

ELECTRONIC VERSION

**PRESERVING THE PUBLIC RECORD: REVIEW OF
ARCHIVES LEGISLATION IN QUEENSLAND**

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ABSTRACT

In 1992, archives legislation was the subject of review by Queensland's Electoral and Administrative Review Commission (EARC). EARC's report and draft Archives Bill was subsequently considered by the Parliamentary Committee for Electoral and Administrative Review (PEARC), which tabled its report in Parliament on 27 November 1992. More recently, in November 1995, the Archives Bill 1995 was introduced into the Legislative Assembly. This Research Bulletin outlines the background to the existing Libraries and Archives Act 1988 (Qld) and its Regulations, and discusses the most recent proposals for changes to these legislative provisions. Key provisions of the Archives Bill 1995 are compared with the recommendations contained in the reports of both EARC and PEARC. Provisions of the Archives Bill 1995 are also compared with the provisions of archives legislation in other Australian jurisdictions, particularly the Commonwealth.

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1. INTRODUCTION

In 1990, the Electoral and Administrative Review Commission (EARC), in its review of Freedom of Information (FOI), identified deficiencies in the care and management of public records. It highlighted concerns about whether existing records management practices of government agencies would be equal to the demands that public access would place upon them. It acknowledged that FOI would place additional demands upon the State Archives.¹

As a result of this review, and of inadequacies in protecting public documents which EARC had identified during its earlier review of the Queensland Legislative Assembly's electoral system, EARC decided to review Queensland's archives legislation.² EARC reported to Parliament on its review of Archives Legislation on 18 June 1992. In its report, EARC included a draft Archives Bill (Appendix A) giving effect to its recommendations. The Parliamentary Committee for Electoral and Administrative Review (PEARC) subsequently considered EARC's report and its recommendations. PEARC's report on Archives Legislation was tabled in the Legislative Assembly on 27 November 1992. With three major exceptions (discussed below), PEARC endorsed the recommendations of EARC and the draft bill. By contrast with EARC, PEARC recommended:

- that the Bill include reference to the administrative, legal and evidential value of archives as well as their historical and heritage value;
- that the Bill not include a requirement that the proposed Archives Authority adopt a policy of decentralisation; and
- that the Bill allow for whole series, rather than document by document, access clearance.³

On 15 November 1995, the then Minister for Administrative Services, Hon. G.R. Milliner MLA, introduced the Archives Bill 1995 to the Queensland Legislative Assembly. Debate on the Bill was adjourned after the Minister's Second Reading Speech, on the motion of Mr Lingard MLA.

¹ Queensland. Electoral and Administrative Review Commission, *Report on Freedom of Information*, December 1990, Government Printer, Brisbane, pp.37-38.

² Queensland. Electoral and Administrative Review Commission, *Report on Review of Archives Legislation*, June 1992, pp.2-3.

³ Queensland. Parliamentary Committee for Electoral and Administrative Review, *Archives Legislation*, 1992, Appendix F.

Section 2 of this *Research Bulletin* briefly describes the background to the existing Queensland Act and regulations governing the administration and preservation of public records. Section 3 discusses in detail the most recent proposals for changes to the legislative provisions governing archives.

2. HISTORICAL BACKGROUND

The *Libraries Act 1943* (Qld) was assented to in 1943 yet Part IV of the Act which dealt with public records did not commence operation until July 1958, some 15 years later. The Government's explanation for postponing the implementation of this part was that, amongst other difficulties, there was no "... *suitable space in which to store and display*" the records⁴. The implementation of Part IV was finally spurred on by the visit in 1954 of Dr. T. R. Schellenburg, Director of Archival Management at the National Archives in Washington and the activities of local historians and academics.⁵ Robert Sharman was appointed State Archivist on 4 November 1959.⁶

The *Libraries Act 1943* made provision for public records to be deposited with the State Library for disposal. Their deposit and disposal was to be authorised by the State Librarian (s. 21(2) &(3)).

In September 1984 the Minister for Tourism, National Parks, Sport and the Arts, the Hon. Peter McKechnie MLA, established a Committee of Review of the State Library. This Committee recommended that the *Library Act 1943* and the *Oxley Memorial Library of Queensland Act 1946* be repealed and new legislation introduced. The *Library and Archives Act 1988* (L&A Act) was assented to and commenced operation on 21 April 1988. The L&A Act constituted the Library Board of Queensland as a statutory authority and set out its functions and powers. Its functions include the control, maintenance and management of the State Library of Queensland and the promotion and administration of archives in Queensland (ss.7-8, 21).

⁴ Reply by the Chief Secretary to a question put by Mr Lloyd Roberts, for Mr Fletcher, pursuant to notice, as to what steps had been taken in Queensland to preserve documents of historical value. Queensland. Journals of the Legislative Assembly, *Votes and Proceedings*, October 13, 1953, pp.212-213.

⁵ Queensland State Archives, *Queensland State Archives - The First Thirty Years*, State Library of Queensland, Brisbane, 1989, p.4.

⁶ Queensland was the last State to appoint a State Archivist. An official position was not created until September 1981.

3. QUEENSLAND'S ARCHIVES BILL 1995

The major purposes of the *Archives Bill 1995* (Qld) were to ensure:

- that public records of Queensland are created, managed, kept and preserved in a useable format;
- that a legislative framework be provided which ensured the independence of the State Archivist and Library Board of Queensland in making decisions regarding the disposal of records, and
- that public access to archival records is consistent with the principles of the *Freedom of Information Act 1992* (Qld) (FOI Act).⁷

The Bill proposed amendments to provisions of the *Library and Archives Act 1988* (L&A Act) and the *Freedom of Information Act 1992* (FOI Act) and various other Acts (**Clauses 49 and 50, Schedule 1**). The major amendment it proposed to the L&A Act was the repeal of Part V which relates to public records.

The remainder of this *Research Bulletin* discusses key provisions of the Archives Bill 1995 and compares them with the recommendations contained in the reports of both EARC and PEARC. Provisions of the Archives Bill are also compared with the provisions of other archives legislation, in particular the Commonwealth *Archives Act 1983*.

3.1. PART 2 - QUEENSLAND STATE ARCHIVIST AND ARCHIVES

3.1.1 The Evolving Role of Archives

Records of continuing value are called archives. Recent literature has challenged the traditional custodial approach to archives management. In Europe, archives institutions have been primarily concerned with custody of archival material but usually very old material. As Australia is a young nation, archives have developed a broader custodial role. Archives responsibilities have come to be seen as extending beyond the problems associated with dealing with records within their control to promoting efficient records administration and ensuring the safe-keeping of those that must be preserved as part of our cultural heritage. The role of archives has changed from one with a "... primarily 'cultural' orientation, to what is nowadays sometimes called 'the continuum' of (public) records administration, with its

⁷ Archives Bill 1995 (Qld), Second Reading Speech, Hon. G. R. Milliner MLA, *Queensland Parliamentary Debates*, 15 November 1995, pp.1105-6.

emphasis both on administrative efficiency and also the safe-keeping of a cultural end-product...’’⁸

The development of electronic records has had its own profound impact upon traditional records management and archival practices.

3.1.2. Separation of archives legislation from library legislation

Archives and libraries have quite different functions but for many years material deposited in archives was considered by many to be the same as library material. In 1956, David Macmillan, Archivist at the University of Sydney, commented that:

The confusion of the Library and Archives functions is bedevilling the organisation of proper Archives throughout the country ... Archives work requires a knowledge of techniques very different from those used by librarians. In Australia alone of advanced countries has there been no proper separation of library and archives, and archives have suffered accordingly.⁹

The administration of the Queensland State Archives was reviewed in 1985.¹⁰ In the *Report of the Committee of Review of the State Library of Queensland* the view was expressed that, although the Archives were housed in a separate location from the State Library, it had “... much in common with other sections of the State Library”.¹¹

The current L&A Act 1988 makes the position of the State Archivist subordinate to the State Librarian, the Library Board and the Minister. Section 51 of the Act provides that the State Archivist shall manage and supervise the operations of the Queensland State Archives subject to directions from the Minister, the Board and the Director and State Librarian.

⁸ I. Maclean, ‘Sir Harold White, 1905-1992’, *Archives and Manuscripts*, 20(2) November 1992, p.196, quoted in Sue McKemmish and Michael Piggott (ed) *The Records Continuum: Ian Maclean and Australian Archives’ First Fifty Years*, Ancora Press in association with Australian Archives, 1994, p.40.

⁹ David Macmillan, ‘Planned State Archives - Queensland’s Opportunity’, *Journal of the Royal Historical Society of Queensland*, 1956, pp.1145-1155, p.1148.

¹⁰ In the same year South Australia reviewed the administrative arrangements of its State archives institution. The upshot of this review was the establishment of a Public Record Office independent of the State Library. Queensland. Electoral and Administrative Review Commission, *Archives Legislation*, Issues Paper No.16, September 1991, p.12.

¹¹ Committee of Review of the State Library of Queensland, *Report*, Library Board of Queensland, Brisbane, 1985, para 5.1.14, quoted in EARC, Issues Paper, 1991, p.12.

In other Australian States, with the exception of Western Australia,¹² archives institutions are entirely separate from libraries.¹³ This separation is the result of a realisation that archives are of a different character and purpose from libraries. Commentators have for many years urged that archives be placed so that they can deal independently with agencies of government.¹⁴

In 1990 the Public Sector Management Commission (PSMC) reviewed the Department of the Premier, Economic and Trade Development. The PSMC recommended that the Queensland State Archives be independent of the Library Board of Queensland and be administered under its own legislation. It also recommended that the administrative responsibilities for archives be transferred to the Administrative Services Department.¹⁵ The transfer of responsibilities was effected in 1991.

For this reason EARC did not raise this issue for discussion purposes in its 1991 Issues Paper. However, the level of concern within the archival community was reflected in the fact that a number of submissions addressed it nevertheless. P.D. Wilson, State Archivist from 1972-86 expressed his view 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

¹² The Western Australian Commission on Government has issued a Discussion Paper entitled 'Independent Archives Authority' August 1995 to seek submissions. Amongst issues for discussion is the proposal for an independent archives authority. Under the *Library Board of Western Australia Act 1951*, the Director of the Public Records Office reports through the State Librarian to the Library Board which in turn reports to the Minister.

¹³ Archives in Australia are administered under the following legislative instruments: Commonwealth: *Archives Act 1983*; New South Wales: *Archives Act 1960*; Victoria: *Public Records Act 1973*; Tasmania: *Archives Act 1983*; South Australia: *Libraries Act 1982*; Western Australia: *Library Board of Western Australia Act 1951*.

¹⁴ T. R. Schellenberg, *Modern Archives - Principles and Techniques*, F. W. Cheshire, Melbourne, 1956, pp.120-121. See further W. Boyd Rayward (ed), *Australian Library History in Context*, Papers of the Third Forum on Australian Library History, University of New South Wales, 17 and 18 July 1987, University of New South Wales, School of Librarianship, Sydney, 1988, pp.33-34.

¹⁵ EARC, Issues Paper, 1991, p.7.

*yawning gap between what librarians consider archives are, and what purposes they serve, and what archivists consider their role in administrative life to be.*¹⁶

EARC recommended that archives legislation be separated from libraries legislation.¹⁷

3.1.3. Decentralisation of state archives

EARC recommended that the new archives legislation provide for the establishment of regional repositories.¹⁸ Many submissions in response to the Issues Paper supported decentralisation. However, PEARC recommended that the requirement in Clause 21(1) of EARC's draft Bill (that the proposed Archives Authority **must** adopt a policy of decentralisation) should be deleted. In his submission to PEARC, Mr Ross Pitt, Deputy Director-General, Services, Administrative Services Department, commented that EARC's decentralisation policy could not be justified on economic grounds. Even where support for the concept of decentralisation was forthcoming, concerns were expressed that, in the absence of increased funding, it would place an enormous burden upon the proposed Archives Authority.¹⁹ The 1995 Bill did not contain any provision for establishment of regional repositories.

3.1.4. An archives authority

In New South Wales, the *Archives Act 1960* establishes an Archives Authority as an independent statutory corporation with management powers. The membership of the Authority consists of nine members and must include a person nominated by the President of the Legislative Council and the Speaker of the Legislative Assembly, a person nominated by the Chief Justice of the Supreme Court, and a person nominated by the Premier. The remaining six members are nominated by the responsible Minister (ss.3 & 4).

¹⁶ Queensland. Electoral and Administrative Review Commission, *Archives Legislation*, Public Submissions, December 1991, Submission No.14, p 3.

¹⁷ EARC, *Report*, 1992, p.13.

¹⁸ EARC, *Report*, 1992, pp. 91-92.

¹⁹ Queensland, PEARC, 1992, pp.12-14.

EARC/PEARC

The EARC Issues Paper identified two significant consequences that flow if such an authority was to be established:

- As the Authority is the final decision making power regarding what records should be retained, it acts as an “... *insulator against any political or administrative pressure to approve the destruction of records*”.
- Appointments to the Authority can be made to “... *reflect the varied interests in preserving archives, in managing public records and in facilitating public sector efficiency and profitability*”.²⁰

Appointments to an Authority of those with expertise in relevant fields would enhance the overall operation of the State Archives and, most critically, separate decision-making from political interests.

The Draft Archives Bill attached to the EARC Report contained provisions establishing a Queensland Archives Authority.²¹ The proposed Authority was to have functions and powers of training, guidance and enforcement in relation to records management, provision of public access to records of a certain age held by the Archives Authority and collection and preservation of records having value as historical records: Clauses 9 & 10.

EARC’s Draft Bill provided for the Archives Authority to consist of three members: a chairperson appointed by the Governor in Council, the State Librarian and the State Archivist: Clause 7.

Proposed legislation

The 1995 Archives Bill did not provide for the establishment of an Archives Authority. Instead the State Archives is to be invested with certain extra powers and the Library Board continues to have a supervisory role (see 3.2 for a discussion of the role of the Library Board).

²⁰ EARC, Issues Paper, 1991, p.61.

²¹ EARC, *Report*, 1992, Appendix A, Clause 6.

3.1.5. Function and powers

Current legislation

Sections 21 and 22 of the L&A Act set out the functions and powers of the Library Board of Queensland. As the State Archives was considered to occupy a subordinate position to the State Library, very little attention is given to archival requirements. The provisions are dominated by library administrative functions and powers. In contrast, the provisions of specific archives legislation of other jurisdictions, notably the Commonwealth *Archives Act 1983*, were drafted after careful consideration of the powers necessary for the effective operation of an archives authority.²²

EARC/PEARC

EARC noted that if archives legislation was separated from library legislation the functions of any Archives Authority would need to be clearly defined. EARC recommended that:

- (a) archives legislation set the functions of the recommended Archives Authority in wide terms similar to those in s.5 of the *Archives Act 1983* (Cth);
- (b) archives legislation confer such powers as set out in s.6 of the *Archives Act 1983* (Cth) 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.²³ (Sections 5 and 6 of the *Archives Act 1983* (Cth) are set out in full in Appendix A.)

Proposed legislation

Clauses 11 and 12 of the Archives Bill 1995 set out the functions and powers of the State Archives. The functions included:

- promoting effective management of records;
- evaluating the administrative, evidential, heritage and legal significance of records to ensure their preservation in useable format;
- authorising disposal;

²² EARC, *Report*, 1992, pp.14-15.

²³ EARC, *Report*, 1992, p.16.

- managing, keeping and preserving records for public authorities and other entities;
- providing public access to public records, and
- conducting research and advising about making, managing, keeping and preserving records.

A catch-all provision was included to cover any other activities that promote these functions: **Clause 11(i)**. The reference in the second listed function (**Clause 11 (b)**) to evaluation of records of “*administrative, evidential, heritage and legal significance*” would appear to give effect to the PEARC recommendation that reference to these values be included, in addition to historical and heritage values.

The powers included:

- establishing and managing any necessary facilities;
- making copies or publishing records of significance;
- acquiring records, and
- advising authorities about making and managing public records.

3.1.6. Archives and public records management

Current legislation

Section 52 of the L&A Act imposes a duty upon the chief officer of a public authority to ensure that “*complete and accurate records of the activities of the public authority*” are kept. There are no clear-cut statutory requirements that public authorities keep specific records.²⁴ The disposal of public records may only occur with the authorisation of the State Archivist or a delegated officer: s.55.

In recent years commentators have challenged traditional views that archivists are concerned with records only after they have gained custody. It is now recognised that archival activities are integrally linked to records management programs. With developments in technology the quantity of records kept has dramatically increased. The ever increasing volume of records, modern information creation and storage devices and the manner and format in which records are kept, makes early identification of records which are to be retained as archives, essential.²⁵ If this

²⁴ EARC, *Report*, 1992, p.42.

²⁵ James G. Bradsher, *Managing Archives and Archival Institutions*, Mansell, London 1988, p.11.

process is delayed, impermanent and different record formats and the volume of records to be appraised for archival value, may make this task almost impossible.

EARC/PEARC

For the purposes of effective public administration, public records must be effectively managed from the time of their creation, throughout their active life and at the time of their disposition. Effective records management is integral to openness and accountability of government. EARC stated that:

*Poor record keeping, and the unauthorised or unlawful destruction of records, impede the identification and preservation of public records. Poor record keeping also impedes the provision of access to records under FOI legislation, the investigation of administrative actions by the Ombudsman, the review of the merits of administrative decisions, public sector auditing and investigation by independent statutory bodies such as the Criminal Justice Commission.*²⁶

At the public seminar conducted by EARC on the archives legislation Mr Chris Hurley, Senior Archivist, Public Records Office, Victoria said in relation to the developing regulatory role of archives:

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.

Later in his speech he commented:

I don't believe that any archivist in this country would feel justified when exercising its power to approve or forbid the destruction of records in wholly disregarding any other public interest considerations apart from the needs of historical research, and I would need convincing to persuade myself that a court would take a different view of the archives responsibilities. Archives laws provide the only general statutory regulation of which records are kept and which are destroyed.

Other mechanisms such as freedom of information, the Ombudsman, the courts, inquiries, reviews, these are all limited and circumscribed in their effect by what records in fact exist when they become involved in the process. Their involvement very often has to be invoked by an interested party. They're not in a position

²⁶ EARC, Issues Paper, 1991, p.28.

*usually to intervene before the fact. No prior decision to destroy or alter relevant records can be overturned or ameliorated by the operation of those mechanisms.*²⁷

The Australian Society of Archivists stated in their submission that:

*Archives are records which have been selected for their continuing administrative value on the basis of their evidential and informational content. Future historical research needs are only one of a number of considerations in this appraisal process.*²⁸

EARC recommended that archives legislation authorise the proposed Archives Authority to consider accountability as well as historical value when establishing records management standards and authorising disposal of public records.²⁹

EARC further recommended that a provision similar to Section 52 of the L&A Act be included in new legislation and that clarification of the type of records that must be kept be provided by **records management standards**.³⁰ Many other Australian jurisdictions have introduced records management standards. The Public Records Office of Victoria introduced *Guidelines for the Storage of Public Records* in 1982.

The *Public Records Act 1973* (Vic) requires the Keeper of Public Records to establish standards for management of public records particularly in relation to their creation, maintenance and security; selection of those suitable for preservation; transfer procedures to the Public Records Office and disposal.³¹

Proposed legislation

Clause 13 of the 1995 Archives Bill authorised the State Archivist to make standards about the “*making, managing, keeping and preserving of public records*”. When making the standards the State archivist was to have regard to “*any law or convention under which a public authority is accountable*”. The standards may relate to:

- what public records should be made and kept;
- the storage of public records, and

²⁷ Queensland. Electoral and Administrative Review Commission, *Record of Proceedings*, Public Seminar on Archives Legislation, December 1991, pp.40 and 43.

²⁸ EARC, Public Submissions, 1991, Submission No.23, p.5.

²⁹ EARC, *Report*, 1992, p.38.

³⁰ EARC, *Report*, 1992, pp.42-43.

³¹ *Public Records Act 1973* (Vic), s.12.

- security of public records.

Clause 14 specified that every public authority must comply with these standards.

3.1.7. Destruction of Public Records

Current Legislation

Under the L&A Act, the State Archivist has responsibility for authorising the destruction of public records: s.55. However, in exercising this responsibility, the State Archivist is subject to direction by others: s.51(2)(b), raising concerns about the possibility of political pressure being brought to bear upon the State Archivist in the exercise of this responsibility.

In Tasmania, the State Archivist, in carrying out the Archivist's responsibilities under the Act, is subject to the control and direction of the Secretary of the Department and indirectly through that person, the Minister. However, in relation to the exercise of his powers regarding destruction and disposal of records, the State Archivist is entirely independent.³² The *Archives Act 1983* (Cth) provides the Archivist with even greater independence and does not contain any provision for ministerial direction where the legislation has left the matter to the discretion of the Australian Archives. In NSW, the legislation establishes an Archives Authority as a statutory corporation which exercises an unfettered discretion as to the disposal of public records.³³

EARC/PEARC

Submissions to EARC on this issue were clearly in favour of ensuring that this function should be carried out independently and without direction.

The Australian Society of Archivists stated in their submission that:

*The responsibility for drawing up destruction schedules lies with the creating body in consultation with the state archival authority. Ultimate responsibility with regard to all aspects of the disposal of public records lies with the archival authority.*³⁴

³² *Archives Act 1983* (Tas), ss.8(7) and 8(8).

³³ *Archives Act 1960* (NSW), ss.3 and 15.

³⁴ EARC, Public Submissions, 1991, Submission No.23, p.6.

Proposed legislation

Clause 16 of the 1995 Archives Bill went some way towards ensuring the independence of the State Archivist in relation to disposal decisions. (The independence of the State Archivist is discussed further at 3.2 in relation to the Library Board.) Under this section it is made clear that neither the State Archivist nor staff of the State Archives were to be subject to any control or direction of a Minister or department in respect of disposal decisions. However, the State Archivist may only dispose or authorise disposal of a public record after approval has been granted by the Library Board: **Clause 20**. **Clause 21** ensured the Library Board's independence from control or direction from a Minister or Department when exercising its functions under the Act.

Clause 22 provided an avenue for review by a public authority of a decision of the State Archivist. Where the State Archivist refused to approve the disposal of particular records, a public authority could make an application to the Library Board, within 14 days of notification of the decision, for a review of that decision. The State Archivist will be required to provide the Library Board with written reasons for refusing to approve the disposal of the public record (**Clause 23**).

3.1.8 Care of public records by other agencies

Currently public records may be disposed of, in preference to their destruction, by way of transfer.³⁵ Public records that are not considered worthy to be retained as archives can be transferred to private individuals or other institutions such as an Historical Society: s.55(8) L&A Act.

EARC/PEARC

EARC identified various reasons why an archives authority would deposit archives with another archives institution, being:

- better storage facilities
- appropriate in view of administrative changes
- remote locations where it is not able to provide facilities
- in-house archives connected to the creator of the records.³⁶

³⁵ This is rarely done in practice and will only be permitted if the records can be transferred to a responsible agency that can ensure proper access to and storage of records.

³⁶ EARC, *Report*, June 1992, p.51.

In Australia and overseas many large public authorities have their own in-house archives. These archives employ professional and experienced staff who develop expertise in relation to the records of their institutions. In addition to providing a valuable resource for their institutions, they provide a valuable resource for researchers. In Queensland, institutions such as the University of Queensland have their own archives. The University stated in its submission that:

... it believes itself to be competent to have permanent custody of its own records and of archival material it legitimately acquires from external sources and to make appropriate decisions about the appraisal and disposal of records and other archival material ... If it be accepted that the University is capable of proper custodianships of its records, 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.³⁷

The Australian Society of Archivists noted in its submission to EARC that public records should be able to be placed in the care of other institutions but that the archives authority should always retain ultimate control:

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 lodgment 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.³⁸

In response to submissions, EARC recommended that while public records should be permitted to be deposited other than with the proposed Archives Authority, the Archives Authority should be able to retrieve these records and that they should be available for access in the same way as all other archives. EARC further recommended that the sale of public records should not be permitted under new legislation.³⁹

³⁷ EARC, Public Submissions, 1991, Submission No.21, p.2.

³⁸ EARC, Public Submissions, 1991, Submission No.23, p.6.

³⁹ EARC, *Report*, 1992, pp.52-53.

Proposed legislation

Clause 15 provided that the State Archivist may make arrangements with public authorities and other entities for storage of public records in places other than the State Archives. The 1995 Bill made no provision for the State Archivist to retrieve records considered to be at risk. However, under the standard-making provisions the State Archivist could regulate the management and storage of such records. **Clause 17** allowed the State Archivist to delegate the Archivist's powers under the Act to Archives' staff or an officer or employee of a public authority.

There is no provision in the 1995 Bill which specifically prohibited the sale of records. **Clause 29** did however, provide that a person must not unlawfully dispose of public records (see discussion of ownership of public records at 3.3.3).

3.2. PART 3 - THE LIBRARY BOARD

The Library Board currently falls under the administrative responsibility of the Minister for the Arts.

Clause 19 of the 1995 Bill added to the functions of the Library Board which are contained in the L&A Act. This clause stated that the functions of the library board include considering recommendations of the State Archivist to dispose of records and reviewing decisions of the State Archivist not to dispose of certain records. **Clause 20** provided that the State Archivist may only dispose, or authorise disposal, with approval of the Library Board. The Bill provided for a direct relationship between the Library Board and the State Archivist by requiring the State Archivist to report to the Library Board to gain approval for disposal decisions.

The relationship between the State Archivist and the Library Board would not be substantially different under the provisions of the 1995 Bill from the existing situation, despite the original recommendations of the Public Sector Management Commission Review and the subsequent removal of administrative responsibility of Queensland State Archives from the Department of the Premier, Economic and Trade Development to the Administrative Services Department.

3.3. PART 4 - PUBLIC RECORDS

3.3.1. Definition of public records

What is a 'record'?

Traditionally Government actions were evidenced by paper records. However, increasingly records are retained in electronic format. The type of records transferred to the State Archives include:

- manuscripts
- printed material ie. photographs
- cartographic and architectural records (ie maps and plans)
- audio-visual materials (ie. sound recordings)
- machine readable records (ie. magnetic tapes or disks).

Current Legislation

There is no definition provided in the L&A Act of the word 'records'. Where a word is not defined it will usually be interpreted by the Courts to have its ordinary meaning.⁴⁰ This ordinary meaning may not be considered broad enough to include records or objects that a government agency may wish to have retained as archives or records stored by the latest electronic means.

EARC/PEARC

The consensus amongst the submissions made in response to the EARC discussion paper was that the definition of 'record' should be as wide as possible so as to encompass record formats derived from current and future technological advances. EARC expressed a view that the definition should be wide enough to allow for technological advances but not be so wide as to cause uncertainty.⁴¹

⁴⁰ D.J. Gifford and K.H. Gifford, 'The plain meaning rule', in *How to Understand an Act of Parliament*, 8th edn, Law Book Company, 1994, pp.92-94.

⁴¹ EARC, *Report*, 1992, p.17.

EARC recommended that the new archives legislation contain definitions similar to the definition of “**record**” in s.3(1) of the *Archives Act 1983* (Tas) and that it should include a non-exhaustive list of examples of records.⁴²

Proposed Legislation

Schedule 2 of the 1995 Bill contained a dictionary of terms used in the Bill. The term “**record**” was defined in terms similar to the equivalent definition contained in the Tasmanian legislation. The definition did not include a list of examples.

What is a “public” record?

To identify those records that are “public”, archives legislation in other jurisdictions has usually adopted one of the following approaches, ie. a definition based on either:

- the purpose or provenance of the records, or
- the custody or ownership of records.⁴³

Current legislation

The L&A Act uses the second approach.⁴⁴ In s.5(2) “**public records**” is stated to mean the “*documentary, photographic, electronic, mechanical or other records of a public authority*”. The definition of “**public authority**” includes “*an office, department, sub-department, board, commission, institution or instrumentality of the State*” and specifically includes a Court, a Commission of Inquiry, a Local Authority and a statutory body: s.5(1).

The remainder of this section expands upon the discussion of the definitions of “public record” and “public authority”. Particular emphasis is placed upon the status of records of the Legislative Assembly and the Governor, and Ministers, under the existing and the proposed legislation.

Records of the Legislative Assembly and the Governor

⁴² Under the *Archives Act 1983* (Tas), “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”.

⁴³ EARC, Issues Paper, 1991, p.14.

⁴⁴ EARC, Issues Paper, 1991, p.14.

The definition of “**public authority**” contained in the L&A Act does not include the records of the Legislative Assembly or the Governor acting in an official capacity.⁴⁵ It was noted by EARC in the Issues Paper that these bodies are considered public bodies, as are the Courts. However, EARC recognised that an executive body such as the State Archives being responsible for records of these bodies might raise concerns about infringement of the doctrine of separation of powers (meaning the separation of the executive, the courts and the legislature). Nevertheless, public interest and administrative ease would best be served if the records of all three institutions were the responsibility of an independent archives authority.⁴⁶

The Criminal Justice Commission referred to the separation of powers issue in its submission in response to the EARC Issues Paper:

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.⁴⁷

EARC/PEARC

EARC recommended that new archives legislation contain a definition of “public record” similar to that of “**crown record**” contained in s.3(1) of the *Archives Act 1983* (Tas.). EARC further recommended that the new legislation contain a definition of “**public authority**” similar to the existing definition in s.5(1) of the L&A Act but also including the Parliament, the Governor in his official capacity and bodies contained in Clause 9 of the then proposed FOI Bill 1991 (Qld).⁴⁸

⁴⁵ The State Archives has in fact taken custody of the Governor’s records for some years. These records are widely used by researchers and have significant heritage value.

⁴⁶ EARC, Issues Paper, 1991, p.16.

⁴⁷ EARC, Public Submissions, 1991, Submission No.13, p.3.

⁴⁸ EARC, *Report*, June 1992, p.24.

Proposed legislation

Schedule 2 of the 1995 Bill contained a definition of “**public record**” similar to the equivalent definition contained in the Tasmanian legislation. A definition of “**public authority**” is included in **Schedule 2** that included the Governor in an official capacity, the Executive Council, the Legislative Assembly, a Minister, the registrar or other proper officer of a court, a commission of inquiry, a department, an inter-governmental authority, a local government and entities identified as in the FOI Act Section 9.⁴⁹

Clause 5, however, stated that the Act would not apply to all public records. The Act would not apply to correspondence between the Governor and the Sovereign, the Governor and the Governor-General, or the Governor and the Governor of another State. Certain records of Government Owned Corporations were also exempted from the operation of the Act. These are records that relate to “**excluded activities**”, as stipulated in various Acts referred to in the FOI Act.⁵⁰ These “excluded activities” are those commercial activities or community service obligations prescribed by regulation.⁵¹

Records of a Minister

The records in a Minister’s office may be divided into four categories:

- departmental
- cabinet document
- ministerial
- personal or political.⁵²

⁴⁹ These included entities: established for a public purpose under an Act or created by the Governor in Council or a Minister; supported by government funds or established under an Act, and declared by regulation to be a public authority for the purposes of the Act; over which government is in a position to exercise control and declared under regulation to be a public authority for the purposes of the Act; persons holding an office declared under a regulation to be a public authority for the Act.

⁵⁰ *Freedom of Information Act 1992* (Qld), s.11A, schedule 2.

⁵¹ *Queensland Investment Corporation Act 1991* (Qld), s.37(1); *Queensland Industry Development Corporation Act 1994* (Qld), s.35(1); *Electricity Act 1994* (Qld), s.256(1).

⁵² EARC, Issues Paper, 1991, p.20.

Current legislation

The first two categories come within the scope of the provisions of the current L&A Act as they fall within the definition of “**public records**”. The last two categories do not. Ideally all records of a Minister should remain together so that they can be studied in their context.⁵³

Under the *Archives Act 1983* (Cth) the Commonwealth Archives may enter into arrangements with individuals to accept their records on certain conditions. These conditions may relate to the extent of access to be given in relation to these records (s.6(2)).

The Library Board of Queensland outlined in its submission the current difficulties and concerns regarding the records of Ministers:

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 so with as he or she pleased. In terms of 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.⁵⁴

EARC/PEARC

In its report EARC recommended in relation to the records of Ministers that :

- archives legislation include provisions for collection of Ministers’ records other than those of a personal or political nature, and
- a provision be included allowing the Archives Authority to enter into special arrangements with the Minister regarding personal and political records and

⁵³ EARC, Issues Paper, 1991, p.20. It should be noted that, as with Governors’ records, Ministers have for some years deposited ministerial records with the State Archives on an informal basis.

⁵⁴ EARC, Public Submissions, 1991, Submission No.15, p.8.

that any such arrangement so far as it precluded access to the records cease to have effect 75 years after the death of the Minister.⁵⁵

Proposed legislation

The definition of “**public record**” in **Schedule 2** of the 1995 Archives Bill included a Ministerial record. “**Ministerial record**” was in turn defined to mean:

... a record in the possession or under the control of a Minister that relates to the affairs of another public authority, and includes-

- a) a record to which the Minister is entitled to access; and*
- b) a record in the possession or under the control of a member of the staff of, or consultant to, the Minister in the person’s capacity as a staff member or consultant.*

There was no provision in the 1995 Archives Bill similar to that contained in s.6(2) of the *Archives Act 1983* (Cth) regarding special arrangements for deposit of private records.⁵⁶

3.3.2. When to Transfer to Archives

If public records are to be open to public access at the end of the restricted period of 30 years it is necessary for them to be transferred to State Archives some time before the end of this period so that they can be made ready for access. Under the *Archives Act 1983* (Cth), Commonwealth institutions are required to transfer records which are no longer active to the Archives once they are 25 years old (s.27).

EARC/PEARC

EARC recommended that the new legislation should require public records be transferred to the Archives Authority after 25 years from the date of their creation. EARC considered that this would allow the public authority sufficient time in which to assess and certify that the documents should not be made available for access.⁵⁷ This also allows the Archives time in which to process and arrange records before they are available for access.

⁵⁵ EARC, *Report*, 1992, p.35.

⁵⁶ It should be noted that the John Oxley Library is quite active in collecting the private records of Ministers.

⁵⁷ EARC, *Report*, 1992, pp.68-69.

Proposed Legislation

Clause 25 of the 1995 Bill required a public authority to advise the State Archivist of any records in the public authority's possession that are more than 25 years old. The State Archivist was given the option of requiring the records to be transferred to the Archives or giving directions about how they should be stored. The clause provided the State Archivist with some flexibility in this regard. **Clause 25(4)** provided that once a record over 25 years old is in the custody of the Archives it can only be removed if the State Archivist is satisfied that the need for it is reasonable or there is some other legitimate reason. This afforded further protection to the record's physical and intellectual integrity by preventing unnecessary or illegitimate access.

Clause 26 made provision for a public authority to give records, less than 25 years of age, which it no longer needs, into the custody of the State Archives. The State Archivist was required to ensure they are readily available if needed by the public authority.

Difficulties often arise as to what body has the responsibility for records when an agency ceases to exist. If no agency takes responsibility for the records of a defunct agency there is no one responsible for storage and retrieval costs or access enquiries. **Clause 28** endeavoured to ensure that public records remain with the authority which created or used the records and its successors.

3.3.3. Ownership of Public Records

In certain European jurisdictions public records are owned by the government and cannot lawfully be removed from government custody or sold. No common law jurisdictions appear to have restricted the transfer of public records in this way. Most submissions addressing this issue were in favour of including provisions in the new legislation making public records inalienable. EARC expressed a view that inalienability "... would reinforce provisions seeking to preserve public records and to prevent their unlawful destruction or loss out of State custody".⁵⁸

Clause 30 of the 1995 Archives Bill provided that ownership of public records vests in the State and could not be alienated from the State.

⁵⁸ EARC, *Report*, 1992, p.27.

3.4. PART 5 - ACCESS TO PUBLIC RECORDS

3.4.1. Archival Period

The archival period for public records is a specified period in which they are not accessible to the public under archives legislative provisions.⁵⁹ The period after this specified period has expired is called the open access period. The archival period under the Commonwealth legislation is 30 years: Archives Act 1983 (Cth), s.3(7). This 30 year period has been adopted in most Commonwealth countries. This period is considered appropriate on the basis that after this time most documents are suitable to be released and this can be done upon the examination of a small sample. Under the Commonwealth Archives Act the archival period runs from the end of the calendar year during which the record comes into existence: s.3(7).

Current legislation

Currently in Queensland, public records are open to access 30 years from the date of the last dealing of the record or 65 years in relation to personal or staff files: r.22 Libraries and Archives Regulations 1990. The term “last dealing” is not defined by the L&A Act or regulations. This has raised some concern that if interpreted loosely to include **any** action on the file then even a FOI application and subsequent dealing with the file could have the effect of extending the archival period.⁶⁰

EARC/PEARC

In its submission to EARC, the Australian Society of Archivists expressed the view that the archival period could be 25 years or less for some classes of documents.⁶¹

EARC recommended that the archives legislation provide for the archival period to run from the date of creation of the record and that there be a 30 year period of restricted access.⁶²

⁵⁹ The records are available for access under FOI provisions.

⁶⁰ EARC, Issues Paper, 1991, p.50.

⁶¹ EARC, Public Submissions, 1991, Submission No.23, p.8. In Tasmania the archival period is 25 years: s.15(7).

⁶² EARC, *Report*, 1992, pp.66-67.

Proposed legislation

Clause 31 of the 1995 Bill provided a meaning of “**restricted access period**”. In relation to records not requiring some special exemption for reasons such as public safety, law enforcement or preservation of confidentiality,⁶³ the period was 30 years. For those documents containing potentially exempt matters the period was 65 years.

3.4.2. Integrating Rights of Access with FOI Legislation

Under current FOI legislation in Queensland there is a statutory right of access to public records when a request by an applicant is submitted, subject to exemptions necessary to protect public and private interests.⁶⁴ The EARC Issues Paper sought submissions as to whether archives legislation should give a complementary right of access to non-current records.⁶⁵

Current legislation

Currently in Queensland there are a number of legislative barriers for members of the public seeking access to older records. Regulation 21 of the L&A Act allows the State Archivist to permit access to those public records in its possession subject to restrictions or conditions imposed by the Chief Officer regarding access and inspection of public records of that authority. Accordingly a member requesting access will only succeed if:

- no access restrictions have been imposed by the Chief Officer of the public authority;
- the State Archivist exercises his discretion in their favour, and
- the records are in the possession of the State Archives.

The State Archivist may request a Chief Officer to review or amend a prohibition or condition on access. If a dispute arises regarding such a request the State Archivist has recourse to the Minister who will give such directions as are considered appropriate (rr.24 &25 L&A Regs).

⁶³ Exempt material mentioned under ss.42, 43, 44 or 46 of the *Freedom of Information Act 1992* (Qld).

⁶⁴ *Freedom of Information Act 1992* (Qld), s.5.

⁶⁵ EARC, Issues Paper, 1991, p.44.

EARC/PEARC

EARC expressed the view that it would be in the public interest that **all** public records, with some exceptions, be open for access at the end of the archival period. EARC recommended that archives legislation provide rights of access to all public records irrespective of their location.⁶⁶

Proposed legislation

The provisions contained in the 1995 Bill regarding public access were drafted to accommodate the different access approaches provided for under FOI and archives legislation and attempted to strike a reasonable balance between the competing demands of rights of access and privacy.

Clause 7 provided that a regulation may exempt particular records or types of public records from the operation of Part 5 of the Bill. This clause was designed to provide a mechanism whereby those agencies, who feel that certain records⁶⁷ containing information of a sensitive nature are not sufficiently protected, can extend protection whilst requiring that the extension of protection be publicly justified. The Bill did not list exemptions as this would not allow for the flexibility needed to cope with changing conditions.⁶⁸

3.4.3 Rights of access to all public records?

EARC/PEARC

In relation to the issue of access EARC recommended that there should be a right of access to all public records subject to the 30 year restricted access period which would run from the time of the creation of the record. At the end of the restricted access period all records apart from those exempt records would be accessible. It recommended that the exempt records would be those that had been individually certified as exempt by the public authority transferring the records to the Archives Authority.⁶⁹

⁶⁶ EARC, *Report*, 1992, pp.64-65.

⁶⁷ For example medical and family records.

⁶⁸ Archives Bill 1995, *Explanatory Notes*, p.2.

⁶⁹ EARC, *Report*, 1992, pp.63-82.

Submissions to EARC stressed that classification of exempt documents should not proceed on a document by document basis. The arguments against this approach were based on the following factors:

- this process is very time and resource consuming;
- most records over 30 years old are low risk;
- a person can still apply for access to specific records that remain closed for longer than 30 years, and
- the system would result in vastly increased administration costs and long delays.⁷⁰

PEARC, on consideration of these submissions, recommended that the requirement for document by document exemption be replaced by a provision for the proposed Archives Authority to classify records as high risk or low risk on a series basis.⁷¹ Access to high risk documents was to be governed by FOI principles on a document by document basis.⁷²

Proposed legislation

Part 5 of the 1995 Archives Bill dealt with access to public records. **Clause 33** provided that once the restricted access period ended then the State Archivist must allow any applicant access. If the restricted access period has not ended access would only be permitted in the following circumstances:

- access is obtained under FOI legislation;
- the State Archivist and the public authority agree that the record may be classified as one to which unrestricted access is allowed.

Regardless of whether or not the restricted access period has come to an end the State Archivist may refuse access if:

- access would be detrimental to the preservation of the record
- the record is reasonably available for purchase

⁷⁰ See the submissions to PEARC by Mr Ross Pitt, Deputy Director-General of the Administrative Services Department, the Library Board of Queensland and the Australian Society of Archivists Incorporated. Queensland, PEARC, 1992, pp.16-18.

⁷¹ “Series” is an archival term which refers to records that have the same provenance and belong together because: they are part of an identifiable filing system; have been kept together for some purpose; have the same format, or relate to the same function.

⁷² Queensland, PEARC, 1992, p.19.

This clause differed somewhat from the clause in the EARC draft Archives Bill. The EARC clause provided that during the period of restricted access the record was not to be available for access unless obtained under FOI or in the custody of the proposed State Archives Authority and classified by the Authority as one to which unrestricted access should be allowed.⁷³ The requirement for custody was deleted to prevent a public authority from refusing access if they retain possession of the record where access would be available if the record had been transferred to the State Archives.

EARC's Draft Bill did not contain any provision for an Archives Authority to refuse access as did **Clause 33**. **Clause 34** dealt with forms of access. **Clause 34 (5)** provided that access must be given in the way that an applicant requests. However, the State Archivist may give access in a different way if the particular form of access requested would be detrimental to the preservation of the record. (**Clause 34(6)**).⁷⁴ Presumably a decision of the State Archivist, pursuant to **Clause 33**, to refuse any form of access, would be reviewable under the *Judicial Review Act 1991*(Qld).

3.5. PART 6 - POWERS OF ENFORCEMENT

3.5.1. Powers of entry and inspection

Current legislation

Currently the State Archivist or an authorised officer has rights of entry and inspection to ensure that public records are preserved and protected: L&A Act ss. 53(1) & 55(2).

EARC/PEARC

Submissions to EARC regarding the issue were, as would be expected, in favour of the State Archivist having a right of inspection. Some of the submissions were in favour of this right extending to inspection of the records of Parliament and the courts. EARC was not in favour of the right of full and open inspection applying to the Parliament and courts. EARC stated:

⁷³ Clause 32 of EARC's draft Archives Bill.

⁷⁴ In comparison, under s.11(2) of the *Public Records Act 1973* (Vic), the Keeper of Public Records may withhold the record from inspection if this would prejudice its preservation. However, under Section 11(3), if access is withheld under 11(2), the Keeper must provide a copy if in his opinion this will not be detrimental to the record.

*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.*⁷⁵

Proposed legislation

Clauses 38 and 39 of the 1995 Archives Bill granted power of entry to an authorised officer. An authorised officer would be entitled to full and free access, at all reasonable times, to all public records in a public authority's possession. It could be argued that this clause was necessary in order to enable the State Archivist to make an informed decision regarding disposal of records. Disposal decisions cannot be made unless the Archivist has a proper understanding of the type of records kept and the functions which they serve. **Clause 39** required officers responsible for records management to comply with requests to:

- produce records or samples for inspection;
- provide access to records, and
- allow an authorised officer to examine the systems for making, keeping and preserving records.

Pursuant to **Clause 39**, in order to exercise this power in relation to the Governor's official residence, the Legislative Assembly or a court, agreement would have to be obtained from the Governor's secretary, the Clerk of the Legislative Assembly, or the registrar or other appropriate officer of the Court.

3.5.2. Powers of Recovery

Current legislation

Section 56 of the L&A Act currently provides for recovery of public records within Queensland. It was recommended that new legislation contain a similar provision.

Proposed legislation

Clauses 41 and 42 of the 1995 Bill provided specific powers regarding the recovery of public records. If the State Archivist believes that a person has unlawful

⁷⁵ EARC, *Report*, 1992, p.55.

possession of public records, then written notice may be given requiring the person to give the records to the person specified in the notice. If the person fails to comply with the notice, the State Archivist may make application to a Magistrates court for an order that they comply with the notice. This power to seek recovery of public records would apply also to records that are the subject of a reciprocal agreement with an archives authority within another state pursuant to **Clause 42**.

3.5.3. Failure of public servants to comply with duties

Current legislation

Currently under the L&A Act, a person who fails to carry out a duty imposed upon him under the Act commits an offence: s.52(3).

EARC/PEARC

Submissions to EARC expressed differing views as to whether failure to meet requirements of the Act should be an offence. Some were of the view that neglect of obligations under the legislation should not amount to an offence whereas others were firmly of the view that it should.

According to the coordinated response received from the Queensland Public Service, one department suggested that where non-compliance was unintentional it would be more constructive to initiate a training and counselling programme.⁷⁶

The Criminal Justice Commission expressed the view 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.*⁷⁷

The Australian Society of Archivists was of the view that the current situation was reasonable insofar as the principal officer should be accountable for failure to meet

⁷⁶ EARC, Public Submissions, 1991, Submission No.20, p.10.

⁷⁷ EARC, Public Submissions, 1991, Submission No.13, p.5.

obligations under the Act but did not believe that neglect to do so should be an offence.⁷⁸

EARC agreed with the submissions of the Criminal Justice Commission and the Australian Society of Archivists. It recommended that failure by an officer be treated either as an offence or breach of discipline. EARC further recommended that where an officer was considered to have committed an offence only that person should be so charged and not the executive officer.⁷⁹

Proposed Legislation

Clause 29 of the 1995 Bill provided that a person must not unlawfully dispose of public records. The maximum penalty for such an offence was to be 165 penalty units (ie \$12,375).

3.6. PART 8 - PROTECTION OF STAFF OF THE QUEENSLAND STATE ARCHIVES

Current Position

Currently no legislative provisions protect staff of the Queensland State Archives from possible legal action as a result of release, in good faith, of information that is, defamatory, a breach of confidence, or which gives rise to criminal action or personal liability.⁸⁰ Under the *Archives Act 1983* (Cth) no action will lie against a person for defamation, breach of confidence or infringement of copyright, nor can they be guilty of a criminal offence where that person has authorised or given access to a record in the ordinary course of the administration of the Act (s.57).

Under the *Freedom of Information Act 1992* (Qld) protection is provided against actions for defamation, breaches of confidence and criminal offences to persons giving or authorising access (ss.102 and 103).

Proposed legislation

Clause 44 of the 1995 Bill protected the State, an official and the author of a public record from actions in defamation and breaches of confidence. **Clause 45** protected an official from any civil liability for any act or omission if they have acted honestly

⁷⁸ EARC, Public Submissions, 1991, Submission No.23, p.7.

⁷⁹ EARC, *Report*, 1992, pp.58-59.

⁸⁰ EARC, *Issues Paper*, 1991, p.57.

and without negligence. Liability would instead attach to the State. A definition of “**official**” was provided in Schedule 2 and referred to the State Archivist or a member of the staff of the State Archives.

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APPENDIX A

Archives Act 1983 (Cth)

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
 - (iii) 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.