



Archives Amendment Bill 2006

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Law and Bills Digest Section

Contents

Purpose.....	2
Background.....	2
What are archives?.....	2
National Archives of Australia	2
<i>Archives Act 1983</i>	3
Basis of policy commitment	3
Position of significant interest groups/press commentary	4
Political party policy positions/commitments.....	4
Main provisions	4
Concluding comments	6
Endnotes.....	6

Archives Amendment Bill 2006

Date introduced: 6 September 2006

House: Senate

Portfolio: Arts and Sport

Commencement: The day after Royal Assent.

Purpose

To update the *Archives Act 1983* according to the 1998 recommendations of the Australian Law Reform Commission.

Background

What are archives?

Archives are defined in the Australian Records Management Standard as:

Those records that are appraised as having continuing value.¹

The term ‘archives’ has traditionally been used to describe records no longer required for current use which have been selected for permanent preservation, that is, the ‘permanent records’ of an organisation or person. It is important to note that most records will not end up as archives in this sense: it has been said that only 3 per cent of government records will end up being preserved as archives.

Other uses for the word ‘archives’ refer to the building or place where archival material is kept, and to the organisation (or part of an organisation) responsible for appraising, acquiring, preserving and making available archival material.²

National Archives of Australia

The task of preserving the permanently valuable records of Australia’s federal government took some time to find a home. Records of the First World War were collected by what is now the Australian War Memorial, and a Public Archives Bill was considered by Cabinet in 1927. However it was only in 1942 that Australia’s participation in the Second World War prompted steps towards the creation of a more general system, with the setting up of the War Archives Committee to deal with records of the war. In 1946, the task was expanded to include the preservation of all Commonwealth archives, and a fledgling

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archives organisation was established. Since then, the body responsible for Commonwealth archives has undergone several changes of name and status:

- Archives Division, Commonwealth National Library (1940s–61)
- Commonwealth Archives Office (1961–74)
- Australian Archives (1971–98)
- National Archives of Australia (NAA) (1998–)³

The NAA became an executive agency in 2001, reporting directly to the federal Minister for the Arts, rather than to the Secretary of the Department of Communications, Information Technology and the Arts.⁴

In 1984, the Australian Archives had a staff of 400, was storing 367,521 shelf metres of permanent and temporary material, and received 3,446 enquiries from the public. In 2005, the NAA had an average staffing level of 447, was storing 357,569 shelf metres of material, and received 120,237 enquiries from the public.⁵

Archives Act 1983

The various archival organisations of the federal government operated without legislative authority until 1983, with the system running on ‘conventions and contacts’ which enabled the archives to obtain and preserve records from other government departments.⁶

The *Archives Act 1983* (‘the Act’) established the Australian Archives as a statutory body. Amongst other things, it set out procedures for the preservation or destruction of Commonwealth records, for public access to records after 30 years, and for administrative review of decisions about access.

Basis of policy commitment

In April 1996, motivated especially by changes in community views on privacy and access to information, as well as the proliferation of electronic record-keeping, Australian Archives initiated a review of the Act. The Australian Law Reform Commission (ALRC) began this review in August 1996, and its report was tabled in parliament in July 1998: [*Australia’s Federal Record: A Review of Archives Act 1983*](#) (ALRC 85).

The report found that recordkeeping in many Commonwealth agencies was in a parlous state that could only be overcome if the NAA were allowed to adopt a pro-active policy stance, and that there was a need for mandatory recordkeeping standards to be implemented by Commonwealth agencies.⁷ One of the main problems facing archival organisations today is the predominance of electronic records, and the need to be involved in the *design* of electronic record-keeping systems if there is to be any realistic hope of continuing access to the records contained in those systems.

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The report also recommended that:⁸

- the NAA be an independent statutory authority (implemented in 2001)
- there be more effective NAA supervision of disposal of non-archival records
- the 15 existing categories under which records may be exempted from public access should be reduced to nine (this recommendation is not effected in the Bill)
- there should be a legislative direction that records more than 30 years old are to be made available to the public unless there are compelling reasons for withholding them
- there should be a statutory obligation on all Commonwealth agencies to make records available at the earliest practicable time
- the NAA should issue guidelines to encourage and facilitate the early release of records, and
- the availability of records should be expanded, particularly through new technologies and public promotion of the availability of records.⁹

Position of significant interest groups/press commentary

The NAA has welcomed the introduction of this Bill as the culmination of over ten years of effort.¹⁰

Political party policy positions/commitments

There has been no political party commentary on the Bill.

Main provisions

All the amendments to existing Acts are contained in Schedule 1 of the Bill. The main amendments are as follows.

An objects clause is added, as recommended by the ALRC (**new section 2A**). This gives the National Archives the functions of identifying, preserving and making accessible the Commonwealth's archival material and overseeing Commonwealth record-keeping through standards and advice. This clause is less detailed than the one recommended by the ALRC, which included aspects such as the evaluation of records, availability of records unless there were compelling grounds against their disclosure, and provision of access to records earlier than prescribed by the minimum statutory obligations.¹¹

A new concept is introduced of records being in the **care** of the Archives, whether they are in the custody of the Archives or in someone else's custody by arrangement with the Archives (**sub-section 3(1)** and others). It is already possible under section 64 of the Act for archives to be in the custody of someone other than the NAA, but the change means

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that such archives are just as much subject to the rest of the Act as archives in the custody of the NAA. This should improve the ability of the public to access and use these materials.

There is a new definition of **record (sub-section 3(1))**. The new definition states that a record is a document kept for the information it contains or for its connection with any event, person, circumstance or thing. The current references to the different *formats* that a record may take are deleted. A new definition was recommended by the ALRC,¹² and the definition in the Bill is said to conform to the Australian and International recordkeeping standard.¹³ However, the definition in the Bill looks somewhat broader than the international standard, which refers specifically to records as being kept ‘in pursuance of legal obligations or in the transaction of business’.¹⁴ Note that there is already a definition of the word ‘record’ in the *Acts Interpretation Act 1901*, which simply states that a record ‘includes information stored or recorded by means of a computer’ (section 25); this does not conflict with the proposed definition in the Bill.

The Director-General of the NAA is given the power to determine if specified records are part of the ‘archival resources of the Commonwealth’ [that is, of permanent value] (**new section 3C**). The Explanatory Memorandum states that this ‘will provide certainty for agencies about what must be retained and what can be destroyed’.¹⁵ Because of the administrative nature of these determinations, they are declared not to be legislative instruments and are therefore not disallowable.¹⁶

The NAA is given authority to transfer temporary records back to the institution responsible for the records (**new section 6A**). This will enable the NAA to relieve itself of temporary records that it may have accepted in the past in the interests of assessing them for possible permanent preservation, or because it was able to do so. Storage of temporary records will in future be the responsibility of the institutions that create them.

The current requirement to transfer records to the NAA is amended to apply only to records determined to be of permanent value (**substituted section 27**). These records are to be transferred to the care of the Archives as soon as practicable, and in any event within 25 years—a tightening of the current provisions, which apply as soon as possible after 25 years have elapsed.

The amendments to the *Copyright Act 1968*, the *Freedom of Information Act 1982* and the *Privacy Act 1988* introduce into those Acts the new concept of the care of archives by the NAA and the change of name of the NAA. The amendments to the Copyright Act also extend to organisations that hold records the same rights to copy those records as are extended to the NAA by current section 51AA of the Copyright Act.

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Concluding comments

One part of the current Act that is not being amended is Part VIII, which deals with ‘finding aids’—the tools that enable users to locate material relevant to their research. The ALRC had recommended that sections 65–67, which prescribe the registers to be kept by the NAA, be replaced by a more general provision requiring the NAA to ‘create adequate finding aids in appropriate formats and to promote their availability.’¹⁷ Sections 65–66 refer to registers by names that are no longer used, and the functions of which are fulfilled by the single RecordSearch database. Section 67 requires the NAA to offer a register of research use of archives. Although such a register might be useful for researchers, this provision has never been put into practice, and given the present-day concerns for privacy, it is unlikely that it will be. Parliament might consider whether these three sections should be replaced along the lines suggested by the ALRC.

Endnotes

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1. AS 4390, Part 1, Clause 4.5, quoted in State Records NSW, ‘Glossary of Recordkeeping Terms’, http://www.records.nsw.gov.au/recordkeeping/glossary_of_recordkeeping_terms_a-c_4298.asp.
 2. Judith Ellis (ed), *Keeping Archives*, 2nd ed., Thorpe/Australian Society of Archivists, Port Melbourne, 1993, p. 463. See also State Records NSW, [ibid.](#)
 3. Sen. R. Alston, [Name change for Archives](#), media release, Canberra, 27 February 1998. The *Archives Act 1983* was amended to reflect this name-change by the *Census Information Legislation Amendment Act 2000*, Schedule 2.
 4. Hon. P. McGauran, MP, Minister for the Arts, [National Archives Awarded Executive Agency Status](#), media release, Canberra, 5 March 2001.
 5. Australian Archives, *First Annual Report 1983–84*, pp. 15 and 16. National Archives of Australia, [Annual Reports 2004–05](#), Canberra, 2005, pp. 19 and 79.
 6. Hilary Golder, *Documenting a Nation. Australian Archives: the First Fifty Years*, Australian Archives with AGPS Press, Canberra, 1994, p. 43. An Archives Bill had been introduced in the Senate in 1978, but did not proceed.
 7. Australian Law Reform Commission, [Urgent action needed to safeguard Australia's archives, ALRC warns](#), media release, 2 July 1998.
 8. Australian Law Reform Commission, [Media briefing paper](#), 2 July 1998.
 9. It could be noted here, by way of example, that the NAA has completed the digitising of every military service record from the First World War (Diana Streak, ‘[Memories replace treasures](#)’, *Canberra Times*, 28 October 2006, p. 6), and that the number of digitised pages available on the [RecordSearch](#) database has passed 9 million (NAA [media release](#), 25 January 2006).

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10. Diana Streak, '[Archives welcomes getting into the Act](#)', *Canberra Times*, 7 September 2006, p. 6.
11. Australian Law Reform Commission, [Australia's Federal Record: A Review of Archives Act 1983](#) (ALRC 85), 1998, Recommendation 1, p. 45.
12. The ALRC's suggested definition was: 'recorded information, in any form, including data in computer systems, created or received or maintained by an organisation or person in the transaction of business or the conduct of affairs and kept as evidence of such activity'. [ibid.](#), Recommendation 24, p. 98.
13. [Explanatory Memorandum](#), p. 3.
14. The Australian and International Standard AS ISO 15489.1—2002 defines records as 'information created, received, and maintained as evidence and information by an organization or person, in pursuance of legal obligations or in the transaction of business' (p. 3, para. 3.15).
15. [ibid.](#)
16. Legislative instruments are required to be tabled by the *Legislative Instruments Act 2003*, and are subject to parliamentary disallowance. Determinations under the new section 3C are exempted from this procedure by new subsection 3C(4).
17. Australian Law Reform Commission, [Australia's Federal Record](#), op. cit., p. 273.

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