

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

TERRITORY RECORDS BILL 2002

EXPLANATORY MEMORANDUM

Circulated by authority of
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OVERVIEW OF BILL

The Territory Records Bill:

- (a) states the obligations of agencies for the management of their records
- (b) provides the records management program of an agency as the way in which an agency is accountable and monitored in relation to their recordkeeping practices
- (c) establishes the mechanism for the approval and adoption of standards and codes, for the creation, management, protection, preservation, storage and disposal of, and access to, Territory records and the processes for monitoring adherence to those standards
- (d) establishes the position of the Director of Territory Records and states the functions of the position
- (e) establishes a Territory Records Advisory Council to advise the Director of Territory Records on the development and operation of the standards for the creation, management, protection, preservation, storage and disposal of, and access to, records throughout the Territory
- (f) recognises that Territory records of enduring evidential, informational or historical value are to be preserved for future reference
- (g) confers an entitlement to public access to those Territory records that have reached a certain age and are open for public access

OUTLINE OF PROVISIONS

PART 1 PRELIMINARY

Clause 1 – Name of Act names the Bill as the *Territory Records Act 2002*.

Clause 2 – Commencement explains that the Bill, once enacted, will commence when a notice of enactment is published in the Gazette. A 12 month commencement period has been established in recognition of the work required to be undertaken by agencies in preparation for the implementation of the legislation, in particular the development of the standards and codes and the establishment of the agency records management programs. The access provisions in Part 3 will not commence until 2007 to enable agencies time to prepare their records for public access.

Clause 3 – Main purposes of Act sets out the main purposes of the proposed Act. These are to establish the basis for good recordkeeping as an integral part of open and accountable government, and to ensure that full and accurate records are created and managed. For records of enduring value the Act establishes an entitlement to access those records of an agency that are open to public access consistent with the principles of the *Freedom of Information Act 1989*.

Clause 4 – Dictionary is the Dictionary at the end of the Act that defines certain words and expressions used in the Act.

Clause 5 – Notes included in the Act are explanatory and are not part of the Act.

Clause 6 – Application of Act provides that the Act does not apply to records that are health records within the meaning of the *Health Records (Privacy and Access) Act 1997* and to certain records of the Community and Health Services Complaints Commissioner. The Act also does not apply to records of the Legal Aid Commission (ACT) that relate to the exercise of a function of an officer of the Commission when practising as, or exercising the function of, a solicitor under the *Legal Aid Act 1977*.

PART 2 MANAGEMENT AND CARE OF RECORDS

Division 2.1 General

Clause 7 – Meaning of agency defines what is meant by the term agency. This is based in part on the definition of public office in the New South Wales *State Records Act 1998* and on the definition of prescribed authority in the *Freedom of Information Act 1989*. The *Freedom of Information Act 1989* is used to achieve consistency of wording in describing the agencies to which the Act would apply. The need for consistency is

appropriate given the close working relationship between the *Territory Records Act 2002* and the *Freedom of Information Act 1989*. It is not intended that Territory Owned Corporations be covered by the Act, however if at a later stage the Government wished to extend the provisions of the Act, Territory Owned Corporations could be included by Regulation.

Clause 8 – Meaning of *principal officer* provides a definition of principal officer of an agency who will have responsibility for the compliance of the Act and for the approval of the agency's records management program.

Clause 9 – Meaning of *record* of an agency **provides a definition of a record for the purposes of the Act. It defines records of the Executive and of agencies other than the Executive, and notes the exclusion of certain types of records in a Minister's control. The definition of records from the Australian Standard on Records Management will also be of assistance to agencies needing a working definition to assist with the development of agency records management programs: 'Records are recorded information, in any form, including data in computer systems, created or received and maintained by an organisation or person in the transaction of business or the conduct of affairs and kept as evidence of such activity'. Under this definition, the Act clearly encompasses electronic and multimedia records. The definition does not include health records and certain records of the Legal Aid Commission (ACT) as set out in section 6.**

Clause 10 – Meaning of *records management* provides a definition of records management for the purposes of the Act. The definition of records management from the Australian Standard on Records Management will again be of assistance to agencies needing a working definition to assist with the development of agency records management programs: 'Records management is the discipline and organizational function of managing records to meet operational business needs, accountability requirements and community expectations'.

Clause 11 – Meaning of *control and entitled to control of a record* provides a definition of control and entitlement to control for the purposes of the Act. These definitions provide an agency with the basis for the ongoing custody for its records and ensures that an agency has the responsibility to recover records that for whatever reason may have fallen outside its control.

Clause 12 – Records to which Act applies provides that the Act applies to a record of an agency whenever it was made. This is also taken to include wherever and by whomever the record was made. This section ensures the inclusion of all Territory records regardless of age, custody or other arrangements such as outsourced functions. This section includes records that were created by the Commonwealth of Australia prior to self-government in the ACT and transferred to the custody of the ACT. These records are presently the subject of a Memorandum of Understanding between the Commonwealth of Australia and the Australian Capital Territory.

Division 2.2 Obligation of principal officers

Clause 13 – Principal officers must ensure Act complied with imposes a duty on the principal officer of an agency to ensure compliance with the Act.

Division 2.3 Records management

Clause 14 – Agencies to make and keep records provides for an agency to ensure that it makes and keeps complete, accurate, reliable and useable documentation of an agency's activity to meet legal, evidential and accountability requirements. The Australian Standard on Records Management provides extensive documentation on what comprises a full and accurate record for the purposes of the Standard.

Clause 15 – Agencies to ensure accessibility of information requires agencies to ensure that the information in its records continues to be accessible in accordance with the *Freedom of Information Act 1989* and with this Act. This is especially important for those records assessed as having archival or enduring value as set out in clause 16 (2) (h). The Act is 'media independent' in its description of recordkeeping, referring to records in all formats. Therefore, agencies will need to ensure that whatever format they choose for particular records that accessibility can continue to be provided. Electronic records which have been captured in a particular format that is no longer in general use by an agency may require migration to current software and hardware or the agency may decide to maintain the original equipment and software to enable continued access to those records. For paper records this provision could refer to some records being printed on archival quality paper or the need to transfer documents received on thermal quality paper to a more stable format. In some instances, an agency may decide to transfer some paper records to an electronic format.

Clause 16 – Approved records management programs requires an agency to develop and maintain a formal records management program which should be based on the functional responsibilities of the agency, to ensure that the records created and maintained by the agency meet the operational business needs, accountability requirements and community expectations of that agency. The agency records management program will be developed utilising the approved standards and codes. The program must include the arrangements set out in subclause (2) (a-l) but will also include the agency's response to the standards and codes. While an agency records management program will be designed to meet the specific requirements of that agency, consistency in the application of standards across Territory agencies is important to demonstrate a whole-of-government approach to records management and to meet public expectations. In developing records management programs, agencies will also need to refer to their responsibilities in other legislation which may also apply. For example some early records will also be covered by the *Heritage*

Objects Act 1991. Arrangements for access to particular classes of record by members of the public will be set out in an agency's records management program, including those records to which a declaration under section 28 of the Act applies. An important part of an agency's records management program will be the arrangements for the disposal of records no longer required by the agency. The community has a right to expect that there will be no unauthorised or premature disposal of records.

Clause 17 – Criteria for approval of records management programs establishes the criteria for the approval of an agency's records management program by the principal officer of the agency. This includes a provision for the approval of a schedule for the disposal of records of the agency. It also includes a provision for the care and management of records that contain information that may enable a person to establish links with their Aboriginal or Torres Strait Islander heritage. This provision also stipulates consultation by the agency about these records with the Territory Records Advisory Council. The principal officer of the agency may still approve an agency's records management program even if it does not fully comply with a particular standard or code, if the Director of Territory Records is satisfied that the noncompliance is necessary for the operational needs of the agency as long as evidential and accountability requirements can be met.

Clause 18 – Approved standards and codes for records management provides for the approval of standards and codes for the management of Territory records. It is anticipated that where practicable the Director of Territory Records will develop the standards and codes utilising standards and codes that have been successfully implemented and proven in other jurisdictions. The standards and codes are to be developed in consultation with agencies to ensure that they can be utilised by agencies to meet their records management obligations.

Clause 19 – Approval of schedules for the disposal of records provides for the approval by the Director of Territory Records of schedules for the disposal of agency records

Clause 20 – Review of approved standards and codes provides for the review of the standards and codes to ensure that they continue to meet the needs of agencies and requirements of the Government.

Clause 21 – Inspection of records management programs provides that a member of the public be able to inspect an agency's records management program to see what records are maintained and the access arrangements for those records. The existence of documents containing some sensitive information does not have to be revealed consistent with the *Freedom of Information Act 1989*.

Division 2.4 Protection of records

Clause 22 – Protecting records imposes a duty on agencies to ensure the safe custody and preservation of records under its control. There will be legitimate occasions when a record is required to be in someone else's possession. This may be when a contractor needs access to the record in carrying out a contract. While the record is not in the possession of the agency it is still in its custody and arrangements for the care and return of the records must be made with the other person. This section also imposes a duty to recover a record that, for whatever reason, is now outside the control of the agency. The Act has not established sanctions for failure to protect records. The Crimes Act will apply if a person wilfully removes, damages or destroys a record.

Clause 23 - Protection measures establishes what is meant by protection of an agency's records. It establishes what an agency can and cannot do with its records and the effect of subsequent legislation on an agency's records. This section does not preclude an agency disposing of a record in accordance with the disposal schedules for that record approved for such a purpose in an agency records management program.

Clause 24 – Normal administrative practice provides for what is meant by 'normal administrative practice' in relation to practices and procedures established in an agency's records management program. It also provides that actions not done in accordance with an agency's records management program would not comply with the Act. Depending on the nature of the action the Crimes Act may apply. Normal administrative practice establishes those procedures set out in an agency records management program that deal with records of an ephemeral nature such as certain drafts, working papers and duplicate records that do not need to be kept by the agency for any length of time.

Division 2.5 Miscellaneous

Clause 25 – Records of an agency that no longer exists etc establishes the procedures for deciding what will happen to records from agencies which merge or cease to exist. In the majority of cases the records will transfer with the function, however if the Government ceases to undertake the function in any form other decisions will need to be made about those records that are required to be kept.

PART 3**ACCESS TO RECORDS**

Clause 26 – Access to records provides for the entitlement to access to a Territory record. This will occur under the Act when a record is 20 years old and not subject to a declaration made under section 28. There is nothing in the Act that would preclude an agency making records available earlier than 20 years if the agency decides to do so, consistent with the *Freedom of Information Act 1989*. There are instances where Commonwealth legislation such as the *Privacy Act 1988* or the *Privacy Amendment (Private Sector) Act 2000* will impact on areas of this legislation such as providing access to records.

Clause 27 – Requests for access provides that a person who wishes to get access to a Territory record that is open to public access may apply to the agency that has control of the record for access to the record. The agency must take reasonable steps to assist a person to make a request and to comply with the request within a reasonable time. The timeframe for the provision of the record could depend on the location or condition of the record.

Clause 28 – Declaration applying provisions of FOI Act deals with documents that are not to be opened for public access at 20 years. The intention of this section is to utilise existing provisions from the *Freedom of Information Act 1989* for exempt documents and not to have a duplicate provision in the Act. Documents that are exempt under the FOI Act are not able to be accessed by the public. This section provides that the Director of Territory Records may, on application by an agency, declare a Territory record to be a record to which certain provisions of the *Freedom of Information Act 1989* apply. The Director may only make a declaration under this section if satisfied that the record contains a document that would, if the *Freedom of Information Act 1989* applied, be an exempt document under certain provisions or sections of that Act.

The exempt provisions from the *Freedom of Information Act 1989* listed in this clause are those that are considered to be appropriate to records that are at least 20 years old. Following a declaration under this section by the Director, records that are considered to be:

- Documents affecting relations with the Commonwealth or states
- Documents affecting enforcement of the law and protection of public safety
- Documents affecting personal privacy
- Documents subject to legal professional privilege
- Documents disclosure of which would be contempt of the Legislative Assembly or a Court,

will not be able to be accessed under the *Territory Records Act 2002* but may still be accessed under the *Freedom of Information Act 1989*. During their existence, the records of a Royal Commission, Board of Inquiry or Judicial Commission are not covered by provisions of the *Freedom of Information Act 1989*, however when the records are 20 years old, they will be treated as if the *Freedom of Information Act 1989* applied for the purposes of access, and if required, a declaration under this section can be used. A declaration under this section can be made for a record or a class of record, at any time, including at the creation of the record.

Clause 29 – Giving access to records under this Act establishes ways in which a person may be given access to a record which can ensure both the access to the record and also the long term preservation of the record. While a person may have a preferred means of access to a record, an agency may decide not to give access this way if satisfied on a number of provisions, including that the agency would incur an unreasonable cost or that it would be detrimental to the proper preservation of the record. This section does not remove a person's entitlement to access a record to which they would normally be entitled.

Clause 30 – Register of records provides that an agency must keep a register of the records for which they have control and to which a declaration made under section 28 is in force. This Register would be part of the agency's recordkeeping system and would be reflected in an agency's records management program.

Clause 31 – Protection from liability when access given provides for a protection from liability when access is given to a record under the Act.

PART 4

DIRECTOR OF TERRITORY RECORDS

Clause 32 – Establishment of position provides for the establishment of the position of Director of Territory Records.

Clause 33 – Functions provides for the functions to be carried out by the Director. While these functions are not exhaustive, they provide an indication of the range of responsibilities to be undertaken by the Director. The Director also has a responsibility under the *Annual Reports (Government Agencies) Act 1995* to prepare an annual report on the operation of the office of the Director of Territory Records.

Clause 34 – Appointment of the director provides for the appointment of the Director by the Minister.

Clause 35 – Term of appointment of director establishes that the Director is to be appointed for a term not longer than 5 years.

Clause 36 – Ending of appointment of director provides the conditions under which the Director's appointment may be terminated.

Clause 37 – Conditions of appointment generally provides that the Director holds the position on conditions decided by the Minister.

Clause 38 - Delegation provides for the delegation of certain powers of the Director.

Clause 39 – Ministerial directions to the director provides that the Minister may give written directions to the Director about the exercise of the Director's functions.

Clause 40 – Arrangements for staff provides for the use by the Director of public servants to assist the Director in carrying out the Director's functions.

PART 5

TERRITORY RECORDS ADVISORY COUNCIL

Division 5.1

Establishment

Clause 41 – Territory Records Advisory Council establishes the Territory Records Advisory Council.

Clause 42 – Functions of council provides for the functions of the Territory Records Advisory Council.

Clause 43 – Membership of the council provides for the appointment of Members of the Council.

Clause 44 – Appointed members of the council provides for the representation of the membership for appointment to the Council.

Clause 45 – Chairperson and deputy chairperson provides for the appointment by the Minister of the Chairperson and Deputy Chairperson of the Council.

Clause 46 – Term of appointment of appointed members provides for the term of appointment of members.

Clause 47 – Ending of appointment of appointed members establishes the circumstances in which the Minister must end the appointment of an appointed member of the council.

Clause 48 – Conditions of appointment generally provides for the conditions of appointment that are decided by the Minister.

Division 5.2 Proceedings of council

Clause 49 – Time and place of meetings of council establishes the conditions for holding meetings of the Council.

Clause 50 – Procedures governing proceedings of council provides for the procedures for the conduct of meetings of the council.

Clause 51 – Disclosure of interests by members of council establishes the conditions for disclosure of interests that could conflict with the proper exercise of the member's functions on the council.

PART 6 MISCELLANEOUS

Clause 52 – Secrecy establishes the responsibilities of a person that has access to information acquired while carrying out their responsibilities under the Act. So long as a person divulges information in the exercise of a function under this or other relevant legislation such as the *Public Sector Management Act 1994* the person would not contravene this provision.

Clause 53 – Secrecy about information acquired under other Acts acknowledges that persons also have responsibilities under other legislation. If an agency knows that they have records to which the secrecy provisions in another Act apply, they should include this restriction in their agency records management program.

Clause 54 - Protection from liability protects persons engaged in the administration of the Act from personal liability for acts and omissions in good faith.

Clause 55 – Determination of fees provides for the determining of fees payable for services under the Act.

Clause 56 – Approved forms provides for the use of a particular form for a particular purpose.

Clause 57 – Regulation-making power provides the regulation making provision for the Act.

Clause 58 – Review of the Act provides for the review of the operation of the Act as soon as possible after 5 years from its commencement.

PART 7 AMENDMENT OF FREEDOM OF INFORMATION ACT 1989

Clause 59 – Act amended in pt 7 amends the *Freedom of Information Act 1989*.

Clause 60 – New section 6A provides the clauses amending the *Freedom of Information Act 1989*. These provisions while part of the *Freedom of Information Act 1989* are key to the operation of the *Territory Records Act 2002*. They ‘turn off’ the provisions of the *Freedom of Information Act 1989* that apply to records that are considered to be of enduring value and are, therefore, still in existence and open for general access when they are 20 years old and available for public access.

However, the *Freedom of Information Act 1989* continues to be important in controlling access to those records that are not to be open to general access at 20 years. The majority of these records will not be open because they contain material of a personal and private nature although there are some other exempt categories considered relevant to records that are 20 years old. Certain provisions of the *Freedom of Information Act 1989* can be ‘turned on’ again by a declaration from the Director of Territory Records (see section 28 of the *Territory Records Act 2002*) upon application of the agency responsible for these types of records. The effect of ‘turning on’ these provisions of the FOI Act allows the affected records to be regarded as exempt records so that they become not available for public access. This approach has been utilised so that there is no conflict between exemption provisions in two pieces of Territory legislation. This approach also obviates the need for separate or duplicate appeal provisions.