From Dust-Bins to Disk-Drives : A Survey of Archives Legislation in Australia [1]

By Chris Hurley

> [1.1.27] Accurate records provide the first defence against concealment and deception. The absence of an effective public record has hindered the Commission in its inquiries. We have noted that on some occasions a deliberate process of interference with official records appears to have taken place .... [1.2.5] The institutions of government and the officials and agencies of government exist for the public, to serve the interests of the public. [1.2.6] This principle .... carries its consequences .... It informs the standards of conduct to be expected of our public officials. And because it represents an ideal which fallible people will not, and perhaps cannot, fully meet, it justifies the imposition of safeguards against the misuse and abuse of official power and position. [4.3.3] The record creation, maintenance and retention practices of government and its agencies are matters for which ministers and chief executive officers bear a particular responsibility [and], doubtless, are ones for which those officials are to be held accountable .... But overall responsibility for records cannot be left with these officials. A separate body should be entrusted with the general oversight of public records, equipped with powers adequate to the purpose. [4.3.4] Experience elsewhere suggests that this vital responsibility should be given to a separate and independent archives authority acting under its own legislation. If the recommendations of the "Report on Review of Archives Legislation" of the Queensland Electoral and Administrative Review Commission ("EARC") are acted upon in that State, Western Australia alone will lack such an authority. The importance of records to accountability emphasises the need.
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> Western Australia, Royal Commission into the Commercial Activities of Government [W.A. Inc.] and Other Matters (1992). *Report... Part II*.

Just as military strategists usually plan for the last war instead of the next, archives legislators often address yesterday's unresolved problems rather than future needs. In this country, as a result of political indifference and neglect, we can add at least twenty five years to the time-lag.

In the 19th century, when Britain established its national archives on a statutory basis as a better `dust-bin' for its ancient archival treasures, Australia did nothing legislatively. During the 20th century, when the vital link was being forged between archives and records management, Australia enacted laws to deposit its documentary relics in libraries. As the century draws to its close, the connections between archives laws and responsible record-keeping have yet to be established (in any sophisticated way) in more than half of our States.

The enactment of archives laws which deal comprehensively with government record-keeping and (where they exist) their enforcement is often resisted or subverted. Other matters which we have failed conspicuously to address (the untamed post-war explosion in paper records, the transition to the electronic environment, and the advent of non-custodial models for the management of archives programs) have not yet made it over the legislative horizon.

Any examination, then, of current archives laws will be a rehearsal of notions already out-of-date : good enough in their day (more than good enough - in their time, real progress and achievement) but not relevant to the post-custodial era. There is, of course, value in even the most primitive of our archives laws because they represent some part of an abiding purpose to identify, preserve, and make available the official record. Too great an emphasis on the need for more up-to-date laws can make us lose sight of their value as a statement of that aspiration.

In this survey, an attempt will be made to pick out and comment on the fundamental issues in archives laws rather than those matters incidental to archival legislation. Our guide will be the excellent RAMP Study by Eric Ketelaar[2] for the International Council on Archives (1985) . The piece will not, therefore, be confined to what is in Australia's archives laws but will stray onto the question of what should be there. It will also be, in part, an account of their historical development and put forward some ideas about their future development.

The danger in such an approach is that it gives a misleading impression of progress. Progress there has undoubtedly been, but the impression derived from the passages of the W.A. Inc. *Report* quoted at the outset - that things are as they should be everywhere but Western Australia - is woefully wrong. It is understandable (and all too typical) that the appeal for archival reform should be couched in terms of "what happens elsewhere".

Politicians in this country seldom have aspirations beyond the lowest common denominator, and often sham their achievements at even that base level.

Archivists have adapted to this political process, some would say lamely, but not without effect. As a professional community, however, their approach has had two great failings :

- a failure to clearly and consistently articulate the issues which archives laws must address with the result that Australian archivists express no political agenda for archives law reform, no expectation that the approach to public archives matters will be broadly uniform, no bench-mark against which existing laws can be measured, and no aspiration as to what legislative reforms we should be urging on governments;
- a failure to alert and mobilise allied special interests (let alone public opinion) of support in a campaign for the improvement and standardisation of archival laws to implement that agenda (if we had one) and a want of will to persist in the face of political indifference and resistance.

ORIGINS OF ARCHIVAL LEGISLATION

The history of legislative development in the Commonwealth and the several States[3] follows a very similar pattern. Broadly speaking, there was no legislative provision for government archives until the middle of the 20th century, and little or no attempt to deal with the old records which the States and the Commonwealth (established as legal entities in 1901) inherited from their predecessors : the six Australian Colonies which had federated. The generic account which follows is not based on what happened in any one jurisdiction, but it reflects the broad road along which archives arrangements developed nearly everywhere.

The first stirrings of interest came from the research community. The mood may be judged from the following quotation which, with appropriate allowance for differences in timing and regional temperament, could have been made almost anywhere :

> In 1917, the Historical Society of Queensland called for a `proper system of dealing with the archives of Queensland' to stop them from being `filched from us and removed to Sydney'. [4]

Research interest in government records was closely linked with endeavours to obtain copies of records held overseas (chiefly in Britain) which were believed to be essential to the study of Australian history, resulting in three not unrelated activities :

- copying documents held in Britain (a process which culminated in the monumental Australian Joint Copying Project);
- publishing records incorporating the copies as well as locally held documents (notably in the doomed *Historical Records of Australia* and *Historical Records of New South Wales*); and
- persuading governments to add deposits of government archives to collections of historical records in the State and Commonwealth Libraries.

It is from the third of these activities that our archives laws derive.

To begin with, most governments issued administrative directions to "departments" (inner government agencies) which required that before records were destroyed they should be scrutinised by the Library[5] which was empowered to take into custody those records it deemed to be of continuing historical value. These early administrative arrangements (e.g. 1910 in New South Wales, 1923 in Western Australia, 1928 in Victoria, 1943 in the Commonwealth) usually excluded from their operation parliaments, the courts, corporations, hospitals, educational bodies, and local government authorities.

Matters were put onto a statutory footing by :

- the *Public Records Act 1943* in Tasmania[6],
- the *Archives Act 1960* in New South Wales,
- the *Public Records Act 1973* in Victoria, and
- the *Archives Act 1983* in the Commonwealth.

Elsewhere, governments have resisted enactment of legislation specifically designed to deal with archives matters. In Queensland, Western Australia, and South Australia provisions for dealing with official records were incorporated into the Acts establishing and governing the State Libraries - and there they remain to this day. In Queensland, the push for action was resisted for many years, and even when legislation was enacted it remained unproclaimed for over a decade (1943-1958).

The early administrative arrangements formed the basis (or indicated the direction and purpose) of provisions placed in the various State Acts dealing with the appraisal and deposit of government archives. From this simplified exposition, certain themes will already be apparent.

Firstly, the problem of **jurisdiction** was implicit from the start. Because the earliest arrangements were by administrative directive within the executive branch of government, no attempt was made to extend them to the judicial and legislative branches. It is this accident of history, rather than any supposed adherence to a `separation of powers' doctrine, which accounts for the difficulty, which continues to this day, in applying archives laws to the whole public sector.

In the British tradition, of course, which Australia would normally have followed, the courts' records lay, not outside, but at the very heart of the archival system. By the same historical accident, the extension of archives laws beyond the small circle of inner `departmental' agencies (to those such as statutory authorities and other outer agencies which had not usually been subject to the earliest administrative directions) has been haphazard and half-hearted. The result of all this is that coverage of the several archives Acts varies widely in practically every jurisdiction.

Far from being resolved in the near future, it now appears that this jurisdictional problem will be compounded by the current rush to `privatise' and `corporatise' government functions - with each State and the Commonwealth taking different, and sometimes extraordinarily ill-informed, positions on whether such functions should remain within the scope of their archives legislation. As will be outlined below, archives laws have now developed far beyond simple issues of appraisal and custody of `historical' records but arrangements for dealing with corporatised agencies sometimes result in their total exclusion from archives law, not merely from those provisions which it might reasonably be argued they need to be exempted from.

The second issue which may be traced back to the beginnings is the emphasis on **collection** of records of permanent **historical interest** together with non-government records in custodial institutions providing facilities for research. Both the institutions to which the responsibility was assigned and the expressed purpose for which it was undertaken reinforced what is now called the "custodial" approach. The whole process of managing the creation and maintenance of government records, of dealing with associated problems of resource management, of addressing other government and public purposes for which records are created and kept fell outside the scope of early archival arrangements.

Just how far the public perception of the role of the archives authorities has come may be illustrated by comparing the 1917 sentiments of the Queensland Historical Society (quoted above) which prompted early moves to establish better dust-bins with this extract from a recent report of the N.S.W. Independent Commission Against Corruption where the role of the archives is considered more broadly :

> The Police Service has set up a task force which will comprehensively review existing practices in relation to all paper, computer and tape based information and records. The aim is to develop "best practice" corporate records policy and practice. External agencies, including the NSW Archives Authority and the ICAC, will be involved in the development of a best practice model and a strategy for implementation.7

This statement at least recognises the archives authority as having a central role in developing corporate records policy and practice.

GENERATIONS OF ARCHIVAL LEGISLATION

In all States, the archives authorities began as a division or branch of the State Library and the pattern was repeated at the Commonwealth level when the archives authority was established jointly with the Commonwealth Parliamentary Library and the Australian War Memorial. In both Tasmania and New South Wales, a legal distinction was made between the archives authority and the State Library, but they were kept together administratively. The first to separate was the Commonwealth (1960), followed by Victoria (1973) and New South Wales (1976). In the 1980's, the State archives were administratively separated from the State Libraries in South Australia and Queensland, but they remain legislatively entangled in the Libraries Act in each case. In Tasmania and Western Australia, the State Archives are still linked administratively with their respective State Libraries.

Libraries were thus the first to "nurture" government archives but, in so doing, they may be said also to have "captured" them :

> so that archival activities and libraries became one in the public and bureaucratic mind ... considered by the public service as `cultural', occasionally interfering, and essentially marginal to public service

functioning[8]

During the 1950's and 1960's, many Australian archivists came increasingly under U.S. influences (culminating in the Schellenberg visit of 1954). This influence introduced a more outward-looking, less custodial view of what a public records program should be. The idea took hold amongst some archivists (especially those in some at least of the government programs) that they should be directing their efforts more towards improving government efficiency by stimulating improved records management, reducing costs through disposal and better storage for secondary records, and adopting a more pro-active role in programming transfers.

A tension, then, existed between what may be loosely called custodial and non-custodial models - between competing notions of what an archives ought to be - at the very time when the first attempts were made to render the idea into statutory form. In one direction has been a pull to formalise library-based, custodial arrangements for preserving tiny quantities of superseded official records saved from destruction so that they can be used for historical research in conjunction with other heritage materials gathered into state-funded collections. In the other direction has been the push to establish a comprehensive statutory regime over arrangements for the management and disposal of and access to public records - regardless of their age or historical worth - to ensure a variety of outcomes, including improved government efficiency and accountability, not merely the preservation and use of some records for historical research.

This tension has not, of course, been reflected in perfectly antithetical expressions of mutually exclusive positions. Since the 1950's, there have been few attempts to take a purely custodial position and the paramount position of heritage considerations in the fabric of our archives arrangements is not seriously challenged. The distinction remains a useful basis for modelling the development of archives laws through what has been called their first and second generations.

The administrative arrangements which precede the archives laws established the State Libraries as proper places for the deposit of unwanted public records and (in some cases) required that records be so offered before being destroyed. The "first generation" Acts formalise these arrangements. They :

- establish an archives authority,
- prohibit destruction without the authority's approval,
- empower the authority to receive records withheld from destruction, and
- permit access to transferred records unless restricted.

"These were the things that the librarians and the researchers most wanted and they were the things that the bureaucrats were prepared to grant them"[9]. The archives authority was seen as a passive recipient of records deemed to be of permanent "archival" value once government has finished with them. It can regulate disposal to the extent of forbidding destruction when it perceives historical value and its business is primarily to house, preserve, and facilitate public use of such records after they arrive (unless the government wishes to restrict access).

The second generation Acts are based on a more activist view of what a public records program should be. This view embodies those aspects of archival activity which first came to the fore in the 1950s and 1960s as an alternative to the custodial model. A "second generation" Act :

- mandates transfer after a nominated period (usually after 25 to 30 years),
- regulates records management activities,
- establishes public rights of access after a specified period.

In each instance, it will be seen that these provisions are pro-active :

- Government agencies are no longer left with an unfettered discretion, they are obliged to conform to external requirements. They cannot hold onto records indefinitely, they must conform to external standards in records management, public access is determined by a process and according to criteria determined by someone else.
- The archives authority must plan and implement regular programmed transfers, it must establish (and possibly enforce) records management standards, it must administer or at least be the vehicle for the exercise of public access rights. By implication (and in some cases expressly) the public records program is directed not only at heritage preservation but also at improved public sector management and accountability.

While the conceptual distinction outlined here is not perfectly reflected in the statutes, most of which share at least

some characteristics of both, it may be fairly said that the Commonwealth and Tasmanian Acts are more or less mature examples of a second generation Act and the New South Wales, Queensland and South Australian Acts illustrate mostly the features of a first generation Act.

The Western Australian Act is largely first generation but it goes further than the others when it establishes a duty for the Library Board :

> **29.** (a) to advise and assist public offices in matters of records management including the creation, maintenance, security and disposal of records;

and confers upon the Board

> **29.** all such powers as may be reasonably necessary for the carrying out of that duty.

Until recently, the Victorian Act consigned most of those matters which arise in a second generation Act to the discretion of the archives authority and second generation features were introduced into the Victorian system by a series of "standards" issued during the 1980's governing creation, management, disposal and transfer. This standard setting power under the Victorian legislation derives from provisions in the Act under which :

> **12.** The Keeper of Public Records shall establish standards for the efficient management of public records and in particular with respect to -
> (a) the creation, maintenance and security of public records;
> (b) the selection of public records worthy of preservation;
> (c) the transfer of public records to the Public record Office; and
> (d) the segregation and disposal of public records not worthy of preservation -
> and shall assist public officers in applying these standards to records under their control

and corresponding duties are laid on public bodies :

> **13.** The officer in charge of a public office -
> (a) shall cause to be made and kept full and accurate records of the business of the office;
> (b) shall be responsible, with the advice and assistance of the Keeper of Public Records, for the carrying out within the office of a program of records management in accordance with the standards established under section 12 by the Keeper of Public Records;
> .....

Amendments in 1994 replaced a transfer standard issued in 1985 with a statutory provision mandating transfer of records to the PRO.

For the most part, therefore, Australian archives laws are stuck somewhere between the first generation (`dust-bin') model and the second generation (`pro-active') model. Even where the second generation model is most clearly articulated, however, there is doubt that it has been fully accepted or is strongly supported. The idea that archives laws are directed towards governing public sector record-keeping rather than the preservation of a research remnant has been endorsed in public inquiries into political corruption in Queensland and Western Australia. It has been endorsed in other less politically charged situations, but there are grounds for believing that it is not widely accepted by governments or within the bureaucracy.

Ominously, the push for statutory reform (to get at least second generation legislation) in Western Australia and Queensland appears to have stalled despite being linked to reform packages arising out State corruption scandals (or possibly because of that). Long standing proposals to up-date legislation in South Australia and New South Wales have not reached Parliament. It is clear, from the annual reports of the three programs (Commonwealth, Tasmania, and Victoria) whose statutes position them most clearly within the second generation, that they must still devote much of their time and attention to the delivery of storage and public reference services.

Meanwhile, the external environment is forever changing. Within the professional literature post-custodial models for archival programs are being developed. What the implications of these models may be for archival legislation is not yet clear. It seems highly unlikely, however, that third generation Acts will seek to mandate the "storage" of records in an archives repository or assume that "access" to those records will be provided by the archives. It is far more likely that the focus of third generation legislation will be on development and implementation of standards for record-keeping which comprehend or impinge on procedures for the disposal, documentation, and accessibility of official records.

ESTABLISHMENT OF THE ARCHIVES AUTHORITY

All the statutes set up an archives authority required and empowered to give effect to the statutory provisions.

The archives authority in Australia is embodied either in an individual statutory office holder (Tasmania, Victoria and the Commonwealth) or (more commonly) in a corporation or board empowered to carry out specified functions (Archives Authority of N.S.W. and the Library Boards of Queensland, South Australia, and Western Australia). The predominance of corporate authorities is because State Libraries Boards were first given the role (and still retain them in three States). When the time came to establish an archives authority in New South Wales, the pattern was followed even though a separate body was formed. In the Commonwealth and Victoria, however, a statutory officer was vested with the powers of archives authority and an advisory body was established. Only Tasmania has a statutory officer as archives authority without an advisory council.

Archives authorities are usually staffed by public servants, subject to prevailing public sector conditions and discipline. The archives are managed, in other words, as an arm of a departmental structure. This has been true also of the authorities established as corporations, although these bodies are usually made formally responsible for the management of the archives staff and, in New South Wales, the senior member of the archives staff typically as the executive officer of the authority. Departmental administration and financing, in other words, the advantages of which are sometimes used in arguments favouring the single statutory officer and advisory council, applies in both models.

The argument for vesting archives authority in a single official appears to be that the matters dealt with are too "sensitive" to be entrusted to a body of outsiders. The bureaucracy must trust the archives and not feel that they are subject to outside interference. The archivist, in other words, should be `one of us'. The suggestion, implicit in all of this, that the statutory officer will be amenable to influence within the bureaucracy of which he is part and know better than to rock the boat sits ill with the clear expectation by Parliament (however obscured and muted in the drafting) that the archives authority must discharge its statutory obligations according to law and not at the behest of executive power. Recent scandals, by no means confined to the archives area, demonstrate that the times are not particularly favourable in this country for public officials who try to put their obligations under the law before the wishes of their political masters.

A corporation composed of external nominees is assumed to be more independent (and possibly more threatening for that reason). In the final analysis, however, the authority's ability to withstand improper pressure will depend upon the character, grit, temperance, wisdom, and standing of whoever must carry out its responsibilities (whether corporate or individual). The point is made entertainingly by the Principal Archivist of New South Wales :

> ... I must quote from the English spy series on television, *Callan*. In one episode Callan was captured by the baddies and his friend Mears is slow in rescuing him, even though Mears has six or seven helpers. When Mears does arrive, Callan upbraids him for his tardiness and notes that it could hardly have been due to shortage of assistance. Mears replies, "It's all very well to say `once more unto the breach, dear friends', but they may turn out to be only acquaintances".
>
> 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 like a 15 inch naval gun : you don't have to fire it, you just make a lot of noise closing the breech. 10

JURISDICTION

Jurisdiction is a product of ambit and application.

- Ambit is the scope of a statute's coverage within government - in effect, which bodies are subject to the Act?
- Application is the decision to include/exclude records created by or in the possession of such bodies - in effect, what "records" of a body subject to the Act are covered by its provisions?

These questions are most commonly settled by defining which bodies or offices are subject to all or part of the statute and by defining what is a "public record". Jurisdiction is about boundaries. It does not determine what an archives authority will do - that is determined by the establishment and functions (see above). Given that the archives authority has a role, the issue is - over what records will that exercise that role? Jurisdiction determines

that.

Government Records : Ambit

In Australia, government is perceived still in 18th century tripartite terms :

- Executive (the Crown and the Departments of State),
- Legislature (the Parliament), and
- Judiciary (the Courts).

Within the Executive, it cannot be assumed unless it is expressly stated (because the role of the archives authority will otherwise be challenged) that an archives law applies to the Vice-Regal representative, Royal Commissions and Boards of Inquiry, the Executive Council, or the Cabinet. Local government authorities (which are in law merely creatures of the State governments) are expressly included or excluded in different jurisdictions. Statutory authorities of various kinds have until recently been regarded as coming within the ambit of archives laws, although in some cases (and for no apparently logical reason) public hospitals, universities and colleges, and public schools have sometimes been treated as if they were not covered.

It has always been possible to argue that the provisions of legislation establishing a particular executive agency had the effect of removing it from the ambit of archives legislation, but such arguments are usually found to be specious and no such exclusion can be said to apply generally. The most common example is a statutory authority where the enabling legislation gives the body control over real property and this is deemed to include its records so as to exclude the authority from compliance with archives law.

Over the last ten years or so, governments have increasingly taken steps to exclude their "corporatised" business enterprises from whole rafts of legislation including archives law and it seems this will be the trend for so long as the fashion for modelling government activity on private enterprise persists in public sector management. This trend has seen (or is likely soon to see) the exclusion of state-owned banks, insurance offices, water and power utilities, transport authorities, and many others. Two broad arguments are used to exempt corporatised bodies from archives law (and much else besides) :

- the **competition argument** : that corporatised bodies "compete" with the private sector, must not receive cross-subsidisation and be free of regulation which does not apply to their competitors;
- the **deregulation argument** : that removal of regulation of any kind is a good in itself especially where economic performance is concerned. are

A more recent trend in "privatisation" and "contracting-out" (transferring the task of delivering government services to the private sector) has led to new problems of interpretation. These are basically two-fold :

- What becomes of pre-existing records of a privatised body? Does the archives authority have a residual interest in them?
- Do records created by a private body contracted to carry out what remains a government function fall within the Act?

If pre-existing records are "sold" along with a privatised body, it is difficult to see on what basis the records could be deemed to remain public records. Indeed, in the case of some businesses (e.g. insurance) the records are the principal asset of the business. There is a long history of "records following function" in transfers of responsibility between governments and this would seem to be a further illustration of the principle. On the other hand, the contracts of sale seldom deal with records and the practical implications (especially when older records have already been transferred to and remain with the archives authority) will continue to provide headaches.

The ambit of archives laws may be defined in various ways. In some cases, a broad definition is used to catch most government bodies and devices employed to exclude specified bodies or categories - e.g. by placing them on a schedule to the Act or allowing bodies to be excluded or included by other administrative action. A variation on this technique allows bodies to be included or excluded from particular aspects of archives law. The alternative method is to attempt by definition or by specifying within the body of the act which bodies (or categories of bodies) are exempt from its provisions in whole or in part.

The former technique has the advantage of flexibility and enables the law to be readily adjusted to meet changing circumstances. It is argued against it that it provides too easy a mechanism for political and administrative manouvering to quietly nullify the original purposes of the law. The latter technique appears to give certainty and prevent the law being stealthily undermined, but in reality, if the government wants strongly enough to change the

ambit of archives law it will. The battle by the Commonwealth Bank to escape the *Archives Act (C'wealth)* was defeated at first but the Bank won the war by subsequent amendment to the Act which placed it comprehensively outside the archives jurisdiction.

This example illustrates why the former approach is probably better. When a powerful government body seeks to escape archives law it becomes a political process in which the issue often becomes all or nothing : the body ends up being either wholly included or totally excluded. If the archives statute itself provides mechanisms by which bodies can be excluded or included by simple administrative instrument, bodies which are able to win political support for the proposition that they "need" to be excluded can be accommodated without the necessity for writing them out of the statute entirely. This makes it easier to write them back in and deal with residual problems when in due course their influence wanes or they are abolished.

Government Records : Application

Once it is determined that a body is subject to archives law, it remains to say which records materials the statute will apply to. Just as the application of the law to bodies can be varied by inclusion or exclusion (whether by definition or instrument) so can its application to records.

The first issue to be addressed is : what is a record? The intention is to delineate that information belonging to an official body which is to be subject to statutory regulation and to differentiate records from other kinds of information which fall outside the provisions of the statute.

Definitions may be inclusive (a record is anything having specified characteristics or on a list of record types) or exclusive (a broad definition followed by a list of exclusions). Definitions have become increasingly broad as archives have attempted to grapple with the changing forms which records take. It is possible that Australian statutes emphasise physical format too much - possibly a library inheritance from the distinction between published materials and manuscripts (which was never of any use and is even more valueless with changing technology). The Victorian Act tries to overcome the problem that new technology is forever out-dating such definitions by linking its definition of "record" to "document" in the *Evidence Act (Vict.)* in the hope that the law of evidence will be always up to date and will provide a satisfactory tool.

Either definition can create controversy - especially when legislation is first proposed. Critics who look only at the definition of "record" jump to the conclusion that the archives is seeking to monopolise all forms of information. In the late 1970's, the *Archives Bill (C'wealth)* ran into considerable opposition from libraries, museums, and collectors of all kinds who supposed that its all-embracing definition of "record" implied aspirations to control all information resources.

The broader the definition of format, the more the test of "record-ness" becomes a matter of stating what function or process it is within a body which determines that information is a record. Broadly, there are two kinds of test used to say what are records, a process test or a property -

- the made or received test : public records are records "made or received" by a body subject to the statute in the course of conducting official business (or by a servant of the body in the course of carrying out an official duty);
- the ownership test : public records are records "owned" by the Crown (in the case of departmental agencies) or a statutory body.

The ownership test (which is used in the Commonwealth Act) is, by itself, clearly too broad and that Act introduces a subsidiary test based on process - the record must be "kept" (a none too precise concept) thus allowing information to pass through an organisation without becoming an official record. While it is clear that both tests are aimed at capturing records of official business, the Commonwealth approach places a stronger onus on (and hence gives greater power to) the archives authority in determining whether material is or is not "official".

Under the definitions, official records are deemed to include written and printed documents, publications which have been incorporated into the record-keeping system, audio-visual material, electronic data, and even artefacts. Since such a definitions clearly extend to materials in the state collections (libraries, museums, and galleries), their collections are sometimes explicitly excluded from the definition of "record". Since such bodies can themselves be collectors of official estrays, it is necessary, when doing so, to make sure that the exclusion of their collections does not permit them to take in official records with impunity.

The definition of official record may be modified in other ways. Few statutes take notice of the special problems of "registration records" (e.g. records of land title or births, deaths, and marriages) where the retention of long-lived

data is not incidental but central to a government agency's function. ways are usually found within the operation of the Acts to exempt such records from the normal transfer requirements.

Non-Government Records and Heritage Functions

The ICA model devised by Eric Ketelaar11 allows for the possibility that archives law will extend to the entire archival heritage of a nation (both public and private). In Australia, archival authorities have sought exclusive domain over public records and arrangements for non-government records have generally been left to libraries and other collecting bodies. There has been only one attempt to write into an Australian archives law consideration of responsibilities for the archives of the nation generally - irrespective of their public/private nature.

The *Archives Act 1983 (C'wealth)* identifies different categories of records and assigns to the archives authority differing responsibilities in respect of each :

- **Commonwealth Records** : those records which, being "owned" by the Commonwealth are its special responsibility and for the disposal, management, and accessing of which the Act makes explicit provision;
- **Archival Resources of the Commonwealth** : those records (including Commonwealth records) which are of national significance or public interest;
- **Archival Resources Relating to Australia** : any other records.

The Commonwealth Act is directed primarily at Commonwealth records in respect of which the archives authority has exclusive jurisdiction and the Act's provisions generally do not apply to the other two categories. In addition, the Australian Archives is to develop and foster co-operative activities aimed at better preservation and use of all archival resources (including the maintenance of a National Register) and :

- in respect of the **Archival Resources of the Commonwealth**, ensure their preservation (where appropriate by taking them into custody);
- in respect of **Archival Resources Relating to Australia**, encourage their preservation by others (and, if necessary, to take direct action to ensure their preservation).

The role of the Archives is not exclusive in relation to either of the wider categories of records.

In 1978 by these provisions won suspicion and opposition in the initial public response to the *Archives Bill*. It is perhaps understandable that little has been done to implement them. They have their origin in the personal archives program of the Australian Archives which was designed to capture official estrays held in the `private' papers of ex-ministers and ex-officials. Such papers were `collected' on the same basis as deposits of private papers to libraries and, in order to keep the records intact, the Archives necessarily became involved in accessioning private as well as official material.

In the States, the terms of separation of the State Archives from Libraries with well established collection programs have usually precluded any concern with non-government records. In the States, unless a body of records is predominantly official, the Archives is unlikely to be involved and none of the State Acts provide for anything like the same level of involvement as the Commonwealth Act.

RECORDS MANAGEMENT & DISPOSAL

> Ko. I've just ascertained that, by the Mikado's law, when a married man is beheaded his wife is buried alive.
> .....
>
> Nank. But stop a bit! This law has never been put in force.
>
> Ko. Not yet. You see, flirting is the only crime punishable with decapitation, and married men never flirt.
>
> Nank. Of course they don't. I quite forgot that!
>
> W S Gilbert, *The Mikado (1885) Act II*

Every archives law in Australia makes it unlawful to destroy official records without the concurrence of the archives authority and also makes it an offence to unlawfully destroy official records. So far as public officials (ministers

and public servants) are concerned, these provisions are a dead letter. No public official has ever been convicted of unlawful disposal. There has never been a case in which proceedings have even been commenced12 The only reasonable conclusion is that, just as married men never flirt, Australian public officials never unlawfully destroy records.

Not even the most custodially oriented, inwards looking archives can avoid the complications which arise from dealings with the outside environment when it comes to disposal. The enormity of the quantities of records within modern government requires that any aspiration to **acquire** historical documents carries with it the necessity to **select** them, which in turn involves **discarding** what cannot be kept (inevitably, most of it). At a very minimum, an archives must be involved with records outside of its custodial jurisdiction to the extent of identifying and isolating those records it wants to keep.

Some bureaucrats and legislators still regard this as the proper limit of involvement by archives in records management. They argue :

> that the regulatory powers of our archives authorities should be read down by reference to what they deem to be the proper purpose of an archives, which is to preserve historical records. The regulatory powers are conferred, they believe, to enable the archives to achieve that purpose. The archives is not and should not be empowered to regulate records management in any way which implies a wider responsibility or a concern for other purposes. 13

Such views spring from official attitudes which (for most of this century) have regarded archives legislation as an `intrusion'. Its first manifestation was an opposition to archives legislation of any kind. R.F. Doust, writing in 1969, has described the attitude thus :

> Departments right from the early 1890's had stressed that records were `their' records: there was little conception of the records as `public' records which the public had some wish to see preserved and to which it might have reasonable access, with necessary safeguards. In the departments, too, and particularly in those whose business lay with individual members of the public, there was some element of censorship, and this may have extended to an attempt to cover-up administrative blunders of [sic] the reasons for unpopular policies. 14

When legislation is finally passed, this element of opposition retreats to a line of defence aimed at nullifying the records management provisions and confining the scope of archives law to old records segregated for public use within the repositories run by the archives authority. In 1992, when mounting a new push to update its Act, the Archives Authority of N.S.W. was able to recall how records management provisions (subsequently deleted from the 1960 Act) had been received thirty years before by the Under Secretary to (of all places) the N.S.W. Attorney-General's Department. Statutory provisions for the regulation of records management could, that official said :

> ... lead to chaos in Government Departments unless used with absolute restraint ... I cannot emphasise too strongly that I regard the proposals as highly dangerous, and can result in Departments being in effect, organised by Librarians ... 15

The rationale for records management provisions may be summed up under the following heads :

1. involvement by the archives authority affords the only practical way of achieving purely `archival goals' - viz. appraisal, preservation, and description - which, because of the volume and complexity of the systems involved, are nowadays unachievable when applied after records have completed their active life;
2. establishment and enforcement of centralised records management standards produce benefits of efficiency and cost-saving not, as opponents claim, increased and unnecessary burdens;
3. an external regime is necessary to uphold accountability and achieve public purpose goals which are larger than `departmental' objectives.

The conflict between the two perceptions of the archives' role is directly linked to which generation of archives law is enacted. In a first generation Act, the overall purpose is to segregate and preserve historical records for research. Any statutory provision perceived as `interfering' with the autonomy of government agencies in unrelated matters (such as records management) will be read down. If the archives authority has a power to prevent disposal, then that power will be interpreted as one which should not be exercised beyond achieving what is necessary and reasonable to ensure that historical records worthy of preservation for historical research are kept. Any attempt by the archives to adjudge a disposal issue (or any other records management matter) in terms of the need to meet a public or any other purpose beyond the needs of historical research is *ultra vires*.

It follows from such a view that :

> when agreeing to, or refusing, an agency's request to destroy records [the] archives should not concern itself with any use the records might have other than the uses of historical research. It is not the archives' responsibility, they say, to consider any other uses or requirements to preserve records. This latter responsibility rests exclusively on the chief executive of a department concerned, and the exercise of an independent responsibility by the archives is both unnecessary and detrimental. 16

On this view, the archives authority must, when exercising its power to approve or forbid the destruction of records (or any other records management regulation or scrutiny) wholly disregard any public interest considerations apart from the needs of historical research. Such an interpretation can only be taken if read in conjunction with a narrow view of what constitutes the purpose or function of an archives. Only if it is made clear that the archives law is directed towards achieving public purposes which are additional to and different from preservation of selected records for research purposes (if, in other words, preservation of records research is **not** made central to the archives' mission), will there be any chance that the records management functions will be exercised in the service of broader public aims and purposes. It cannot then be questioned that the archives may (and should) have regard to the totality of records when formulating and evaluating records management practices.

If, on the other hand, the archives authority is established within the framework of a first generation Act and its functions are directed largely or exclusively towards preserving records it holds, then the danger is that any records management powers will be read down so that they operate wholly within the boundaries of what is necessary to achieve those limited purposes. The records management task cannot flourish within a custodial environment. A dysfunction is created between the responsibility for causing accountable record-keeping and the limitations arising from or imposed by a structure focussed on holdings and the movement of material.

The continuation of archives authorities within library structures inevitably creates this kind of dysfunction. Regrettably, as recently as July 1994 Western Australia has proposed re-creating just such a dysfunctional structure while appearing to respond to the recommendations of the `W.A. Inc.' Royal Commission17 for an independent archives authority. It is proposed to separate records management functions between an independent audit authority and an archives which would remain within the State Library framework. This proposed division of responsibility, if implemented, would create a crack so wide that true accountability will slip right through it.

Archives laws provide "the only general statutory regulation of which records are kept and which are destroyed"18 and of standards of record-keeping. Other statutory mechanisms are limited by focusing on particular records (and not upon the generality of official records) or, as in the case of court action, the protections are limited to the period after action commences.

> What, then, is the value added by the archives to the process? clearly, it lies in the requirement that agencies submit their records practices to external scrutiny ...
>
> The requirement ... achieves at least three things : first, it provides an additional safeguard for the public interest in record retention second, it establishes routine procedures for documenting the decisions which have been taken ... and third, it ... provides record creators with some measure of protection from undue political influence in the process of keeping and destroying records.
>
> No minister or official determined to destroy or falsify the record will be prevented by archives law from doing so. what archives procedures do is establish a norm ... from which such actions can and usually will be seen to depart, thus making detection more likely ...
>
> ... records creators must be responsible for the efficient administration of their agencies subject to ... compliance with the rules and regulations established by or in accordance with the law to serve the needs of government and the public interest. 19

CUSTODY AND OWNERSHIP

When a gentleman sends his valet with a suit of clothes to the tailor, the law recognises three separate levels of rights and responsibilities :

- The gentleman retains **ownership** of the suit. He is entitled to the full benefit and enjoyment of his property.
- He has given the valet **custody**. The valet may, within the bounds of law and reason, exercise the owner's rights, but he may not sell the suit.

- The tailor is given **possession** by the custodian with the implied consent of the owner. He may not be charged with theft, but he must (except in extraordinary circumstances) surrender the property if required to do so by the owner or custodian and he may only do with the suit what he is expressly allowed to do by them.

Unless the situation is varied by a court, statute, or contract, possessory rights are inferior to custody and ownership rights and ownership rights prevail over custodial rights. Archives laws seldom confer ownership on the archives authority20 . Archives authorities discharge their responsibilities through custody and possession.

First generation Acts operate by giving the archives authority custody (which is almost always equated with possession) on the assumption that the archives' responsibilities are fulfilled by exercising custodial rights (through possession) devolved upon the archives by the owner (the Crown). The archives "preserves" and gives access to records which have been transferred to it. Possession is the mechanism by which records are made subject to the archives regime.

The nexus between custody and possession is broken in the second generation Acts though this is not always realised and custody is sometimes read down so that it equates with possession. Many of the archives responsibilities are still contingent upon physical possession, but custodial responsibilities may be exercised in other ways. The archival access regime, for example, may apply to records in the `open period' regardless of whether or not they have yet been transferred (C'wealth Act). The records management and disposal provisions apply (though not yet in all Acts) to records generally - not only those held by the archives or proposed for destruction. Recovery provisions (below) apply to records which have been misappropriated from official custody - not just those stolen from archives' premises.

As we move towards a third generation of laws for the so-called `post custodial' era, it seems possible that statutes will be needed which separate even more clearly the notions of custody and possession. In future, when dealing `post-custodially' with official records, the archives regime may exercise its responsibilities without ever attaining physical possession of the records. It appears likely that such legislation would focus on the role of the archives authority in records management and disposal regulation and in documentation and access strategies applying to records which might never leave the `active' environment. In this way the archives authority might acquire custody of records remaining in the possession of the records-creator (or the successor to the creator's record-keeping system).

Inalienability & Replevin

In the Ketelaar model, allowance is made for statutory (or constitutional) protection for the public records through provisions which make them "inalienable"21. This means that ownership cannot lawfully pass away from the state and that any action purporting to have that effect (e.g. contract of sale or implied gift) is void. In the case of constitutional protection, it would even nullify a law purporting to alienate official records.

Australian law (steeped in the British tradition) seems to find this a nasty, foreign notion. Perhaps this comes from a reverence for property. None at any rate outlaws dealing in official records and all appear to contemplate, in one way or another, that official records may pass lawfully into private hands. The Commonwealth Act makes sale a form of disposal which can be undertaken with the permission of the archives authority. The Victorian Act goes further and excludes from the definition of "public record" any record which is "beneficially owned" by a person or non-government body. Respect for property rights (even if acquired in suspicious or dubious circumstances) appears to make it unlikely that notions of inalienability will be written into the Australian Acts any time soon.

Instead, the laws give the archives authorities restricted powers to recover public record estrays (in addition to common law rights the Crown undoubtedly has to seek to recover its misappropriated property through the courts). In recent years, State archives authorities have had to consider whether their recovery provisions apply across State borders.

Recovery takes one of three forms :

- power to intervene to prevent sale of or declare a record;
- power to apply to a court for restitution (on the assumption that the state is entitled to possession of the records);
- power to compulsory acquire a record upon payment of compensation (on the assumption that the state does not have enforceable claims);

It is argued by some that more draconian recovery powers -

- will be **counter-productive** because they will drive the traffic in estrays underground (or interstate) and result in fewer being recovered, and
- are **unfair** because in many cases the documents only survive because public-spirited citizens saved them from official neglect.

There is truth in both arguments and recovery provisions (however drafted) must be administered wisely. The beneficial effects of the work of altruistic collectors can be overstated, however, and do not, in any case, entitle them to the undisturbed enjoyment of someone else's property.

Places of Deposit

Several Acts allow for the appointment of places outside the premises of the archives authority in which official records may be lodged with the permission of the archives authority, e.g. Victoria :

> **14. (1)** Where it appears to the Minister that a place outside the Public Record Office is suitable for the safe-keeping and preservation of public records he may appoint it as a place of deposit for any specified class of public records. .....
>
> (2) Public records in a place of deposit appointed under this section shall be in the custody and under the control of the Keeper of Public Records.

Typically, such provisions are used to allow non-metropolitan collecting bodies to hold historical archives of regional significance as an alternative to removing them to the city. They have also been used to allow the development of `in-house' archives in long-lived bodies resistant to transfer - e.g. public utilities, banks. There seems no reason why, under a post-custodial regime, the whole of the storage/retrieval arrangements could not be thus delegated to a state library or commercial company.

ACCESS

Before the introduction of freedom of information laws in the early 1980's (C'wealth, Vic), archives legislation provided the sole example of statutory access regimes having general application to official records. Access rights had been enacted for particular categories of records (notably provisions in local government laws requiring that certain municipal records be available for inspection by ratepayers). Only archives laws conferred a general right of access to records regardless of type or origin upon transfer to archives ("open records") with provision to withhold access, usually upon a decision of the transferring agency ("closed records").

Archives laws applied, however, only to records after they were transferred into archives custody. Regardless of the age of the records, access under archives law did not apply to records retained by an agency. Freedom of information (FOI) laws, on the other hand, apply to all government records other than those of specified agencies or classes of agencies ("excluded records") and records deemed, upon examination after request, to belong to one or more of the specified categories of restriction ("exempt records").

FOI gives strict access rights. Access must be given to single documents (and even parts of a single document). Generally, whole categories of documents cannot be withheld. Access can only be denied to an eligible record if it falls within a statutory category of exemption (e.g. personal privacy, national security). An adverse decision is usually appealable to a court or tribunal. In most cases, however, the retrospective application of FOI is limited creating an "FOI" gap" between older records which are open under archives law and more recent records above the FOI threshold (e.g. post-1977 records under FOI Vic).

Under pre-FOI archives laws, access rights were fairly limited. The grounds for closure were never specified - those responsible for closure (usually the transferring agency) having, in effect, an unfettered discretion. Apart from very limited common law rights of administrative review by the courts (which were never exercised), there was no appeal against closure. The system, moreover, was a rough and ready one involving the closure of whole consignments of records many of which, it is safe to assume, did not warrant closure on even the most restrictive view of what actually needed to be withheld : "a record or class of records" (Vic.).

In the dying days of the McMahon Government in the early 1970's, the Commonwealth attempted, by administrative fiat, to introduce into Australia the British notion of a 30 year rule (records are transferred to the Public Record Office and become available for public inspection, with exceptions, 30 years after they are created). The measure was brought in hurriedly and without preparation. Apart from Cabinet records22, no attempt was made to give effect to the transfer arm of the rule. Although a vague intention to give it statutory form was mentioned, over ten years were to elapse before the Archives Act (C'wealth) was finally enacted.

By chance, drafting of the Commonwealth Archives Act became caught up with development of the first FOI legislation in Australia23 When considering how the two access regimes would intermesh, it became apparent that, if access under the archives regime was to be in any sense a substitute and replacement for FOI access after 30 years, it must extend similar (and certainly not more restrictive) access rights over older records as FOI had created when those same records were less than 30 years old and in the closed period.

The most extensive public discussion of this issue appears in the 1990 *Report* of the Legal & Constitutional Committee (L&CC) of the Victorian Parliament recommending changes to Victoria's Public Records and FOI Acts, later taken up and applied by the Electoral & Administrative Review Commission (EARC) in Queensland24 recommending changes to Queensland's archives law. Broadly speaking, the L&CC (Vic) offered three models - to establish :

- no nexus between the two regimes beyond excluding from FOI records which are open under the archives regime (the "No-Nexus Model"),
- a complete nexus between the two regimes so that after 30 years FOI no longer applies and all access rights come under the archives regime (the so called "Commonwealth model"), and
- a partial nexus so that after 30 years all access rights come under the archives regime except for closed records which continue to be subject to FOI until they are released (the so called "Victorian model").

The Victorian Government has recently introduced amendments25 to Victoria's *Public Records Act* which for the most part follow the no-nexus model. The Victorian model described here should not be confused, therefore, with what is now practice in that State.

Under the no-nexus model, strict access rights (criteria and appeals) exist only under FOI. FOI applies to all records not yet transferred and to closed transferred records until they are released under archives law. The "FOI gap" must be closed by amending the FOI Act to eliminate (at once or gradually) the restriction on retrospective FOI. Access rights under archives law remain crude :

- applying only to transferred records (or, on a more sophisticated model, to records in the custody but not necessarily the possession of the archives),
- whole consignments may be closed including benign material,
- the decision to close records may taken by the transferring agency,
- criteria need not be specified, and
- there need be no appeal against closure.

Unless records are transferred and opened, their access status is not considered until an FOI request is received (access upon request) and they are then made available to the applicant, under FOI not released for general access by the whole world.

Under the Commonwealth model, strict access rights (at least as liberal as those available under FOI) are applied under archives law after 30 years and FOI access rights are extinguished at that time. Archives must, therefore, establish a regime for applying access rights to individual documents (or parts thereof). It cannot work by class or category of records when withholding access. Closure can only be made by reference to statutory criteria and appeals are available against adverse decisions. Moreover, archives access rights must apply 30 years after their creation to **all** records, not merely those which have been transferred into Archives' custody. In addition, a presumption of open-ness is established. All records must be released 30 years after they are created unless positive action is taken to close them. Records are then available to the world when requested (release prior to request26). This is the essential distinction between archives and FOI access regimes.

The Victorian model takes features from the other two. All records, regardless of whether or not they have been transferred, become subject to the archives access regime when they reach the open period. A decision must then be made whether or not they are to be `open'. Once open, access is under archives not FOI law. Criteria for closing records in the open period is specified in the archives statute. In order to avoid the difficulties and resource implications of trying to apply document-by-document clearance to the totality of records over 30 years old :

- records may be closed by category, class, or consignment,
- there is no appeal against closure under archives law,
- an application for access may be made under FOI for access to closed records in the open access period.

The Victorian model thus closes the `FOI gap' and provides for release under archives rules for the majority of

records in the open period. It :

- precludes the necessity for the archives authority to establish elaborate procedures to examine and `clear' records or to deal with appeals against closure;
- puts back onto agencies the responsibility for administering access to closed records in the open period and appeals against continued refusal to release - using an extension of FOI arrangements to closed records in the open period to do this;
- provides agencies with an incentive to transfer records into archives custody as they enter the open period, so that they will be relieved of the expense and bother of administering an elaborate access regime.

Thus the chief virtue of the recommendations developed by the L&CC (Vic) was to eliminate the necessity for duplicating elaborate FOI access examination and clearance procedures in the open period. Given the resource implications of the alternative, it is difficult to see how new laws can follow any other path but they have already even in Victoria itself. Perhaps only time will reveal to governments the true costs of permitting FOI to be extended in an unlimited way into the open period.

TABLES

ENDNOTES

1. This review is current up to July 1994. Changes (for good or ill) are known to be (or during the last few years to have been) under consideration in New South Wales, Queensland, South Australia, Victoria, Western Australia. That is to say, legislation is or recently has been subject to proposals for change everywhere but the Commonwealth, Northern Territory, and Tasmania. .
2. UNESCO, General Information Programme and UNISIST, *Archival and records management legislation and regulations ; a RAMP study with guidelines* prepared by Eric Ketelaar (Paris, 1985).
3. This piece looks at statutory provisions dealing primarily with government (rather than private or corporate) archives arrangements, including provisions in the State *Libraries Acts* prior to the development of separate legislation. By and large, it is a survey of the Acts, not of regulations and other delegated legislation under the Acts. It does not attempt to review related legislation impinging on archives (e.g. freedom of information laws, evidence laws, audit legislation, provisions in other laws affecting the creation, maintenance or disposal of records). Still less is there any attempt to review the position of archives under the law generally.
4. Library Board of Queensland, *Queensland State Archives : The first thirty years (1989)*, p.4. The growth of interest in archival regulation during both world wars, which has often been remarked upon, may be attributable to the galvanisation of national endeavour and public spiritedness generally during those periods. A more prosaic explanation is that paper drives in support of the war effort were then perceived as an immediate threat.
5. In this context, the word `Library' should be taken to mean the State Library of each of the States and, in the case of the Commonwealth, the Commonwealth Parliamentary Library and the Australian War Memorial in their joint archival capacity after 1944.
6. Tasmania's Archives Act was completely revised and modernised in 1983.
7. N.S.W. Independent Commission Against Corruption. *Investigation into the Relationship Between Police and Criminals* Second Report (April, 1994), pp. 46-47.
8. John Cross, "Legislative Developments in Archives" in Electoral and administrative Review commission of *Queensland, Record of Proceedings : Public Seminar on archives Legislation* (9 December 1991), p.10.
9. John Cross, "Legislative Developments in Archives", p.11.
10. John Cross, "Legislative Developments in Archives", p.13.
11. UNESCO, General Information Programme and UNISIST, *Archival and records management legislation* ... paras. 38-50 and 193.
12. One State Archivist has recently been dismissed for trying to enforce theme, however, and another served with a Writ of Mandamus for allegedly failing to do so.
13. C Hurley, " The Regulatory Role - Furthering Cultural and Public Administration Purposes" in Electoral and Administrative Review Commission of Queensland. *Record of Proceedings : Public seminar on Archives Legislation* (9 December 1991), pp. 40-41.
14. R.F. Doust, `The administration of official archives in N.S.W. 1870-1960' UNSW, M.Lib. Thesis, 1969 quoted in Archives Authority of New South Wales, `Government records in New South Wales from 1788 to the 21st century' (November, 1992), p. 26.
15. Archives Authority of New South Wales, *Government records in New South Wales from 1788 to the 21st century : a proposal for public records legislation for NSW* (November, 1992), p. 27.
16. C Hurley, "The Regulatory Role ...", p. 41
17. Western Australia, Minister for the Arts, *Discussion Paper on New Public Records Legislation for Western Australia* (25 July 1994).
18. C Hurley, "The Regulatory Role ...", p.43.
19. C Hurley, "The Regulatory Role ...", pp. 41-42.
20. Departments do not own records, public records remain (for the most part) the property of the Crown. Some statutory authorities may be conferred ownership rights over their records under the Crown.
21. UNESCO, General Information Programme and UNISIST, *Archival and records management legislation* ..., paras 33-37 and 192.
22. The tradition of non-disclosure was so strong that even when the Cabinet records were first "released" in 1972, for the most part what was transferred was photocopies - the originals remaining physically for some years in the Cabinet Office. What the public actually saw was photocopies of these photocopies.
23. Although Victoria's FOI Act was first to the statute book (by a few months), it was virtually a copy of the Commonwealth Bill which had been around for years.
24. Parliament of Victoria, Legal & Constitutional Committee, *Thirty-Eighth Report to the Parliament : Report upon Freedom of Information in Victoria* (November, 1989) - Chapter 6 - Integrating Public Access Systems : The Freedom of Information Act 1982 and the Public Records Act 1973.
Queensland, Electoral and Administrative Review Commission, *Report on Review of Archives Legislation* (June 1992), - Chapter 5 - A Right of Access to All Public Records.
25. Compulsory transfer has been reduced from 85 to 25 years. Access is limited to records which have been transferred; the archives

access regime does not apply to records, regardless of age, which remain outside archives custody. The maximum period of closure has been raised (lowered) from 25 years after transfer (effectively 110 years) to 30 years after transfer (effectively 55 years). "Special access" to non-personal records has been abolished and (astonishingly) closures, once made by administrative decision, are by law made unalterable thereafter in any circumstances. There are no criteria for closure, no appeals, and nothing has been done to close the "FOI gap".
26 . In fact, most post-30 year old records remain "pending" examination until called for - for resource reasons.

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