's history is completely and accurately recorded, and to facilitate the future use of those records as archival materials; and
- (b) to examine and evaluate the historical significance of public records and to undertake the preservation of those worthy of preservation; and
- (c) to examine, and evaluate the historical significance of, other records relating to Queensland's history and to undertake, assist or encourage the preservation of those worthy of preservation; and
- (d) to provide temporary storage for public records until their historical significance has been evaluated and a decision made as to whether they are worthy of preservation;
- (e) to undertake the custody and management on behalf of a public authority or other body or person of records that may have value as archival materials; and
- (f) to acquire and preserve records of value as archival materials; and
- (g) with the approval of the Minister, to undertake the custody and preservation of records which, although not of direct relevance to Queensland's history, are of relevance to the history of Australia; and
- (h) to encourage and facilitate the use of archival materials; and
- (i) to make public records available for public access in accordance with this Act; and
- (j) to provide a reference service for the use of members of the public; and
- (k) to provide a copying service to promote the dissemination of archival materials throughout Queensland and to promote the dissemination of such materials in any other practicable way; and
- (l) to conduct research and provide advice in relation to the management and preservation of archival materials; and
- (m) to collaborate with other bodies interested in the preservation of Queensland's historical heritage; and



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- (n) to collaborate with other Australian authorities in relation to the preservation or storage of archival materials and, in appropriate cases, to enter into agreements or arrangements with such authorities providing for reciprocal rights of access to archival materials; and
- (o) to facilitate the preservation and accessibility of records held as computer records or in some other electronic form.

**Powers of the Authority**

**10. (1)** The Authority has all powers reasonably necessary for or incidental to the performance of its functions and may, for example -

- (a) undertake a survey and appraisal of public records; and
- (b) establish and manage repositories and other facilities to store or exhibit archival materials; and
- (c) arrange for the acquisition of materials of sufficient significance to Queensland's history to justify their acquisition and preservation; and
- (d) make records in a form appropriate for inclusion in the archives of public administrative structures and procedures; and
- (e) make copies (but not so as to infringe any copyright) of public records or other materials of value to Queensland's history; and
- (f) arrange for the publication of archival materials; and
- (g) publish indexes of and other guides to archival material; and
- (h) authorise the disposal or destruction of public records that are of insufficient value to justify their preservation as archival materials; and
- (i) provide assistance on request by public authorities in the training of persons involved in the making, management or preservation of public records; and
- (j) provide or assist in the provision of theoretical or practical training in relation to the proper management of records or archival materials; and
- (k) maintain appropriate computer, microfilm or other systems for facilitating access to the archival materials in the Authority's custody; and
- (l) facilitate the use of the archives in any other appropriate way.

**(2)** The Authority has, for or in connection with the performance of its functions, the legal capacity of a natural person, and may, for example -

- (a) enter into contracts; and
- (b) acquire, hold and dispose of property; and
- (c) appoint agents and attorneys; and

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- (d) engage consultants; and
- (e) make charges for services provided by it.

(3) If the copyright to any record in the Authority's custody lies in the Crown in right of Queensland or a public authority, that copyright is not infringed by the copying or publication of the record under this Act.

**Division 3 - Ministerial direction**

**Ministerial direction**

11. The Minister may not, by direction to the Authority or in any other way, interfere with the independence of the Authority's discretion to determine which records should be preserved and which may be destroyed.

**Division 4 - The State Archivist**

**The State Archivist**

12. (1) There is to be a State Archivist.

(2) The State Archivist is to be appointed and is to hold office under the *Public Service Management and Employment Act 1988*.

(3) The State Archivist is the chief executive officer of the Authority.

**Division 5 - Delegation**

**Delegation**

13. The Authority may delegate any of its powers (including discretionary powers) to an officer or employee of the Authority or to any other suitable person.

**Division 6 - Annual report**

**Annual report**

14. (1) The Authority must, not later than 31 October in each year, furnish the Minister with a report on the administration of this Act during the financial year that ended on the preceding 30 June.

(2) The report must deal with the extent to which public authorities are complying with this Act and may contain instances of non-compliance and measures that the Authority recommends be taken to prevent or reduce the likelihood of recurrence.

(3) The Minister must table a copy of the report in the Legislative Assembly within 14 days after receiving the report if the Legislative Assembly is then in session, but, if not, within 14 days after the commencement of the next session.

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**Division 7 - The Advisory Council**

**Establishment of the Advisory Council**

15. An advisory council called the Queensland Archives Advisory Council is established.

**Composition of the Advisory Council**

16. (1) The Advisory Council is to consist of -
- (a) a member of the judiciary; and
  - (b) a member of the Legislative Assembly; and
  - (c) a person with wide experience in executive government; and
  - (d) a person with wide experience in local government; and
  - (e) a historian; and
  - (f) an expert in record management; and
  - (g) an expert in public administration; and
  - (h) a person with special interest or expertise in genealogy; and
  - (i) such other members as the Governor in Council thinks fit to appoint.

(2) A member of the Advisory Council is to be appointed by the Governor in Council for a term of office not exceeding 5 years stated in the instrument of appointment but is, on completion of a term of office, eligible for reappointment.

(3) One of the members of the Advisory Council is to be appointed by the Governor in Council to be the chairperson of the Council.

**Meetings and procedure of the Advisory Council**

17. (1) The Advisory Council may meet at such times and places as it thinks fit but it must meet at least once in each quarter.

(2) The Chairperson of the Advisory Council or the Authority may at any time call a meeting of the Advisory Council.

(3) Subject to any regulation governing the procedure of the Advisory Council, the Council may determine its own procedures.

(4) The Advisory Council must ensure that accurate minutes are kept of its proceedings.

**Functions of the Advisory Council**

18. The functions of the Advisory Council are -
- (a) to advise the Authority or the Minister on issues affecting the administration or enforcement of this Act; and

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- (b) to provide a forum for discussion of issues affecting the administration or enforcement of this Act; and
- (c) to consider, and make recommendations on, any matters referred to the Advisory Council by the Authority or the Minister.

**PART 3 - THE QUEENSLAND STATE ARCHIVES**

**The Queensland State Archives**

19. The Queensland State Archives consists of the repositories established or maintained under this Act for receiving and preserving records.

**Administration of the State Archives**

20. The Authority has the administration, management and control of the Queensland State Archives.

**Regional divisions of the State Archives**

21. (1) The Authority must adopt a policy of decentralisation and establish as many regional divisions of the Queensland State Archives as are consistent with the proper and efficient administration of the Archives.

(2) The Authority may make arrangements with a local authority or other body under which a regional division of the Queensland State Archives is to be under the joint administration and control of the Authority and the local authority or other body.

(3) An arrangement entered into under subsection (2) must provide for the management of public records kept as archival materials in accordance with standards laid down or approved by the Authority.

**Custody of records outside the State Archives**

22. (1) The Authority may by arrangement with a public authority or other person provide for the custody of public records to the possession of which the Authority is entitled in repositories outside the State Archives.

(2) An arrangement entered into under subsection (1) must provide for the management of public records kept as archival materials in accordance with standards laid down or approved by the Authority.

(3) The Authority may at any time take (or resume) the custody and control of records stored outside the State Archives under arrangements made under this section.

**Central register of archival materials**

23. The Authority must keep a comprehensive register of public records stored in the Queensland State Archives and public records stored outside those Archives but in accordance with arrangements made by the Authority under this Part.

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**PART 4 - PUBLIC RECORDS**

**Division 1 - Property in public records**

**Property in public records**

24. (1) The property in public records that are records of an instrumentality or agency of the Crown vests in the Crown and cannot be alienated from the Crown.

(2) The property in public records that are records of a public authority that is not an instrumentality or agency of the Crown vests in that authority and cannot be alienated.

(3) This section does not affect an interest in public records lawfully acquired before the commencement of this Act.

**Sale of public records**

25. The sale of public records is prohibited.

**Division 2 - Making and preservation**

**Standards**

26. (1) The Authority must establish standards governing the making, management and preservation of public records and in particular -

(a) the matters in relation to which public records are to be made and kept; and

(b) the security of public records.

(2) In establishing standards the Authority should have regard to-

(a) any law or convention under which a public authority is accountable; and

(b) the needs of future historical research.

(3) The Authority may revise and amend the standards from time to time.

(4) Section 28A of the Acts Interpretation Act 1954 applies in relation to standards established for the purposes of this section as if they were regulations.

(5) The Authority must assist public authorities to apply the standard to records under their control.

**Public authority to make and preserve adequate records**

27. A public authority must -

(a) cause complete and accurate records to be made, managed and kept in accordance with standards established by the Authority under this Part; and

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(b) comply with any requirements as to the making, management and preservation of public records contained in those standards.

**Division 3 - Transfer of public records to the Authority**

**Transfer of records to the Authority**

28. (1) Subject to this section, when a public authority no longer requires a public record to be readily available for the purposes of the public authority, the public authority may transfer the record to the Authority's custody and, if the record has been in existence for 25 years, the public authority must (unless the record is lawfully destroyed in accordance with the Authority's relevant standard) transfer the record to the Authority's custody.

(2) This section does not apply to records of a class excluded from its application by regulation.

**Public records to be kept available to public authorities**

29. (1) Subject to subsection (2), the Authority must ensure that all public records received into its custody from a public authority are made available, as reasonably required, for use by, or at the direction of, that authority.

(2) A record that has been in existence for more than 25 years is not to be removed from the custody of the Authority unless its removal is reasonably required for the proper conduct of the public authority's business or the Authority is satisfied that there is some other sufficient reason for allowing it to be removed from its custody.

**Division 4 - Destruction and disposition of public records**

**Standards governing destruction or disposition**

30. (1) The Authority must establish standards governing the evaluation of the public records and the destruction or disposition of those that do not justify preservation.

(2) The standards may provide for the removal of records that do not justify preservation in the Queensland State Archives to some alternative custody but only on condition that the Authority reserves the right to resume control of the records.

(3) The Authority may revise and amend the standards from time to time.

(4) The Authority must assist public authorities to apply the standards to records under their control.

**Destruction etc. of public records**

31. (1) Subject to subsection (2), a person must not destroy, damage or dispose of a public record.

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Maximum penalty: 200 penalty units.

- (2) Subsection (1) does not prevent -
- (a) the destruction or disposal of public records as required by law; or
  - (b) the destruction or disposal of public records in accordance with standards established by the Authority under this Division; or
  - (c) the destruction or disposal of public records with the approval of the Authority and subject to any conditions on which the approval is given.

**PART 5 - ACCESS TO ARCHIVAL MATERIAL**

**General principles of access**

32. (1) Subject to this section and section 33, the following principles govern access to public records -

- (a) during the period of restricted access, a public record is not to be available for public access unless -
  - (i) access is obtained under the *Freedom of Information Act 1992*; or
  - (ii) the record is in the Authority's custody and is classified by the Authority as a record to which unrestricted access should be allowed;
- (b) after the end of the period of restricted access -
  - (i) a public record other than an exempt record (whether or not in the Authority's custody) is to be available for public access; and
  - (ii) an exempt record is not to be available for public access unless access is obtained under the *Freedom of Information Act 1992*.

(2) If the Authority refuses access to a record under this Act on the ground that the record is an exempt record, that decision is subject to review under the *Freedom of Information Act 1992* as if it were a decision made by the relevant public authority to refuse access to a document under that Act.

**Discretionary access**

33. (1) The Authority has a discretion to allow access to any record in its custody (except an exempt record) during the period of restricted access.

(2) The relevant public authority has a discretion to allow access to an exempt record in the Authority's custody.

(3) The Authority or the relevant public authority may impose such conditions on access allowed under this section as it considers necessary -

- (a) to protect the public interest; or
- (b) to safeguard living persons from the possibility of prejudice; or

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(c) for any other purpose.

(4) A person must not contravene a condition on which that person has been allowed access to a record under this section.

Maximum penalty: 20 penalty units.

**Forms of access**

34. (1) If a public record is publicly accessible under this Act, the Authority must, on application by a member of the public, give the applicant access to the document.

(2) Access to a public record may be given in any one or more of the following ways -

- (a) by allowing the applicant a reasonable opportunity to examine the record; or
- (b) by providing the applicant with a copy of the record; or
- (c) if the record can be reproduced or displayed by means of computer equipment, a projector or other equipment, by allowing the applicant to use that equipment; or
- (d) by providing the applicant with a transcript of the record.

(3) Subject to subsection (4), if an applicant applies for access to a record in a particular form, and it is possible to give access in that form, access must be given in that form.

(4) If the giving of access under this Part in the form requested by the applicant -

- (a) would interfere unreasonably with the operations of the State Archives, of a public authority or of some other body or person that has custody of the record ; or
- (b) would not, having regard to the physical nature of the record, be appropriate; or
- (c) would be detrimental to the preservation of the record; or
- (d) would involve infringement of a copyright (other than a copyright that is vested in the Crown in right of Queensland or a public authority),

access in that form may be refused and access given in another form.

(5) The Authority may determine reasonable conditions to which access to the record is to be subject and, if access is given by providing a copy or transcript of the record, may impose a reasonable charge.

(6) If the original of a record is withheld from public access for the purpose of ensuring its safe custody or preservation, but it is practicable to provide a copy of the record without prejudice to the proper preservation or safe custody of the original, a copy must be provided.



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(7) A public authority that has custody of a record to which access is sought under this section must, at the request of the Authority, do anything necessary to enable the Authority to give access to the record.

**PART 6 - POWERS OF ENFORCEMENT**

**Division 1 - Entry and inspection**

**Appointment of authorised persons**

35. The Authority may authorise any of its officers or employees to exercise the powers of an authorised person under this Act.

**Identity cards**

36. (1) The Authority must issue to each authorised person an identity card containing a photograph of the authorised person.

(2) A person who ceases to be an authorised person must, as soon as practicable, return the identity card to the Authority.

Maximum penalty for contravention of this subsection - 10 penalty units.

(3) An authorised person is not entitled to exercise powers under this Act in relation to another person unless the authorised person first produces the identity card for inspection by that person.

**Right of inspection**

37. (1) The Authority is entitled, for the purposes of this Act, to full and free access, at all reasonable times, to all public records in the custody of public authorities.

(2) An authorised person may at any reasonable time -

- (a) enter the premises of a public authority; and
- (b) examine the authority's procedures in regard to the making, management and preservation of records; and
- (c) examine the authority's records.

(3) An officer or employee who is responsible for the management of the public authority's records must, at the request of the authorised person -

- (a) produce the authority's records, or a particular class or sample of those records, for the authorised person's inspection or facilitate the authorised person's access to the authority's records or a particular class or sample of those records in some other way; and
- (b) allow the authorised person to examine the authority's systems for making and keeping records in operation.

(4) A person must not -

- (a) contravene subsection (2); or

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- (b) obstruct an authorised officer in the exercise of powers under this section.

Maximum penalty: 10 penalty units.

(5) The Authority's powers under this section are subject to the following qualifications -

- (a) the powers are not to be exercised in relation to the Governor's official establishment except by arrangement with the Governor's secretary; and
- (b) the powers are not to be exercised in relation to the Legislative Assembly except by arrangement with the clerk of the Legislative Assembly; and
- (c) the powers are not to be exercised in relation to a court except by arrangement with the chief administrative officer of the court.

(6) If the Authority seeks to make an arrangement under subsection (5) the consent of the secretary, clerk or chief administrative officer must not be unreasonably withheld.

**Division 2 - Recovery of public records**

**Recovery of public records**

38. (1) If the Authority has reason to believe that public records are in the possession of a person who has no lawful authority to be in possession of the records, the Authority may, by written notice, require the person to deliver up the public records to the Authority in accordance with directions contained in the notice.

(2) A person must not, without reasonable excuse, fail to comply with a requirement under subsection (1).

Maximum penalty: 40 penalty units.

(3) A court before which proceedings for an offence against subsection (2) are heard may, if satisfied that the defendant is in possession of public records without lawful authority, order the defendant to deliver up the records to the Authority.

(4) If a person fails without reasonable excuse to comply with the order of a court under subsection (3), the person is guilty of an offence.

Maximum penalty: 100 penalty units plus 5 additional penalty units for every day that the failure continues.

**Reciprocal arrangements**

39. (1) The Authority may enter into a reciprocal agreement with any authority with corresponding responsibilities under the law of another State or Territory of the Commonwealth (the "reciprocating State") -

- (a) under which the Authority will take action in Queensland to recover materials of archival significance to the reciprocating State and deliver them up to the reciprocating State; and

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- (b) the other party to the agreement will take action in the reciprocating State to recover materials of archival significance to Queensland and deliver them up to the Authority.

(2) If the Authority has reason to believe that records to which an agreement under this section applies are in the possession of a person who has no lawful authority to be in possession of the records, the Authority may, by written notice, require the person to deliver up the records to the Authority in accordance with directions contained in the notice.

(3) A person must not, without reasonable excuse, fail to comply with a requirement under subsection (2).

Maximum penalty: 40 penalty units.

(4) A court before which proceedings for an offence against subsection (3) are heard may, if satisfied that the defendant is in possession of records without lawful authority, order the defendant to deliver up the records to the Authority.

(5) If a person fails without reasonable excuse to comply with the order of a court under subsection (4), the person is guilty of an offence.

Maximum penalty: 100 penalty units plus 5 additional penalty units for every day that the failure has continued.

**Division 3 - Injunctive relief**

**Injunctive relief**

40. (1) If the Supreme Court is satisfied, on the application of the Authority, that there is reasonable cause to suspect that a person is about to destroy or damage public records, it may make any one or more of the following orders -

- (a) an order restraining that person from any act that might result in damage to or destruction of the records; or
- (b) an order that the records be placed in the custody of the Authority; or
- (c) any other order that may be necessary in the circumstances to protect the records from harm.

(2) An order may be made under this section without notice to the defendant, but in that case the court must allow the defendant a reasonable opportunity to appear before the court to show cause why the order should not continue in force, and if the court, after hearing the defendant, is not satisfied that the order should continue in force, it must be rescinded.

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**Division 4 - Investigation of offences**

**Powers of the Ombudsman and the Criminal Justice Commission**

41. The powers of the Ombudsman and the Criminal Justice Commission extend to the investigation of complaints of mismanagement or misbehaviour in public administration relating to the making, management, preservation, or destruction of public records by public authorities, or officers or employees of public authorities.

**Division 5 - Breaches of discipline**

**Offences and breaches of discipline by officers and employees**

42. (1) If an officer or employee of a public authority contravenes a provision of this Act that is declared by this Act to be an offence, the contravention may be dealt with either as an offence or as a breach of discipline.

(2) If an officer or employee of a public authority with responsibility for management of the records of the public authority fails to ensure (as far as lies within his or her power) that the authority complies with its responsibilities under this Act, that officer or employee commits a breach of discipline.

(3) The chief executive officer of a public authority must ensure that suspected breaches of discipline arising from non-compliance with this Act are thoroughly investigated and that, in appropriate cases, disciplinary action is taken.

**PART 7 - MISCELLANEOUS**

**Acquisition of records from private sources**

43. (1) The Authority may enter into arrangements to acquire title to, or temporary or permanent custody of, records of significance to Queensland's history.

(2) An arrangement under this section may be made on such conditions as the Authority thinks fit, which may include conditions limiting access to the records but a limitation on access cannot operate -

- (a) if the records were acquired from a natural person, after the date falling 75 years after the death of the person from whom the records were acquired; or
- (b) if the records were acquired from a body corporate, after a date falling 75 years after the creation of the records.

(3) If the Authority acquires title to or temporary custody of records under this section, the records are, subject to subsection (4), to be treated (while they remain in the custody of the Authority) as public records for the purposes of the provisions of this Act governing access to records.

(4) If the conditions of the arrangement under which the Authority acquired title to or possession of the records are inconsistent with a provision of this Act, the conditions have effect despite the inconsistency.

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**Protection from civil liability**

44. (1) If access is given to a record in accordance with this Act -

- (a) no action for defamation, breach of confidence or infringement of copyright lies against the Crown, the Authority or any person concerned in authorising or giving access to the record; and
- (b) no action for defamation or breach of confidence in respect of any publication involved in, or resulting from, the giving of access lies against the author of the record or any other person; and
- (c) a person who authorised or gives access to the record does not, by so doing, commit an offence.

(2) The giving of access to a record under this Act is not to be taken, for the purposes of the law relating to defamation or breach of confidence, to constitute an authorisation or approval of the publication of the record or of its contents by the person to whom the access is given.

(3) No civil liability is incurred by -

- (a) the Authority; or
- (b) a public authority; or
- (c) an officer or employee of the Authority or a public authority,

for an act or omission (other than authorising or giving access to a record) done or omitted to be done honestly and without negligence under or for the purposes of this Act.

(4) A liability that would, but for subsection (3), attach to a body or person mentioned in that subsection attaches instead to the State.

**Evidence**

45. (1) A record that is admissible in evidence on its production from proper custody is, if it is produced from the custody of the Authority, taken to have been produced from proper custody.

(2) An officer of the Authority may give a certificate as to the origin, history, nature or contents of a record in the custody of the Authority, and such a certificate is admissible in evidence in legal proceedings as evidence of any fact stated in the certificate.

**Access to records apart from this Act**

46. This Act is not to be construed as limiting rights of access to records that exist apart from this Act.

**Regulations**

47. The Governor may make regulations for the purposes of this Act.

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**SCHEDULE**

*Amendments and Transitional Provisions*

**Amendment of Libraries and Archives Act 1988**

1. The *Libraries and Archives Act 1988* is amended as follows:

**Section 1 -**

*omit "and Archives"*

**Section 5 -**

(1) definition "**departmental head**" -

*omit*

(2) definition "**public authority**" -

*omit*

(3) subsections (2) and (3) -

*omit*

**Section 21 (c) -**

(1) *omit "and archives"*

(2) *omit "and archival"*

**Section 21 (d) -**

*omit "archival"*

**Section 21 (e) -**

*omit "archival"*

**Section 21 (h) -**

*omit*

**Section 22 (2) (c) -**

*omit "or archive"*

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**Section 22 (2) (d) -**

*omit "and archives"*

**Section 22 (2) (e) -**

*omit "and archives"*

**Section 22 (2) (f) -**

*omit "or archival"*

**Section 22 (2) (g) -**

*omit "or archival"*

**Section 22 (2) (h) -**

*omit "or archival"*

**Section 23 -**

*omit "or the Queensland State Archives"*

**Section 25 -**

*omit "(including to the Queensland State Archives)"*

**Part V (sections 50 to 61) -**

*omit*

**Section 71 (3) and (4) -**

*omit*

**Section 73 (2) (g) -**

*omit "including public records in the possession of the Queensland State Archives"*

**Section 73 (2) (h) and (i) -**

*omit*

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**Amendment of *Freedom of Information Act 1992***

2. The *Freedom of Information Act 1992* is amended as follows:

**Section 11(1) -**

*omit* "This Act does not apply to"

*insert* "Subject to subsection (3), this Act does not apply to"

**After section 11(2) -**

*insert* -

(3) This Act applies in relation to a document that is a record of a body or person referred to in subsection (1) after the period of restricted access under the *Archives Act 1992* ends.

**Section 12 -**

*omit, insert* -

**Application of Act to Information Commissioner**

12. (1) Subject to subsection (2), section 20 and Parts 3 and 4 do not apply to the Commissioner or documents of the Commissioner.

(2) The provisions referred to in subsection (1) apply in relation to a document that is a record of the Commissioner after the period of restricted access under the *Archives Act 1992* ends.

**Section 17 (1) -**

*omit* "*Libraries and Archives Act 1988*"

*insert* "*Archives Act 1992*"

**Section 17 (2) -**

*omit* "*Libraries and Archives Act 1988*"

*insert* "*Archives Act 1992*"

**Section 22 (c) -**

*omit, insert* -

(c) a document that is available for public inspection under the *Archives Act 1992*;

**Section 24 (1)(b) -**

*omit, insert* -

(b) is not available for public inspection under the *Archives Act 1992*;



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**After section 51 -**

*insert -*

**51A.** Matter classified as exempt matter by section 36, 37, 39, 40, 41, 47, 48 or 50 ceases to be exempt matter when the period of restricted access under the *Archives Act 1992* ends in relation to the document in which the matter is contained.

**Transitional provisions**

**3.** (1) The repositories maintained by the Library Board of Queensland for archival purposes immediately before the commencement of this Act are transferred to the administration and control of the Authority.

(2) The provisions governing access to public records immediately before the commencement of this Act apply (subject to adaptations and modifications prescribed by regulation) to the exclusion of Part 5 (access to archival materials) for the first year after the commencement of this Act in relation to public records generally and for the following 3 years in relation to public records that had been deposited in the Queensland State Archives before the commencement of this Act.

## APPENDIX B

### ATTACHMENT ON ACCESS

While I have no problem with the enactment of a parallel access system under archives legislation as proposed under Issues 13 - 28, it is possible the Commission will encounter an argument that enactment of the *Freedom of Information Bill 1991 (Qld)* would make the establishment of a separate statutory access right under archives law unnecessary.

A separate access right should be established under archives law because :-

(1) **Ambit (paras 2.1.0 - 2.3.0 below)**

FOI does not provide a statutory scheme of access in the archival period for those activities of government which are subject to archives law but excluded from FOI (c11. 11 & 12). Whatever reasons there are for excluding such records from a statutory scheme of access through FOI while they remain current must eventually disappear as they grow older and advance further into the "archival period". They must eventually fall under the statutory scheme of access provided by the archives law.

(2) **FOI Procedures Unsuitable for Access to Archival Records (paras 3.1.0 - 3.2.3 below)**

FOI procedures should not be used to obtain access to records made available under access provisions of the Archives Act. As the draft paper points out, the Model 2 provides a statutory basis for providing access in a different manner to the one contemplated by FOI and establishes the framework for the mandatory transfer rule under which a system of workable access clearance arrangements can be established.

#### 1.0.0 BACKGROUND

1.1.0 The Bill establishes a right of access to information held by the Queensland government (cl. 4).

1.2.0 The Bill applies to all records regardless of age (cl. 10).

1.3.0 The Bill does not circumscribe the operation of access provisions in the existing *Libraries and Archives Act* (cl. 15) but allows a person to obtain access to "closed" records in QSA under FOI (cl. 17).

1.4.0 Personal papers deposited at QSA or a public library to which access has been restricted by the donor are subject to FOI unless they are "private" or "non-official" (i.e. not a document of an agency or an official document of a Minister within the meaning of the Act) - cl. 23.

1.5.0 All other records held by QSA, unless they are reasonably available for inspection, are subject to FOI - c11. 22 & 24. Records which are not "reasonably available" (i.e. "closed records") are deemed to be in the possession of the transferring agency or its successor - cl. 24(1).

#### 2.0.0 DIFFERENCES IN AMBIT

2.1.0 The ambit of the new Archives Act is not yet determined. It is possible, indeed likely, that it will cover activities of government which are put outside the operation of FOI by c11. 11 & 12.

2.2.0 In respect of these agencies (the Governor, Parliament, the courts, commissions of inquiry, etc) no statutory right of access is provided by FOI to records of any age.

2.3.0 To the extent that the records of any of these excluded agencies are subject to archives law, it is important that they should be subject to a statutory scheme of access after they reach the access period (even though they were not previously subject to FOI law). Since FOI does not apply, the Archives Act must provide separately for access to these records once they reach the archival period.

## 3.0.0 FOI PROCEDURES UNSUITABLE FOR ACCESS TO ARCHIVAL RECORDS

3.1.0 Access to "Open" Records at QSA

- 3.1.1 Access under FOI is not available to records at QSA which are "reasonably available for inspection" there. Closed records at QSA and all records outside QSA are subject to FOI. To achieve the benefits of Model 2, it is important to keep the quantity and type of records in the archival period which are available only under FOI to a minimum - i.e. those left outside QSA and those at QSA but "closed" to a minimum.
- 3.1.2 To achieve this, the new Archives Act must mandate transfer of archival period records, require the release of all records after a specified period (thus reducing the quantity of records not "reasonably available" for inspection at QSA, and limit the discretion of agencies and Ministers to "close" records in the archival period. A statutory protection, similar to cl. 102 - 104 of the FOI Bill, must be extended to QSA staff giving access under the new Archives Act.
- 3.1.3 A nexus should be established between cl. 22(c) of the FOI Bill and the access provisions of the new Archives Act to establish that a record to which access is granted by QSA in terms provided for in the Archives Act is "reasonably available" within the meaning of the FOI Act. This is to preclude argument under FOI as to whether public access given by QSA constitutes reasonable availability under FOI. The best and simplest way of doing this will be to substitute for the notion of "reasonably available" in para 24(1)(b) of FOI(Qld) the concept of "available in accordance with" the scheme of access established by the Archives Act.

Recommendation

Once the Archives Act is framed, amend 22(c) and 24(1)(b) of FOI by deleting the words "reasonably available for public inspection" and substituting "available for public inspection in accordance with [a reference to the relevant provisions of proposed Archives Act].

- 3.1.4 The scheme of access envisaged for the proposed Archives Act will apply to records lodged in places of deposit - cf. cl. 24(2). It follows that FOI should be refused under cl.22(c) where such documents are "open" under archives law. In consequence, cl.24(2) should be redrafted along the same lines as cl.24(1) to reflect the fact that FOI access is not appropriate where documents in a place of deposit are available by other means.

Recommendation

Amend 22(c) and 24(2) by removing records released under archives law and lodged in a place of deposit from the operation of FOI(Qld).

3.2.0 Access to "Closed" Records at QSA3.2.1 Provided :-

- \* mandatory transfer is introduced and observed; and
- \* the quantity of closures in the archival period is limited by establishing a statutory requirement to release records in the "open period" subject only to the application criteria for closure under the Archives Act

the system contemplated in the Bill conforms largely to the outline of Model 2 given in the EARC Discussion Paper No. 16. Some modification will be necessary, however, in the way requests for "closed" records at QSA are handled.

3.2.2 The effect of cll. 24, 25 and 26 appears to be :-

- \* most closed records at QSA are deemed to be in the possession of another agency - cl. 24(1);
- \* such records are consequently "documents of [that] agency" not of QSA - cl. 7;
- \* applications under FOI should, accordingly, be made to the responsible agency and not QSA - cl. 25(1);
- \* apart from the normal obligations to assist, QSA is not obliged to receive or handle FOI requests for closed records - cll. 25(3) & 25(4);
- \* QSA may (but is not obliged to) consent to the transfer of an FOI request for a closed record "held" by QSA.

In broad terms, therefore, the desired result under Model 2 - that

the responsible agency, not QSA, should administer access to closed records appears to have been achieved.

3.2.3 There remain some difficulties and uncertainties :-

- \* If the new Archives Act vests control and management of records at QSA with QSA, such records - notwithstanding cl. 24(1) - could be deemed to be QSA's documents as well as the responsible agency's which would appear to defeat the purpose of the FOI drafting.
- \* It is unclear what circumstances are contemplated by the phrase "if the agency is entitled to access..." in cl. 24(1) and what consequences follow if an agency is not entitled to access;


**Recommendation**

In drafting the new Archives Act, care should be taken with provisions relating to :-

- \* control and management of public records by QSA over records in QSA custody, and
- \* limitations on agencies' rights of access/retrieval from QSA to ensure that they do not unwittingly make QSA liable for handling FOI requests to closed records which should properly be handled by agencies.

## APPENDIX C

NEWSPAPER ADVERTISEMENT: 21 SEPTEMBER 1991



**ELECTORAL AND ADMINISTRATIVE  
REVIEW COMMISSION**

**Notice of Review of Archives Legislation**

The Commission seeks written public submissions on its review project on "Archives Legislation" in Queensland. This review will culminate in a report in mid 1992 to the Chairman of the Parliamentary Committee for Electoral and Administrative Review, the Speaker of the Legislative Assembly and the Premier.

Issues Paper No. 16 relating to the Commission's review is now available. It focuses on Queensland's existing archives legislation, contained in the *Libraries and Archives Act 1988 (Qld)*. Issues raised for consideration in Issues Paper No. 16 include:

- (1) the protection of public records from unauthorised destruction;
- (2) the powers and functions which archives legislation should confer on an archives authority in Queensland;
- (3) the role of an archives authority in the management of public records, including, for the purposes of government accountability, ensuring that government agencies properly create, maintain, use and preserve public records;
- (4) whether, in addition to FOI legislation which would provide a right of access to current public records, there should be a complementary statutory right of access to non-current public records; and
- (5) the administration of archives in Queensland.

Copies of Issues Paper No. 16 may be inspected at major Public Libraries, selected Magistrates Courts and the Commission's Public Reading Room from Wednesday 25 September 1991. Persons wishing to obtain a copy of Issues Paper No. 16 may contact the Commission.

Written submissions on Issues Paper No. 16 should be sent to the Commission by 12.00 noon on Friday, 29 November 1991. The Commission's address is:

**ELECTORAL AND ADMINISTRATIVE REVIEW COMMISSION  
PO BOX 349, NORTH QUAY QLD 4002 (Reference 0805)**

All submissions received will be available for public inspection at the Commission's Public Reading Room from 6 December 1991 and at major Public Libraries and selected Magistrates Courts from 13 December 1991. Comments in response to initial submissions should be sent to the Commission by 24 January 1992 and will be available for inspection in the Commission's Public Reading Room from 31 January 1992.

**Commission Address:** Level 9, Capital Hill, 85 George Street, Brisbane.

**Telephone:** (07) 237 1260,  
(008) 177 172;

**Facsimile:** (07) 237 9778.

**TOM SHERMAN**  
Chairman, 21 September 1991.

MO377C

## APPENDIX D

## LIST OF PUBLIC SUBMISSIONS AND COMMENTS IN RESPONSE

Submission No.	Name/Organisation	Address	Date Received
1	P O'Brien	PO Box 502 SMITHFIELD Q 4878	28/10/91
2	Anglican Church of Australia in the State of Queensland	The Most Reverend P Hollingworth Anglican Archbishop of Brisbane c/- The Registrar GPO Box 421 BRISBANE Q 4001	11/11/91
3	Capricornia Collection Society	H Armstrong President University College of Central Queensland Library Rockhampton Mail Centre ROCKHAMPTON Q 4702	14/11/91
4	University of Central Queensland Library	J Edwards University Librarian Rockhampton Campus Rockhampton Mail Centre ROCKHAMPTON Q 4702	20/11/91
5	C Buckley	Assistant Director Archival & Records Management Services Australian Archives GPO Box 888 BRISBANE Q 4001	21/11/91
6	A Sandell	Lot 85 Greensward Road TAMBORINE Q 4270	25/11/91
7	J Blake	20 Portland Street ANNERLEY Q 4103	25/11/91

Submission No.	Name/Organisation	Address	Date Received
8	Boonah Shire Archives	C K Pfeffer Hon. Shire Archivist PO Box 97 BOONAH Q 4310	26/11/91
9	Records Management Association of Australia Queensland Branch	M J Hangan President PO Box 361 NORTH QUAY Q 4002	26/11/91
10	Beaudesert Shire Council	G W Day Shire Clerk PO Box 25 BEAUDESERT Q 4285	26/11/91
11	James Cook University of North Queensland	J Edwards University Archivist TOWNSVILLE Q 4811	28/11/91
12	Staff of Queensland State Archives	c/- Anne Birgan Senior Archivist Technical Services PO Box 491 ANNERLEY Q 4103	28/11/91
13	Criminal Justice Commission	S H Lambrides Acting General Counsel PO Box 157 NORTH QUAY Q 4002	28/11/91
14	P D Wilson	Place Names Unit Department of Lands PO Box 40 WOOLLOONGABBA QLD 4102	28/11/91
15	Library Board of Queensland	M Cross Chairman PO Box 488 SOUTH BRISBANE QLD 4101	28/11/91

<b>Submission No.</b>	<b>Name/Organisation</b>	<b>Address</b>	<b>Date Received</b>
16	Rockhampton and District Historical Society	D J Parker President PO Box 169 ROCKHAMPTON Q 4700	29/11/91
17	Boonah Shire Council	I C Flint Shire Clerk PO Box 97 BOONAH Q 4310	29/11/91
18	Australian Institute for the Conservation of Cultural Material (Inc)	V Gillespie Honorary Secretary GPO Box 1638 CANBERRA ACT 2601	29/11/91
19	Moreton Shire Council	N J T Craswell Shire Clerk PO Box 192 IPSWICH Q 4305	29/11/91
20	Coordinated Response from the Queensland Public Service	N W Lawson Acting Director-General Department of the Premier, Economic and Trade Development PO Box 185 NORTH QUAY Q 4002	29/11/91
21	The University of Queensland	B G Wilson Vice-Chancellor BRISBANE Q 4072	29/11/91
22	G I Acland & P Taylor	Archives and Records Management Services The University of Queensland BRISBANE Q 4072	29/11/91
23	Australian Society of Archivists Incorporated	C Coggin President c/- State Archives Alexander Library Building Perth Cultural Centre PERTH WA 6000	29/11/91



Submission No.	Name/Organisation	Address	Date Received
24	Brisbane City Council	P W Berthold Town Clerk GPO Box 1434 BRISBANE Q 4001	29/11/91
25	J W Gillam	218 Brighton Terrace BRIGHTON Q 4017	29/11/91
26	Royal Historical Society of Queensland	S W Sheaffe Honorary Secretary Old Commissariat Stores PO Box 57 NORTH QUAY Q 4002	29/11/91
27	Australian Council of Archives	B Berzins Executive Officer PO Box 767 DICKSON ACT 2602	29/11/91
28	Queensland Historians Institute	Helen Gregory President PO Box 35 FORTITUDE VALLEY Q 4006	2/12/91
29	Deputy Director-General (Services) Administrative Services Department	Administrative Services Department GPO Box 2457 BRISBANE Q 4001	2/12/91
30	H J W Stokes & R Summerell	Australian Archives PO Box 34 DICKSON ACT 2602	2/12/91
31	The University of Queensland Libraries	The University of Queensland ST LUCIA Q 4072	2/12/91
32	The Town Clerk Rockhampton City Council	P O Box 243 ROCKHAMPTON Q 4700	9/12/91
33	Aboriginal and Torres Strait Islander Commission, Cairns Regional Office	1st Floor, Aplin House 19 Aplin Street CAIRNS QLD 4870	3/1/92

Submission No.	Name/Organisation	Address	Date Received
34	P B Nolan Auditor-General Department of the Auditor-General, Queensland	GPO Box 1139 BRISBANE QLD 4001	17/1/92
35	A W Skimin Chief Executive Officer Archives & Historical Studies ACT Regional Administrative Support Branch Department of Defence	P O Box E33 CANBERRA ACT 2600	20/1/92
36	Australian Council of Archives	P O Box 767 DICKSON ACT 2602	24/1/92
37	The Shire Clerk Mulgrave Shire Council	P O Box 1093 CAIRNS QLD 4870	31/01/92
38	K Lindeberg	12 Winster Court ALEXANDRA HILLS QLD 4161	23/04/92
39	D F O'Neill	69 Hutton Road FERNY HILLS QLD 4055	12/05/92

**APPENDIX E**  
**ARCHIVES LEGISLATION**

**Monday, 9 December 1991**  
**Seminar Room, State Works Centre**  
**80 George Street, Brisbane**

Chair: Commissioner Brian Hunter

9.00 a.m.	Introduction and Welcome	Mr Tom Sherman Chairman Electoral & Administrative Review Commission
<i>Session 1</i>	<i>The Role of Archives and Legislative Expression of that Role</i>	
9.10 a.m.	Legislative Developments in Archives	Mr John Cross Principal Archivist Archives Office of NSW
9.40 a.m.	The Cultural Heritage Role of Archives - A User's View	Professor Geoffrey Bolton Department of History University of Queensland
10.10 a.m.	The Records Management Role of Archives	Ms Susan Porter Deputy Director-General (Corporate Services) Administrative Services Department [For Mr Ross Pitt Deputy Director-General (Services)]
10.40 a.m.	Questions to the Panel	
<b>11.00 a.m.</b>	<b>Morning Tea</b>	
11.30 a.m.	The Regulatory Role - Furthering Cultural and Public Administration Purposes	Mr Chris Hurley Senior Archivist Public Record Office, Victoria
12.00 noon	"Special case" records/offices	Dr Jim Stokes Director Access and Client Services Australian Archives
12.30 p.m.	Questions to the Panel	

**12.45 p.m. Lunch**

**Session 2 *Integrating Rights of Access to Public Records***

2.00 p.m. Recommendations of the Victorian Legal & Constitutional Committee  
 Mr Spencer Zifcak  
 Solicitor & Barrister,  
 Supreme Court of Victoria  
 Former Research Director  
 Victorian Legal & Constitutional Committee

2.30 p.m. Applying the Models to Access Systems in Queensland  
 Mr Dominic McGann  
 Principal Policy Officer  
 Office of the Cabinet

3.00 p.m. Questions to the Panel

**3.15 p.m. Afternoon Tea**

**Session 3 *Putting Archival Ideals into Practice***

3.45 p.m. Managing the Record Rather than the Relic  
 Ms Glenda Acland  
 University Archivist &  
 Coordinator  
 Records Management  
 University of Queensland

4.05 p.m. Transforming Ideals into Reality in Queensland  
 Ms Lee McGregor  
 State Archivist  
 Queensland State Archives

4.35 p.m. Questions to the Panel

4.50 p.m. Closing Remarks  
 Mr Manfred Cross  
 Chairman  
 Library Board of Queensland

**5.00 p.m. Close**

## APPENDIX F

### ARCHIVES ACT 1983 (COMMONWEALTH)

#### PART II- ESTABLISHMENT, FUNCTIONS AND POWERS OF THE AUSTRALIAN ARCHIVES

##### Establishment and functions of Australian Archives

5. (1) There shall be, within the Department, an organization by the name of the Australian Archives.
- (2) The functions of the Australian Archives are, subject to this Act:
- (a) to ensure the conservation and preservation of the existing and future archival resources of the Commonwealth;
  - (b) to encourage and foster the preservation of all other archival resources relating to Australia;
  - (c) to promote, by providing advice and other assistance to Commonwealth institutions, the keeping of current Commonwealth records in an efficient and economical manner and in a manner that will facilitate their use as part of the archival resources of the Commonwealth;
  - (d) to ascertain the material that constitutes the archival resources of the Commonwealth;
  - (e) to have the custody and management of Commonwealth records, other than current Commonwealth records, that:
    - (i) are part of the archival resources of the Commonwealth;
    - (ii) ought to be examined to ascertain whether they are part of those archival resources; or
    - (ii) although they are not part of those archival resources, are required to be permanently or temporarily preserved;
  - (f) to seek to obtain, and to have the custody and management of, material (including Commonwealth records) not in the custody of a Commonwealth institution, that forms part of the archival resources of the commonwealth and, in the opinion of the Director-General, ought to be in the custody of the Archives;
  - (g) with the approval of the Minister, to accept and have the custody and management of material that, though not part of the archival resources of the Commonwealth, forms part of archival resources relating to Australia and, in the opinion of the Minister, ought to be in the custody of the Archives in order to ensure its preservation or for any other reason;
  - (h) to encourage, facilitate, publicise and sponsor the use of archival material;
  - (j) to make Commonwealth records available for public access in accordance with this Act and to take part in arrangements for other access to Commonwealth records;
  - (k) to conduct research, and provide advice, in relation to the management and preservation of records and other archival material;
  - (l) to develop and foster the co-ordination of activities relating to the preservation and use of the archival resources of the Commonwealth and other archival resources relating to Australia; and
  - (m) with the approval of the Minister, and in accordance with arrangements made with a person responsible for exempt material, to perform any of the foregoing functions in relation to that material as if that material formed part of the archival resources of the Commonwealth.

(3) Nothing in this Part derogates from the powers and functions of the Public Service Board or any other Commonwealth institution in relation to the keeping of current Commonwealth records.

### **Powers of Archives**

6. (1) The Archives may do all things that are necessary or convenient to be done for or in connection with the performance of its functions and, in particular, without limiting the generality of the foregoing, may:

- (a) establish and control repositories or other facilities to house or exhibit material of the Archives and, in association with a State, the Australian Capital Territory, the Northern Territory or other person, control repositories or other facilities in which material of the Archives is housed or exhibited;
- (b) undertake the survey, appraisal, accessioning, arrangement, description and indexing of Commonwealth records;
- (c) make arrangements for the acquisition by the Commonwealth of, or of copyright in relation to, or arrangements relating to the custody of, material that forms part of the archival resources of the Commonwealth;
- (d) chronicle and record matters relating to the structure and functioning of Commonwealth institutions or other matters of archival significance and make records for the purpose of adding to the archival resources of the Commonwealth;
- (e) make copies, by microfilming or otherwise, of archival material, but not so as to infringe copyright (other than copyright owned by the Commonwealth) subsisting in the material;
- (f) arrange for the publication of material forming part of the archival resources of the Commonwealth or works based on such material, but not so as to infringe copyright (other than copyright owned by the Commonwealth) subsisting in the material or works;
- (g) publish indexes of, and other guides to, archival material
- (h) authorize the disposal or destruction of Commonwealth records;
- (j) on request, assist Commonwealth institutions in the training of persons responsible for the keeping of current Commonwealth records;
- (k) train, or assist in the training of, persons, other than persons responsible for the keeping of current Commonwealth records, for work in connection with records and other archival material;
- (l) obtain and maintain equipment for use in retrieving, or otherwise obtaining, information from records; and
- (m) provide information and facilities for persons using the material of the Archives.

(2) Where, in the performance of its functions, the Archives enters into arrangements to accept the custody of records from a person other than a Commonwealth institution, those arrangements may provide for the extent (if any) to which the Archives or other persons are to have access to those records and any such arrangements have effect notwithstanding anything contained in Division 3 of Part V.

(3) Where an arrangement entered into by the Archives to accept the custody of records from a person other than a Commonwealth institution relates to a Commonwealth record, then, to the extent that that arrangement, in so far as it relates to such a record, is inconsistent with a provision of Part V, that provision shall prevail.

## APPENDIX G

**INDEX OF REFERENCES TO PARTICULAR CLAUSES OF THE  
DRAFT ARCHIVES BILL 1992 (QLD) IN THE TEXT OF THE REPORT**

<u>Clause</u>	<u>Paragraphs of the Report to which the Clause Relates</u>
1	2.13
2	2.13, 5.117
3	7.6
4	2.44, 2.52, 2.75, 2.77, 2.80, 2.88, 2.149, 5.26, 5.31, 5.103, 5.104, 5.107, 5.112
5	2.80, 2.85, 2.98
6	7.6
7	7.6
8	(Procedural only)
9	2.20, 2.112, 3.15, 6.34, 6.37
10	2.30, 3.22, 7.47, 7.48
11	4.47, 7.5
12	(Formal)
13	4.52
14	7.21
15	7.16
16	7.18
17	(Procedural only)
18	7.19
19	(Formal)
20	(Formal)
21	2.85, 6.25, 6.26
22	4.62, 4.63
23	6.28
24	2.111
25	2.111, 4.74
26	3.15, 3.22, 4.31, 4.32, 4.33

<u>Clause</u>	<u>Paragraphs of the Report to which the Clause Relates</u>
27	4.16, 4.31
28	5.45
29	(Facilitatory)
30	4.31
31	4.50, 4.52
32	5.14, 5.68, 5.103, 5.104
33	5.123, 5.129, 5.130
34	6.33, 7.50
35	(Formal)
36	(Formal/procedural)
37	2.30, 2.75, 4.98
38	2.30
39	2.30, 4.78
40	(Procedural/remedial)
41	4.131
42	4.131
43	2.130, 2.154
44	5.136
45	(Evidentiary)
46	(Preservation)
47	(Regulations)
<u>Schedule</u>	<u>Paragraphs of the Report to which the Clause Relates</u>
Libraries and Archives Act	2.13
Freedom of Information Legislation	5.55, 5.56, 5.103, 5.107
Transitional Provisions	5.116, 5.117, 5.118



