From Dust-bins to Disk-drives and Now to Dispersal: the State records Act (New South Wales) 1998

By Chris Hurley

Abstract

In May 1998, the New South Wales Parliament enacted a new State Records Act. The author was consultant to the N.S.W. Archives Authority in developing this legislation. Using an analytical matrix he originally worked up in 1994, he argues that the new Act represents a definite departure from all previous records legislation[1] in Australia and can be seen as a stepping stone to the kind of legislation we need for a post-custodial future.

Background

A survey of records legislation (entitled "From Dust Bins to Disk-drives") which I completed barely four years ago as an Appendix to *The Records Continuum*[2] is rapidly becoming out of date. New legislation has passed in South Australia and New South Wales and a major Law Reform Commission Review of the 1983 Commonwealth Act has been completed. A copy of the Western Australian State Records Bill 1998 became available just as this article was going to the printer and a comment on it is included below[3].

Some continuing process for documenting legislative changes as they occur, and for comparing and contrasting legislative provisions at Commonwealth and State level, would be desirable. This article does not attempt to do that. At a more fundamental level, it may be asked whether the direction legislative changes are taking involves any significant variation from the typology given in my earlier analysis. In other words, does the 1994 analysis just need to be updated or should it, instead, be revised?

I accepted this invitation to provide a brief analysis of the new *State Records Act* in New South Wales in the belief that, in some ways, it breaks the mould. Since 1993, I have been a consultant to the New South Wales Archives Authority, now State Records Authority (SRA), on its proposed new Bill. It is not for this reason alone that I regard its passage into law as a significant step. There are good reasons, which I shall endeavour to outline here, for regarding it as important, ground-breaking legislation which poses a real challenge for other archives authorities - whether to emulate or repudiate it.

It will not be possible, for reasons of space, to make a detailed analysis of the whole of the new Act. I will confine myself, therefore, to some aspects only which seem to me to justify the above contention.

The Act should not, in my view, be regarded as just one more addition to the portfolio of records legislation in this country. In my 1994 analysis I placed all Australian legislation into a generational framework which implied progress along a linear axis :

> The 'first generation' Acts …
> - 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
>
> The archives authority was seen as a passive recipient of records deemed to be of permanent 'archival' value once government had finished with them … The second generation Acts are based on a more activist view of what a public records program should be …
> - mandates transfer after a nominated period …
> - regulates records management activities, and
> - establishes public rights of access after a specified period.
>
> In each instance it will be seen that these provisions are proactive … 4

This generational model was useful in depicting a direction along which archivists wanted change to occur. Having an archives authority to prevent thoughtless destruction, to take older records and look after them and make them available were foundation stones in a system which was progressively maturing into one which required agencies to transfer records, imposed access obligations after 30 years on all records (not just those which had been transferred), and regulated records management (not just the management of archives).

Into this model, the *Archives Act 1960 (New South Wales)* clearly fitted as a first generation Act. My brief, when I first accepted the commission from John Cross5 to be his consultant on the proposed Bill, was to help the Archives Authority develop and implement second generation legislation. What makes the resulting legislation significant is that we failed in this. The new Act can justifiably be regarded - if not as third generation legislation - at least as the first Australian example of a post-second-generation Act. As we jokingly said from time to time - it is a 2½ generation Act.

It was clear to us from the outset that third generation legislation might not extend the straight line drawn between the two points already plotted in the 1994 analysis :

> … 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 the development and implementation of standards for recordkeeping which comprehend or impinge on procedures for the disposal, documentation, and accessibility of official records.6
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> In this essay, I will use the 1994 model to analyse the new N.S.W. Act, drawing attention to those features, in particular, which point the way to new directions. This should be regarded as preliminary work to a full scale revision of the 1994 model, bringing the whole survey up to date, perhaps when the review of the Commonwealth Act is completed and amendments are enacted.

Reverse All Engines?

The line of direction from first to second generation Acts seemed to be along a path giving the archives authority more say (more power, more control) over recordkeeping throughout Government. No single misconception gave us more

trouble. We had similar problems when we began trying to enact the Commonwealth Act in the 1970's.

The problem is that in bureaucratic terms records laws are seen as charters; instruments for empowering one public agency (the archives authority) at the expense of others (agencies). In the inter-play of bureaucratic politics, such legislation is routinely (even automatically) opposed and watered down by other agencies who believe their "turf" is being invaded. Since records legislation (by its very nature) invades everybody's turf, the opposition is formidable.

Although it seems implausibly naïve to say so, what one has to try to convince people of is this : that records legislation is first and foremost a mechanism for imposing corporate (i.e. Government) control over agency recordkeeping and only secondly about assigning their respective roles in that process to the archives authority and to Government agencies. Further, it needs to be understood that the same corporate recordkeeping objectives can be achieved in a variety of ways involving different mixes of responsibilities.

The error goes back to first generation Acts which were largely about separating the respective spheres of activity of agencies and the archives authority and empowering them each to operate in their respective spheres without interfering too much with each other. Second generation Acts emphatically "intruded" into the activities of agencies (as if these were entirely the concern of feudal baronies making up the bureaucracy and of no interest to the Government whose legislation it was). The point which I have never successfully got across in nearly twenty-five years is that the purpose of such legislation is to regulate the totality of government recordkeeping activities - of both agencies and the archives authority - not just to assign responsibilities to each. Agencies seek to "escape" the clutches of the archives authority by having themselves exempted from the statutes, whereas the principle should be that (even if an agency is not "subject" to rule from the archives authority) every agency should be subject to a records law which specifies what its obligations to corporate accountability should be, even if they are different from those of other agencies.

In a second generation Act, much of the success in implementing the purposes of the legislation still depends upon the initiative taken by the archives authority to make things happen and its success in achieving an operating environment where its practices and procedures are universally adopted by agencies. Logically, however, the distinction between first and second generation Acts is clear. It is not possible to have a first generation Act without an archives authority; such Acts operate on the assumption that total responsibility for records lies with agencies until the archives authority takes over at which point (when records are no longer needed for current administrative purposes) total responsibility passes to the archives authority. It should be possible (though I would not like to try) to design a second generation Act without the need to have an archives authority at all.

Although second generation Acts appear to be empowering archives authorities and expanding their role and functions at the "expense" of agency autonomy, when correctly viewed they should be seen as being, possibly, stepping stones towards the ultimate extinction of the archives authority. For what is happening is not really

an expansion of the archives authority's "power" at the expense of agency independence. It is rather an extension of corporate governance - a movement outwards of what some call the archival or recordkeeping boundary. When that boundary is co-extensive with corporate activity, when recordkeeping rules govern all corporate activity to which they are appropriate, it is arguable that quite different instruments will be needed to provide and enforce that corporate governance.

Indeed, I think it is arguable that archivists have already proven themselves to be unfit to be entrusted with that role. But that is another debate.

The point to make here is that in second generation Acts, the outwards movement of the recordkeeping boundary appeared to be giving the archives authority more things to do over larger quantities of records. Records came to the authority by predetermined rules, not when agencies thought fit. Access rights applied to records which had not yet come into the authority's control if they were old enough. The authority had an explicit mandate to advise (or even dictate) on the manner in which records were made and handled.

It could be assumed that a third generation Act would go on adding to the roles, responsibilities, and activities (and by implication the budgets and staffs) of archives authorities. From this point of view, legislation such as the New South Wales *State Records Act* 1998 which does not require records to move "from" an agency "to" the authority (and actually empowers the authority to refuse to take them) may seem a retrograde step.

The trick is to look at it the right way up. The new Act does indeed (to use the pejorative language of hostile agencies) "intrude" more than the old one into their activities. The archives authority (perceived as the instrument still of that intrusion) runs the risk of being regarded with suspicion and resentment. What it does not do is to intrude by mandating that tasks previously undertaken by agencies are taken over and thereafter carried out by the archives authority. It abolishes, in other words, or at least de-emphasises, the life cycle approach under which what are essentially the same recordkeeping tasks are split into two separate sets of responsibilities mandated solely on the age and appraised value of the records.

The new Act goes some way (and its failure to go all the way is what makes it a 2½ generation Act rather that a third generation Act) to separating out corporate governance policies and procedures from implementation. A true third generation Act would set out (and establish machinery for promulgating) the corporate governance framework for Government recordkeeping allowing for alternative implementation strategies. It might say little (if anything) about the implementation strategies which were to be used. Since these implementation strategies cover almost everything that was in a first generation Act and much that was in a second generation Act, it is apparent that they will be very different from what we are used to.

To put matters at a practical level. Third generation Acts will say what the principles are which govern good recordkeeping, they will lay down the outcomes which must be achieved and the expectations (including citizens' entitlements) which must be satisfied. They will be less concerned with how these are achieved. Thus the *State Records Act* 1998 empowers the SRA to set "standards". These standards are

important instruments in achieving the Act's objectives. The Act specifies a mechanism for identifying who (the SRA itself or an agency) is responsible for carrying out and satisfying the relevant standard(s) in particular circumstances.

The key to understanding the underlying logic of the legislation is that such standards are applicable to anyone who is carrying out a responsibility under the Act : to the SRA as much as an agency. Under second generation legislation, it was possible to regard a standard as an instrument whereby the archives authority imposed an obligation on agencies. Under third generation legislation, standards will govern recordkeeping wherever and by whomsoever it is carried out[7].

It can be argued that a conflict exists between the role of the archives authority as standard setter and as implementer, and this not only on the insulting (and largely irrelevant) grounds of "professional capture"[8]. This conflict is not simply about whether archives authority should adopt a purchaser/provider model. It goes much further than that. It delineates several quite separate functions for the professional recordkeeper : that of assumed professional knowledge about what things should be accomplished, that of designing systems aimed at achieving them, and that of being responsible for carrying them out.

None of these roles necessarily belong together and they are all different from deciding what the outcomes themselves should be. The formulation of recordkeeping policy is a task of corporate governance - for the board or government to decide. The policy, or elements of it, can be set out in legislation (arguably, should be) but it can't be left to recordkeeping professionals to be both deciders of what the recordkeeping policy should be and experts on how it can be done - though this has, historically, been the role assigned to us.

The issue for debate (I do not assume my analysis will be widely accepted) is, to use a specific example, whether the archivist should be responsible for deciding what records are to be destroyed or kept or simply what records need to be destroyed and kept in order to achieve a designated outcome. The same distinction can be made in any one of a dozen other issues which might come the archivist's way. Giving up the decision-making responsibility is not an abdication by the archivist or recordkeeper, it is an affirmation of it. A disposal policy must be grounded on something more substantial and more convincing than the archivist's best judgement. There must be an external validation of the decision, call it "literary warrant", a policy, whatever. It follows that archives legislation which places in the archivist's hands an absolute discretion about what to keep and what to destroy is inimical to (rather than supportive of) good recordkeeping.

Now, I have argued often enough against fettering the archivist's discretion in disposal and other areas (and against removing that discretion) for this to seem paradoxical. The object remains the same : to establish a body of rules and procedures to ensure a consistent, reliable, predictable, justifiable, and testable disposal outcome. The point is that until legislation establishes some better way, the independent judgement of an archives authority is to be preferred to the unregulated power of business units within a corporation (be it a business or a government) to make their own decisions without reference to corporate authority acting in conformity to social and legal requirements as well as business needs.

It is along this path of development that the faltering steps of the *State Records Act* beyond its second generation roots must be judged.

Custody

First generation statutes established a definite boundary between the archives authority and the realm of records creation. Second generation Acts began to extend the statutory regime outwards, so that statutory requirements operated in the realm of the creator as well as that of the archives authority. It is now possible to speculate that third generation Acts will do away with the boundary altogether.

The first generation boundary distinguished between records belonging to or under the care, custody, and control of the bureaucracy and those which had passed over to the other side of the boundary to become the concern of the archives authority. In many of these Acts, passage across the control or custody boundary actually transforms records into "archives", a defined term for that sub-category of records transferred to and controlled by the archives authority[9].

Almost the only intrusion into the record-creator's realm made by first generation Acts was a prohibition on destruction without the approval of the archives authority. Since this was, to some extent, the process by which records were to be propelled across the boundary and this passive approach (archives waiting until asked) was the least intrusive of all possible mechanisms, it scarcely constitutes an exception.

Second generation Acts are characterised by provisions which "intrude" the statutory regime into the otherwise unfettered discretions of record-creators (we would now say provisions which impose corporate control on recordkeeping practice). The first instances of this were the provisions in some State Acts for the archives authority to inspect agency premises and to give (with varying degrees of dominion) advice and assistance to agencies in carrying out their recordkeeping tasks. Prior to this new Act, the most advanced examples of this have been the standard-setting provisions (ss.12 and 13) of the *Public Records Act (Victoria) 1973* and some aspects of the 1997 South Australian legislation.

Curiously, the 1983 Commonwealth Act, in other respects the model of what a second generation Act should be, was almost entirely innocent of any suggestion that the Archives should have such a role[10]. This was owing to the opposition of the then Commonwealth Public Service Board which saw involvement by the archives authority in records management as intruding on its domain. The obvious solution, to include a standard-setting power and assign it to the Board was not seriously considered. Where the 1983 Commonwealth Act did foreshadow a truly third generation development was in the drafting of the access provisions to extend a statutory right of access over all records more than 30 years old regardless of whether or not they had been transferred.

These provisions envisaged a universal access regime which had nothing to do with archival boundaries, enduring values, or custody arrangements. The Act was even drafted to allow the possibility that the access clearance process which it requires need not be done by Australian Archives' staff, but could be done by anyone, anywhere, under delegation. Regrettably, Australian Archives chose not to develop

these potentials and continued effectively to run a centralised access clearance regime (possibly because of perceived difficulties when the Archives was called upon to defend access closures before an external appeals tribunal).

Third generation Acts may take the next logical step and separate outcomes from implementation strategies. Under these statutes, recordkeeping rules will be established which apply regardless of age, appraisal status or location of records. Those rules will be satisfied by whosoever is identified as being responsible for the matter which is the subject of the rule. Identifying and assigning these responsibilities will become a major task. It will not, therefore, be a matter of making one person or body responsible for satisfying every recordkeeping rule by moving records into a domain within which one person or body has exclusive and total control for everything - such as an archives authority. Rather, it will be an important part of the legislative task to establish a framework for identifying which bodies are responsible for which records (wherever they may be found) and, where overlap or ambiguity is possible, who has primary responsibility.

The new Act certainly persists in the establishment of an archival boundary by creating a distinction between "State record" and "State archive" - the latter being those State records of which the Archives Authority of New South Wales has assumed control. State archives can exist in "distributed custody" - i.e. the Authority can assume "control" over records which are to be found in the creating agency (or anywhere else, for that matter).

Because the *place* debate has become so confused, it may be necessary at this point to distinguish between distributed custody and post-custodial arrangements. Post-custodialism (as I use the term) means the application, within a domain, of a set of universal recordkeeping rules regardless of where records are kept within the system and irrespective of who (provided they are authorised) implements them. In order to have distributed custody within such a domain, you must first identify some portion of the whole (and establish special rules applying only to that portion) so that custody of it can be "distributed" along with responsibility for implementing the special rules. Distributed custody, in other words, only makes sense from the point of view of the archives authority. Post-custodialism steps outside that point of view.

On this interpretation, the new Act is still some way from a full blooded third generation model. It establishes a custodial regime (of "control") over a sub-set of the whole called State archives. The distributed State archives are the responsibility of the SRA which exercises its obligations, in part, through a system of "agreements" with persons, including government agencies, who hold them (s.36). This is the distributed custody.

These are the kinds of compromise that real world legislation has to make along the painful path of transition towards the future. But the new Act has some wholly third generation, post-custodial features too. These jostle (perhaps uncomfortably) with its other provisions. For the "agreements" provision does not cover all the things which will be necessary for the SRA to carry out its responsibilities. To do that, it will have to rely on its standard setting powers under s.13. Thus, in order to ensure that archives which have not been transferred are well managed, the SRA will have to rely not only on specific agreements with the surrogate custodians but also on

obligations arising out of standards which have general application - not just to custodians of archives.

Certain implications follow. The standards may be expressed to apply to all records (not just archives) so that the SRA's obligations in respect of archives will be satisfied by compliance with standards which apply to records generally. Should the need arise, there is, however, nothing to prevent the establishment of a standard which applies only to archives. By extension, it will be seen that at least some standards will apply to both government agencies and to the SRA itself. A standard on storage conditions, for example, whether for all records or just for archives would be what would set the bench-mark for a preservation environment regardless of whether that environment was in premises managed by the SRA or within the distributed custody realm.

The distinction between the two methods, however imperfectly realised in this incarnation, is perfectly clear. The agreements provision (s. 36) allows the SRA to implement rules applying to records segregated from the whole by ensuring that the custodian of those records abides by a contract specific to them. The standards provision (s. 13) allows the SRA to set out what rules are to apply regardless of who has management and control of the records.

Ambit

The *Archives Act* 1960 (NSW) did not apply to the entire public sector in that State. The Act's ambit was limited by intentional omission, oversight, subsequent legal interpretation, and the effects of the effluxion of time. With the new Act, our purpose was to establish a legislative regime which covered the entire public sector.

The most difficult obstacle was the perception that being covered by the new Act would necessarily carry with it an obligation to submit to all of its substantive provisions. Some agencies feel that their case is special and that the ordinary obligations under records laws do not (or should not) apply to them. This is reasonable. They then go on to argue that they and their records should be excluded in their totality from the operation of records law. This does not follow.

One of the intentions of the new Act is that there should never be doubt about the status of an agency under the Act even if none of its substantive provisions apply. The definition of "public office" (s.3) is meant to be comprehensive, that is to include all public sector agencies without exception. Section 81(2) of the Act then provides for the operation of provisions relating to any agency or its records to be suspended by regulation and, where appropriate, brought back in the same way.

This has two advantages :

1. It reduces the area of doubt as to coverage. Even if new administrative arrangements are set up, they are more likely than not to be caught. If it is not appropriate for them to be covered, the mechanism exists for suspending the Act's operation over them.
2. It mitigates against unintended consequences when agencies continue to be excluded once the good reasons for excluding them no longer apply. When

> those reasons no longer apply or the agency goes out of business, it is easier to have them revert back into a system they have always been part of (though its operation has been suspended) than it is to bring them into a system to which they have never belonged.

In other cases, the exemption from substantive provisions is enacted in the body of the statute itself (either to nominated bodies or to specified classes of records) and its operation, in these cases, may be extended only by agreement with the bodies concerned.

The sole exception to the flexibility which this approach gives is in the area of regulation of disposal. No agency and no record of any kind or on any ground can be exempted from the obligation to be accountable for disposal of public records (Part 3)[11].

Enforcement

Third generation Acts will make us distinguish between enforcement and the larger issue of compliance. First and second generation Acts tend to establish specific obligations and prohibit specific actions with the result that transgression constitutes a breach. This should, in my view, continue to be a feature of third generation Acts, but they will also need to deal with outcomes and utilise processes which do not mandate or prohibit specific actions (so long as the outcome is achieved) and where the black-and-white issue of transgression is replaced by degrees of compliance. This will be more commonly the approach in applying standards and codes of practice - though these too can be enforceable.

In *Dust Bins*[12] the question of compliance was discussed almost entirely in terms of enforcement and the failure to seek prosecutions under provisions which make it a criminal offence to unlawfully destroy public records. It is not surprising that our first generation Acts should have settled on this method. As noted above, the prohibition on disposal was practically the only matter upon which an obligation from the archives side of the boundary stretched out to impose on records creators over on the other side.

One reason why there have been no prosecutions is that in Australia governments discourage (where they do not actually forbid) prosecution of one government agency on the initiative of another and any move towards it is swiftly frustrated. Because they involve criminal sanctions, the standard of proof (beyond reasonable doubt) is higher than it would be in ordinary court action (on the balance of probabilities). Similarly, criminal action ordinarily lies against a natural person who is often either the agent of the guilty party (the lowly file clerk) or the remote instigator (the guilty Chief Executive who did not actually do the deed). Moreover, the best evidence is usually the testimony of the person who would have to be prosecuted and therefore hard to obtain. Even if all these obstacles are overcome, the defence could argue absence of *mens rea* (although records were indeed destroyed without approval, there was no criminal intent).

Happily for bureaucracy, none of these issues has ever been tested. I have even heard it argued that the criminal sanctions were never intended to be used against

bureaucrats, that they are there to prevent wanton or reckless destruction by ordinary people in search rooms, not to convict civil servants going about the Queen's business! It remains unclear who would investigate (the police?), what role the archives authority has, and who decides to prosecute. The fact remains that so long as our society regards the destruction of official records as less serious than the theft of soap[13], these provisions (though not without totemic value) will continue to be a dead letter.

The apparent pointlessness of seeking prosecutions fits in well with a temperamental repugnance for confrontation on the part of many archivists-

When constabulary duty's to be done -
(to be done)
A policeman's lot is not a happy one
(happy one)[14].

This has led to a view within the profession (accompanied by the appropriate rhetoric) that compliance is only about "training", "education", "assistance", "partnerships", and "co-operation" with our "clients", on the basis that you can catch more flies with honey and that good will won't take root in the hearts of those you are trying to imprison.

For third generation legislation, several issues arise. Leaving aside the wider issues of compliance, the question remains : how are specific prohibitions and obligations arising under the legislation to be enforced? As the range of obligations (on either side of the boundary) increases, it is clear that criminal sanctions will not, indeed, be the only or the most appropriate ones (without conceding to those who want to get rid of them that they should be done away with altogether). The fact that those which remain could apply against the archives authority itself and its employees might resolve what its role in investigation should be :

For duty, duty must be done;
The rule applies to everyone,
And painful though that duty be,
To shirk the task were fiddle-de-dee![15]

The core question is : what alternative enforcement mechanisms ("education", "assistance" and other compliance mechanisms apart) are available?

One method which has (arguably) always been available is what used to be called the prerogative writs. These apply the principle that a court can intervene into the administrative process where a statutory obligation is being breached or ignored to compel a government official or agency to carry out that duty (*mandamus*) or to prevent a breach of duty (*prohibition*). These ancient administrative law remedies have been in part the basis for a much more active litigation of recordkeeping matters in North America and there is no reason why they could not be used here (including, conceivably, by the archives authority itself)[16].

This road to enforcement has certain advantages. First, it removes all the difficulties with criminal prosecution. Second, it is available to ordinary citizens (provided they

can establish "standing" before the court) and they may not be intimidated by governments reluctant to have agencies prosecuted. Thirdly, and best of all, the enforcement mechanism is the court itself. Once a writ is issued, the agency must comply or be in contempt of court, and courts suffer contempt with much less equanimity than wimpy archivists.

The new Act introduces, for the first time, an enforcement mechanism based on this reasoning. It specifically empowers the SRA to make an application in the New South Wales Supreme Court seeking an injunction restraining a person who is "contravening or is proposing to contravene a provision of this Act" from doing so or "requiring the person to do any act or thing necessary to avoid or remedy the contravention" (s. 72). For the purposes of this section, it should be noted that "person" is defined (s. 3) to include "a public office and a body (whether or not incorporated)". This mechanism operates in respect of all statutory obligations under the new Act, not just over unlawful disposal.

The fact no doubt remains that the use of this provision will still require courage and determination on the part of the archives authority. It remains to be seen whether or not it falls into disuse like the old prosecution provisions. It represents a challenge for other archives authorities too to take it up and urge its introduction into legislation elsewhere.

Conclusion

Compliance is the key issue. The road not taken would disestablish much of the role and purpose of the archives authorities without replacing them with stronger, more effective processes for corporate governance. The temptation to discard what we have achieved in earlier legislation, in conformity with current fashions for deregulation, while cloaking this in good post-custodial rhetoric, is a major threat. We must beware. Time will tell.

There are other notable provisions in this Act. The decision to borrow, from the 1973 Victorian Act, the obligation to make and keep "full and accurate" records (s. 12) and the standard-setting provisions (s. 13) was a wise one. Extensive work was done to bring the recovery provisions up to date, including a courageous attempt to give reciprocal application to other States' recovery laws (s. 48) which, although enacted unilaterally, offers other archives authorities around the country the opportunity to inaugurate (for the first time) a national system for regulating the trade in State estrays.

Less happily, the Act stops short of a truly satisfactory resolution of the access problem. It avoids the impossible work-loads of the Commonwealth system and provides (at least) a statutory obligation to make a decision after thirty years (s. 51). Our archival access systems all now need substantial overhaul and I am on record for over ten years as to what I think should be done (applying the so-called "Victorian option" which I argued, successfully, before the Victorian Legal & Constitutional Committee in the 1980's17 and which they subsequently recommended, unsuccessfully, be adopted). There is no space here to open the access debate, but it badly needs to be resolved.

The New South Wales Archives Authority set out to update the 1960 *Archives Act* from first to second generation legislation. On the way, it found itself overtaken by new, fresh, and stimulating ideas. The resulting legislation cannot be claimed to be model third generation legislation, but it goes some considerable way and I hope others will follow and extend upon what has been achieved.

END-NOTES

1. Note on Terminology and Usage : In this article, I use the term "records" to refer to the totality of records created by a Government. The agency created to give effect to an Act, I call the "archives authority". The term "archives" is used here to refer to a subset of Government records defined by appraisal status or location (e.g. noncurrent records having "historical value" held by an archives authority).

The Victorian Act (1973) annihilated the legislative distinction between records and archives. The Commonwealth Act (1983) and South Australian Act (1997) have done the same. Regrettably, the distinction has begun to creep back into the thinking and emanations of archives authorities in some of these jurisdictions with the implication that archives (or records of "enduring" or historical value) possess some particular status or relevance.

The New South Wales Act (1960) established three categories of record (viz. Public records, Public archives, and State archives). In the new Act (1998), the distinction between "State record" and "State archive" is retained, the latter term now defined to mean records (regardless of location) over which the new State Records Authority (SRA) has assumed control.

2. Sue McKemmish and Michael Piggott (eds), *The Records Continuum : Ian Maclean and Australian Archives First Fifty Years* (Melbourne, Ancora Press in association with Australian Archives, 1994), pp. 206-232.

3. See end-note 7.

4. "From Dust Bins to Disk-drives", in *The Records Continuum*, op cit., pp.210-211.

5. I take this opportunity to pay tribute to John's persistence and vision in having this legislation developed and enacted. This is to say nothing of his enduring friendship and support, which I value highly. From a consultant's point of view he was that rarest of clients : he knew what he wanted!

6. "From Dust Bins to Disk-drives", in *The Records Continuum*, op cit., p. 212.

7. The Western Australian *State Records Bill* 1998 follows almost exactly the pattern given here for third generation laws. Its most significant feature is that it separates the role of the archives authority, the proposed independent State Records Commission (SRC), from any part in the governance of the State Records Office (SRO). The Commission will be responsible for implementing a regime of Record Keeping Plans throughout government. Every agency, including the SRC and the SRO, must have a Plan. The Bill specifies what the Plan has to include, and obliges every agency and its staff to comply with the Plan. These Plans will determine what records are made, how long they are kept, which can be disposed of and how : including what does and doesn't go to the SRO. In addition to monitoring compliance and inquiring into breaches of the Act, the SRC has a duty to enunciate the principles and standards governing the implementation and operation of Record Keeping Plans.

8. Managerialists hold that professionals are, for a variety of reasons, poor managers of the functions they carry out. One reason is that they are presumed (unlike professional managers and entrepreneurs) to have a vested interest and career stake in making work for themselves. "Professional capture" is the pejorative term applied by such people to situations where activities are being undertaken by people who know what they are doing.

9. The 1983 *Archives Act* (Commonwealth) certainly set out to avoid any such distinction. It is unfortunate, therefore, that the recent Australian Law Reform Commission review sought to establish it by arguing that records of "enduring value" were of some special concern to the archives authority - and actually thought they had found it in the 1983 Act in the definition of "archival resources of the Commonwealth". Their recommendations that new legislation should establish such a distinction and give the Archives special responsibility points a different direction for Commonwealth legislation than the one I am painting here. Some legislation, such as New Zealand (1957) and New South Wales

(1960) make "noncurrency" the defining characteristic of a separate class of archives to distinguish between those archives which have been transferred and those which have not. The Commonwealth Act (1983) does have a category "material of the Archives" to identify Commonwealth records (regardless of age, currency, or appraised value) which are housed in and managed by the Archives, but this concept is not the same.

10. As will be noted below, this aspect of second generation legislation does not necessarily have to involve empowering the archives authority to set rules and see to their implementation. Under second generation legislation, however, this is almost invariably necessitated by the existence of an archival boundary - the area of operation for such rules being the realm outside of the archives authority.

11. Some exceptions to this general rule are provided for, e.g. where disposal is mandated by statute, ordered by a court, or determined by resolution of Parliament.

12. "Dust Bins to Disk-drives", in *The Records Continuum*, op cit., p.220.

13. This is an obscure reference to one of the more bizarre episodes in the notorious "Heiner Case" in Queensland - where the authorities argued that prosecution for records offences should not be undertaken because they were "stale" while simultaneously pursuing a hapless railway worker for petty pilfering which ante-dated those alleged offences by years.

14. W.S. Gilbert, *The Pirates of Penzance* (1880), Act II.

15. W.S. Gilbert, *Ruddigore* (1887), Act I

16. I know of only one instance in which a writ has been sought in a recordkeeping matter and that was sought in Queensland against the State Archivist - but (so far as I am aware) it never came to court.

17. Parliament of Victoria, Legal & Constitutional Committee, *Thirty-Eighth Report to the Parliament: Report upon Freedom of Information in Victoria*, Nov., 1989 - Chapter 6 - "Integrating Public Access Systems: *The Freedom of Information Act 1982* and the *Public Records Act 1973*. See also Queensland Electoral and Administrative Review Commission, *Report on Review of Archives Legislation*, June 1992 - Chapter 5 - "A Right of Access to All Public Records". The "Victorian option" recommends establishing an obligation on agencies to make a decision on access in the open period (as in the new Act) and supposes that this will be done at the level of whole classes or consignments of records. It allows an unfettered discretion for agencies to close whole groups of records in the open period but affords a mechanism for the public to seek access to such records (i.e. open period records within a class of records which have been closed) by means of a Freedom of Information or FOI-like process, involving document-by-document examination by the agency concerned and a right of appeal. This relocates responsibility for access release from the archives authority back to the agency responsible for the records. It also makes those agencies responsible for things like privacy or security, and not the archives authority, responsible for ensuring that their purposes are achieved.