

White Paper

Review of the
State Records
Act 1998;

**The Future of
History in NSW**

Executive Summary

This paper presents the recommended outcomes of a three-year review process, which considered the *State Records Act 1998* (SR Act) and, in the scope of finding a solution, the *Historic Houses Act 1980*. The paper contains policy positions that will strengthen both recordkeeping and access to history in NSW.

Records of government have an immediate purpose in the demonstration of accountability, transparency, and integrity. Failure to create, keep, protect, or be able to provide appropriate access to these records can have significant implications for individuals and agencies and can erode public confidence in government. Government records that are of enduring value must be identified and retained in perpetuity so that students, historians, archivists, curators, artists, and the public alike can access and interpret them.

Along with serving their purpose in the present, a small proportion of government records will be needed in the future and are retained as part of the State Archives Collection (the Collection). It is in this Collection, and in significant places in our history, that the stories of our past are contained. Access to, and interpretation of, this material enriches our lives and creates a deeper understanding of who we are. These materials not only reveal the past to us but foster a better understanding of the present and inform contemporary debate about the future.

This paper contains a set of changes which call for the adoption of contemporary ideas as lenses through which to explore and interrogate the State's archives and significant places, and the development of new platforms to present material from our history.

Underpinned by a thorough analysis, these policy positions manifest in two principal proposals. The first is to strengthen and improve the SR Act through several amendments to this legislation. The second is to create a new cultural institution from the two existing organisations (the State Archives and Records Authority of New South Wales (SARA) and the Historic Houses Trust of New South Wales, trading as Sydney Living Museums (SLM)). This would be achieved through the development of new legislation to establish a new cultural institution: Museums of History | New South Wales (MHNSW); and to repeal the *Historic Houses Act 1980*.

This proposal will shift passive access and engagement with the State Archives Collection to an active and concrete proposition that engages people with rich content and situates the Collection within broader historical and cultural narratives, particularly the significant that have shaped our history.

In addition, this proposal enhances the strong foundation of recordkeeping policy and regulation by creating a dedicated public office, State Records Authority NSW (SRANSW), with recordkeeping policy and regulation as its sole focus, supported by the additional monitoring powers.

Together this set of policy objectives and the way they are defined in legislation provide for stronger recordkeeping across NSW public offices. Stronger compliance with recordkeeping obligations will ensure that questions of current government accountability can be answered, and the memory of the State is preserved in perpetuity.

Overview of Changes

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Overview of Changes

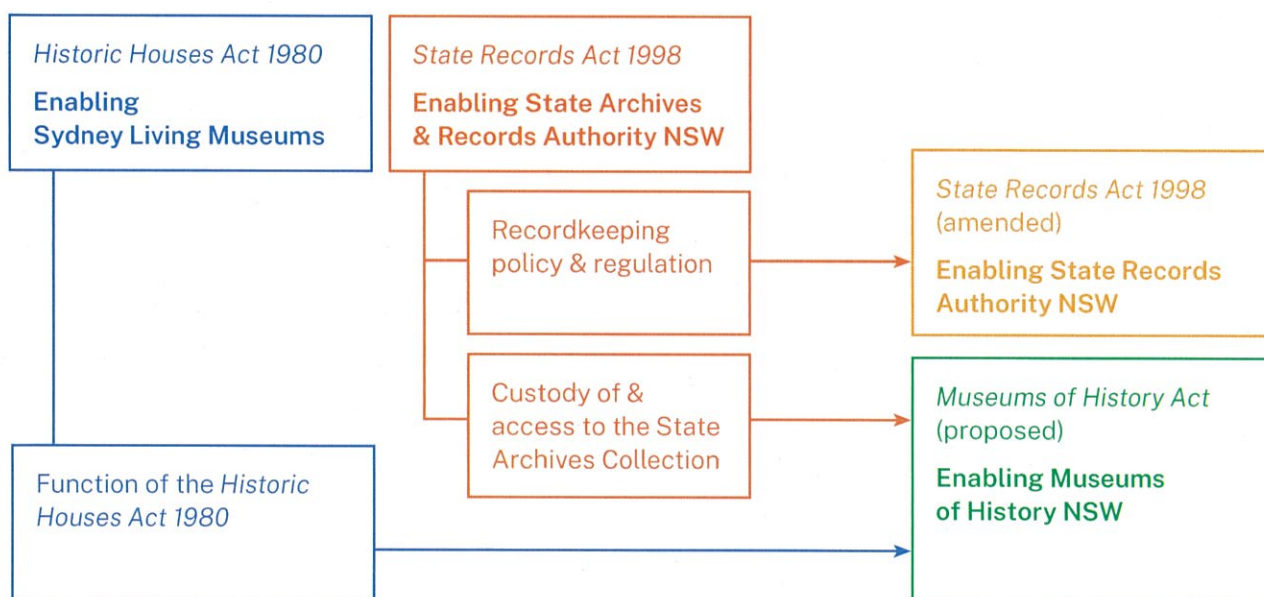
The diagram below illustrates the proposals, at a high level, that are considered in this paper and the impacts on legislation and core functions of the current SARA and SLM.

Current

State Records Act 1998
Historic Houses Act 1980

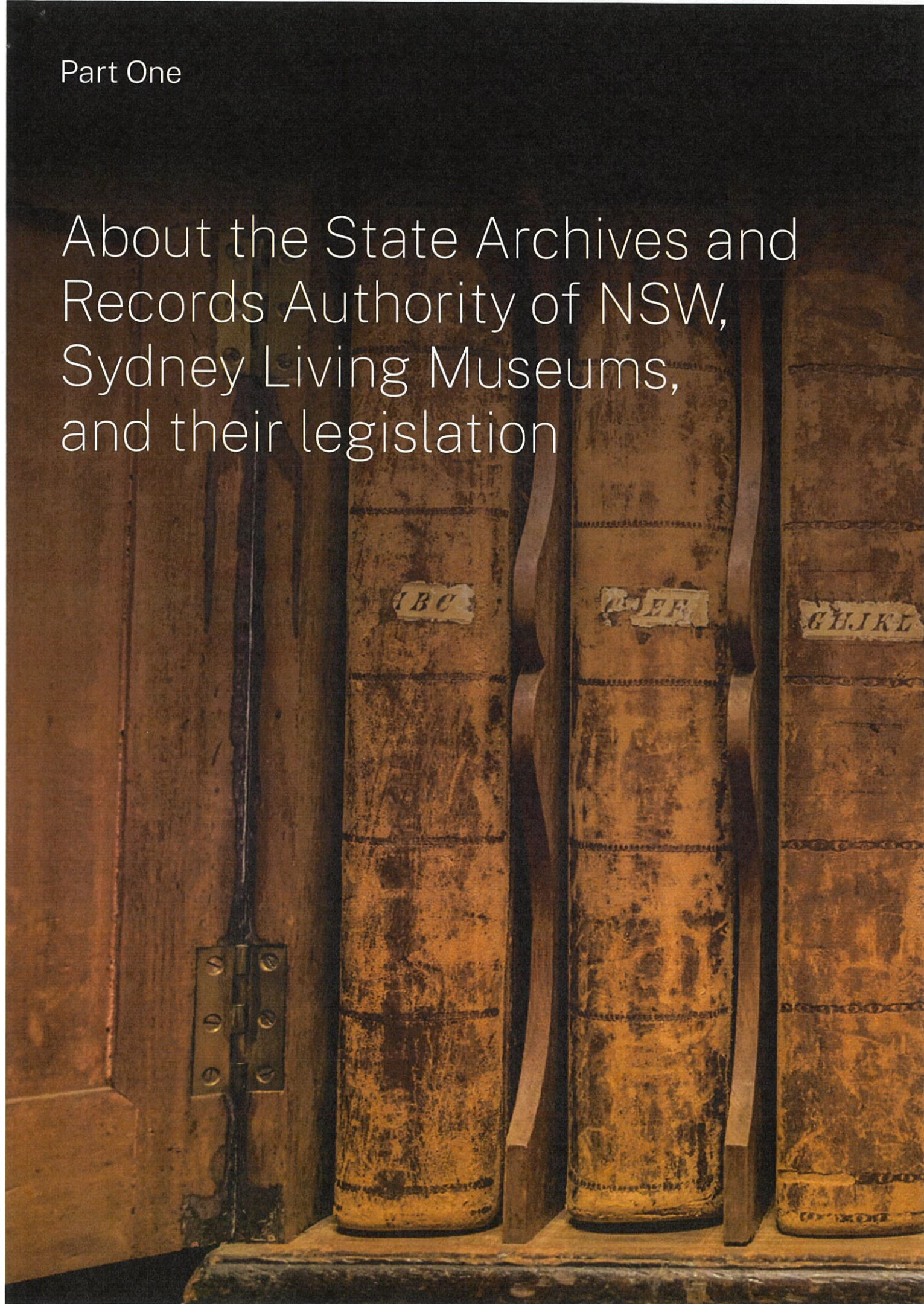
Future

State Records Act 1998 (amended)
Museums of History Act (proposed)
Historic Houses Act 1980 (repealed)



Part One

About the State Archives and Records Authority of NSW, Sydney Living Museums, and their legislation



The State Records Act 1998

The *State Records Act 1998* (SR Act) provides for the creation, management, and protection of the records of NSW public offices and for public access to those records. It also establishes the State Archives and Records Authority of New South Wales (SARA) and SARA's Board.

By establishing obligations for NSW public offices to create, keep and protect records of their activities, the SR Act is a foundation for government accountability, integrity, transparency, and efficiency. The SR Act's requirements to create, protect and transfer records of enduring value to SARA ensure that NSW's collective memory and cultural heritage will continue to grow. The right of public access to records that is established by the SR Act ensures that these records can ultimately be read, experienced, and used by citizens.

The SR Act has eight parts:

- Part 1 – *Preliminary*, which defines key terms and concepts.
- Part 2 – *Records management*, which sets out the records management responsibilities of public offices.
- Part 3 – *Protection of State records*, which protects State records from unauthorised disposal by public offices and provides the foundation for identifying records of continuing value.
- Part 4 – *Control of State records*, which encourages the proper control and management of records of continuing value that are no longer in use by a public office.
- Part 5 – *Recovery of State records*, which protects official records that have left official hands by giving SARA the power to recover them, both within and outside of NSW.
- Part 6 – *Public access to State records*, which provides a right of public access to State records that are at least 30 years old, unless a public office determines to close the records to public access.
- Part 7 – *The State Archives and Records Authority of New South Wales*, which defines the powers and responsibilities of SARA, and the powers, responsibilities, and composition of SARA's Board.
- Part 8 – *Miscellaneous*, which comprises miscellaneous provisions.

The SR Act replaced the *Archives Act 1960*, moving the focus of public records legislation in NSW from the archival legacy to the contemporary business environment, aiming to ensure that public offices continued to make, keep, and use records to support government accountability and ongoing business and community use and better illustrate the multifaceted current and potential future purpose of government records.

When a government record is identified as having enduring value, it is accessioned into the NSW State Archives Collection. The Collection is a continuous record containing material dating prior to 1788, which documents the establishment and evolution of a constructed colonial state – the first state, New South Wales. This Collection is a multi-format, globally significant archive which is valued in excess of \$1.04 billion and grows by kilometres every year.

Government recordkeeping can therefore be viewed as a continuum – at one end are temporary records that may be used and disposed of in the normal course of business or called upon to demonstrate decision-making. At the other end is a select group of records that find a permanent home in the State Archives Collection, and, once open to public access, allow contemporary thinkers to understand history and find the social, cultural, and political value contained in the archives.

State Archives and Records Authority of NSW (SARA)

SARA is one of Australia's pre-eminent archives and records authorities with a vast collection of historical records and archives pre-dating the European settlement of Australia in 1788. With responsibilities for the development and preservation of and access to the State's archives, SARA runs a successful commercial enterprise, managing and storing over 660 kilometres of current government records for NSW public sector offices.

The operational activities of SARA can be broken down into three key functional areas:

- Collections Access and Engagement
- Commercial Operations
- Recordkeeping Standards and Advice (policy and regulation)

Collections, Access and Engagement is the custodian and advocate for the State Archives Collection, which is one of the most complete and important collections documenting colonisation in the world. This vast cultural collection of more than 88 lineal metres of physical items and more than 1,200 gigabytes of digital archives details the construction of NSW and the wielding of colonial power. Multiple series of documents in the Collection are now inscribed on the UNESCO Memory of the World Register.

SARA's *Commercial Operations* business provides commercial storage, records management, digitisation, and consultancy services to public offices, and generates the majority of SARA's operating revenue.

The *Recordkeeping Standards and Advice* team assists public offices to meet their recordkeeping obligations under the SR Act and fulfils SARA's statutory responsibility for promoting effective and efficient recordkeeping across the NSW public sector. They do this by setting standards, providing guidance, promoting good practice, and monitoring public office performance and compliance.

The Recordkeeping Standards and Advice team also facilitate the setting and review of standards and codes of best practice for all aspects of records management in NSW public offices (under sections 13(1) and 13(4) of the SR Act).

With regard to retention and disposal obligations, State records cannot be disposed of without the approval of SARA and its Board. A small number of the total records generated are kept in perpetuity because of their enduring value; these records are not able to be destroyed by a public office but become part of the State Archives Collection.

The Historic Houses Act 1980

The Historic Houses Trust of New South Wales was established under the *Historic Houses Act 1980* (NSW) (HHT Act). From 1980 to 2013, it was known by this name. Following a significant review of structure and operations in 2013, it became known publicly as Sydney Living Museums. This change was not legislative and SLM's financial statements retain the name Historic Houses Trust of New South Wales, while all other references adopt the publicly recognised brand, Sydney Living Museums.

Sydney Living Museums (SLM)

SLM is a State Cultural Institution that cares for a group of the most important historic houses, gardens, and museums in NSW on behalf of the people of NSW. SLM's purpose is to enrich and revitalise people's lives through the precious places and collections in its care and preserve these places for future generations to enjoy.

The 12 museums which SLM opens to the public are Elizabeth Bay House, Elizabeth Farm, Hyde Park Barracks, Justice & Police Museum, Meroogal, Museum of Sydney *on the site of first Government House*, Rose Seidler House, Rouse Hill Estate, Susannah Place, The Mint and the Caroline Simpson Library & Research Collection, and Vacluse House. All the museums are listed on the NSW State Heritage Register. The site of the first Government House at the Museum of Sydney is also inscribed on the National Heritage List. The Hyde Park Barracks is additionally inscribed on the National Heritage List and the UNESCO World Heritage List.

SLM cares for a portfolio of assets valued at more than \$338 million, including buildings, land, and museum collections. Its built assets comprise a number of historic buildings dating from between 1793 and 1950 and include some of the earliest surviving colonial buildings in Australia, as well as major public buildings of the Macquarie era.

SLM collects, catalogues and conserves material relating to its sites and the organisation's core themes of domestic material culture; the history of art, architecture, and design; and aspects of Sydney's social history related to its sites and the people who lived there. The collections include furniture, ceramics, silverware, soft furnishings, archives, household and personal accessories, costumes, artworks, photographs, and archaeological artefacts. Most objects are on display, placing a limit on the number of new stories that can be told and content that can be shared through primary source material and presents a challenge in attracting new and repeat audiences.

SLM's sites – and their collections – are promoted both as a collective of culturally activated heritage sites and as single destinations.

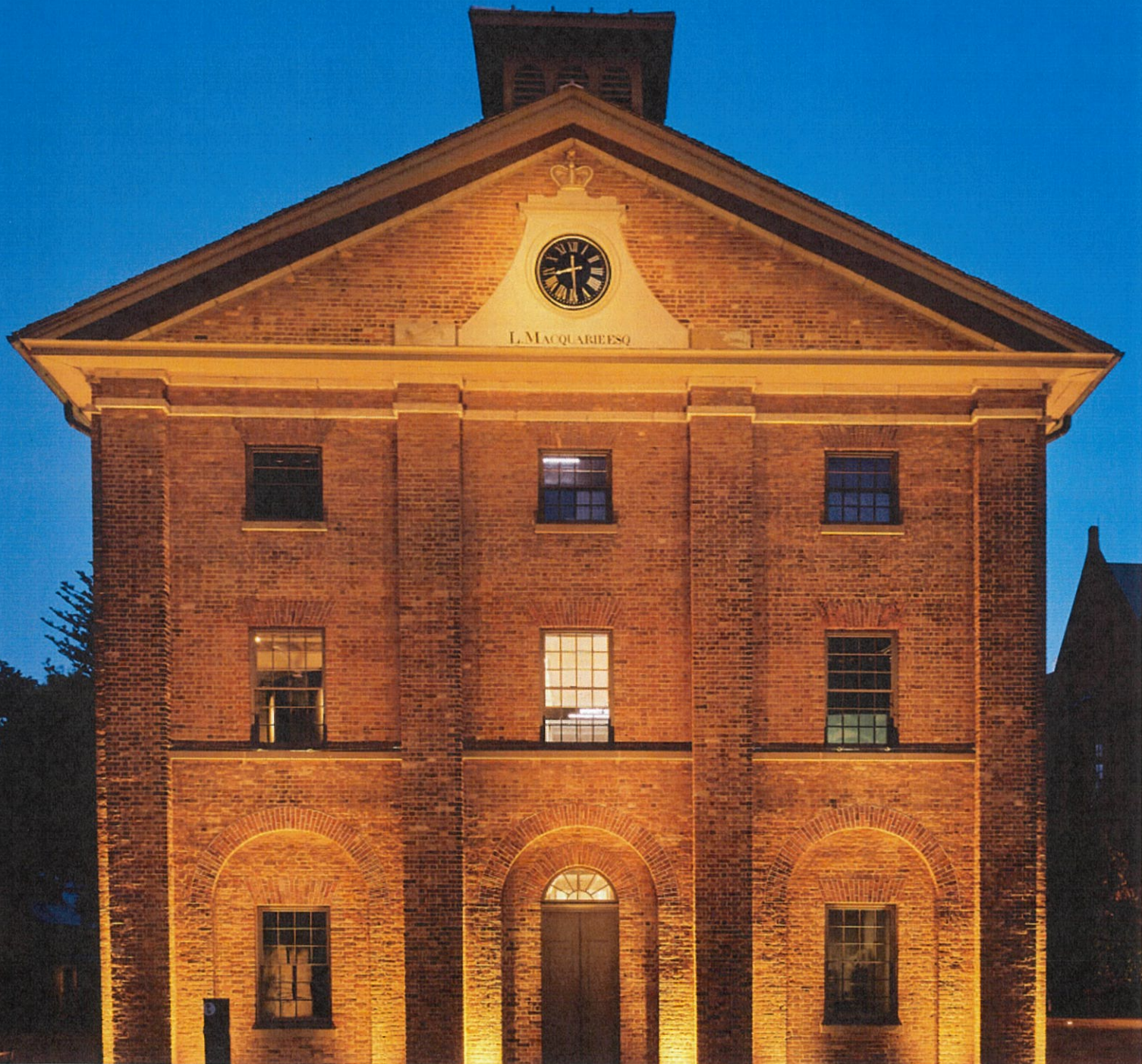
SLM's exhibitions, public and learning programs, and online offer bring history to life. SLM's commitment to audiences – local, regional, national, and international – is to maintain its museums, landscapes and collections with integrity while presenting the narrative of each in contemporary, compelling, and relevant ways.

The organisation has three divisions:

- *Corporate & Commercial Services* supports the business of SLM and its position as a leading history and cultural heritage organisation in NSW. This division is responsible for the provision of corporate services support and advice, including human resources, information and communications technology, logistics, commercial venue hire, property rental, and food and beverage partnerships.
- *Heritage, Assets & Museums* manages the conservation, operational management, and daily visitor experience at SLM's 12 sites, as well as conservation management planning, asset maintenance and the delivery of capital works, collections care, conservation, and landscaping.
- *Audience & Creative Production* manages SLM's Audience, Marketing, Communications, Production, Learning, Public Programs, Digital, Design, Curatorial, Research and First Nations Advisory functions; and delivers the permanent interpretation of each site, the temporary exhibition program, and the touring exhibitions program.

Part Two

Museums of History New South Wales (MHNSW)



The Case for Change

The proposal to establish a new Cultural Institution (CI) with a focus on protecting and sharing the stories of NSW originated at a 'History Roundtable' held in October 2018, to discuss the future of History and History-telling in NSW. In a paper produced following the History Roundtable, the Minister for the Arts, The Hon Don Harwin MLC, is noted as having addressed the need to *'more effectively connect collections and scholarship across public collections and institutions to engage with diverse audiences in telling the story of Sydney and NSW. The story must address the history of First Nations Peoples, colonisation and dispossession, challenge, triumph and achievement as foundations for the evolution of a contemporary society.'*

From there, the proposal to establish a new CI with a focus on the history of NSW was developed along with prospects to improve the focus on and support for recordkeeping in NSW public offices.

Improving and strengthening recordkeeping in NSW public offices will enhance credibility and trust in our public institutions. It will also ensure that future material destined for the State Archives Collection is identified and managed correctly. These outcomes will be achieved by several specific amendments to the SR Act and housing this vital function in a dedicated public office, the State Records Authority NSW (SRANSW), with additional monitoring powers. An agency with recordkeeping policy and regulation as its sole focus can work with public offices across the state to educate, support and monitor this most integral of government functions.

The opportunity to establish a new CI focused on the social and developmental history of the State presents the Government and public with benefits on multiple fronts. The new Institution will develop more platforms to engage with material from NSW history and activate the collections of both SARA and SLM so that they offer more than passive access. Additionally, the formation of the new CI will allow for better leveraging of opportunities for sponsorship, prospects for funding and a greater influence in decision making across the cultural sector.

The new cultural institution: Museums of History | New South Wales (MHNSW) will be responsible for collecting, managing, preserving, and providing public access to government archives, objects, buildings and places of historic, social, cultural or architectural interest to the people of NSW. With the asset base of the current SARA and SLM, two of the key collections of historical material in the country, MHNSW will demonstrate that history matters to the people that live in and visit our state.

With history as a core objective, MHNSW will hold the NSW State Archives Collection and 12 of the State's most iconic properties as a basis to enrich and enliven our understanding of history. This is a completely complementary set of objectives to add to NSW's existing State Cultural Institutions, which do the same with art, literature, and library services, applied arts and sciences, our natural environment and the diverse range of entertainment arts that the Sydney Opera House promotes. This will enable MHNSW to maintain the State's Archival Collection and portfolio of significant places across NSW and interpret them to illuminate our history.

In engaging people with our history, MHNSW will include pre-colonial as a key aspect of its curatorial research and presentation. MHNSW will ensure that First Nations voices and perspectives are included and amplified in the story telling, learning and programming drawn from the significant Collections of SARA and SLM. This will be achieved by building on the strong foundations of SLM who engage community through their exhibitions, education programs and acquisitions and working to open and interpret more material from the State Archives Collection relevant to First Nations people. This commitment will be strengthened by a Board member who has experience or knowledge of First Nations culture.

Opportunities for access and engagement

The State's archival collection is a vast and important collection containing material that pre-dates European settlement. The Collection is one of the largest and most complete documentations of colonisation in the world, detailing both the construction of NSW and the exercise of colonial power, and its impact on First Nations peoples. Access to and interpretation of this evidence of the State's past will enable people to engage with the State's history, and provide a forum to focus on research, exhibitions, storytelling, preservation, and education.

SARA's current form and facilities do not support, comprehensive access and engagement in this manner as it lacks the space and capacity to exhibit and curate its collection for broad public consumption. Enabling the design and curation to expand public access and consumption will increase the ability of the new CI to engage with its audience and encourage a new generation of historians.

The ability to realise ongoing opportunities has already been demonstrated in part. The first partnered exhibition, *A Thousand Words*, was held at the Museum of Sydney from July-November 2020 and displayed photographic images from the collections of SARA and SLM. Due to the COVID-19 pandemic the exhibition was also presented online as a digital exhibition, which was made possible through the collaborative efforts of SARA and the SLM in-house digital content production team. The online exhibition received a total of 223,769 views, and high levels of digital engagement.

A second collaborative exhibition, *History Reflected* was planned to run at the Museum of Sydney from 3 July – 21 November 2021, however this was deferred to 2022 because of COVID-19 related restrictions.

History Reflected takes audiences on a journey through the NSW State Archives Collection to see what these unique historical records reveal about the past and to reflect on what they might mean to us today. The exhibition was developed by Sydney Living Museums and NSW State Archives to celebrate the coming together of two of the state's signature cultural institutions.

History Reflected presents a curated selection of 25 items from the Collection spanning a period of 213 years, from 1787 to 2000. Accompanying each of the items is an explanation of its historical significance as well as a reflection on its meaning today. These reflections give voice to a range of perspectives that explore questions about who we are; what we believe and understand about ourselves and others; our values, aspirations and hopes; how we express ourselves; the places we live, work, or visit and our relationships with others.

In late 2021, more collaborative exhibitions will open at the Museum of Sydney. *How to move a zoo* takes the historical story of the movement of Sydney Zoo from Moore Park to North Sydney and recreates it through original archival material, animation, digital interactives, and companion installations at several of SLM's properties in partnership with Taronga Zoo.

Opportunities for activation

SLM is responsible for the ongoing management and preservation of a collection of important historic properties and artefacts largely related to those properties. SLM also runs a conservation program to protect “at-risk” historically significant properties from inappropriate development and owns several commercially leased properties.

The philosophy of SLM has been to drive place-based exhibitions and displays focused on conserving and protecting “cultural narratives”. However, this is inhibited by SLM’s limited collections. These limitations are arguably impacting on visitation growth, return on investment and opportunities for SLM to generate a more substantial following within the community.

The power of fresh and new content to drive visitation numbers has been demonstrated by record-breaking admissions to the recent Narcissus Garden installation at Vaucluse House (24 April – 23 May 2021). The exhibition has attracted the highest ever crowds to Australia’s oldest house museum, attracting over 6,500 visitors to the gardens and over 3,300 visitors inside Vaucluse house over a one-month period, representing a visitation increase of 170% for the comparative period since 2018.

In the upcoming exhibition *Iridescent* by Gerwyn Davies, queer photographic artist and costume maker Gerwyn Davies responds to and reimagines the museums, archives, historic houses, and gardens under the care of Sydney Living Museums and NSW State Archives.

In a series of 12 large-scale photographic works, Davies dramatically transforms each property into a stage on which an extravagant performance is played out for the camera by the artist as a vividly costumed character.

Rather than recount the familiar histories of these properties, Davies draws out and reinterprets the whispers and fragments of their lesser-known stories. Costume and camera are used to conjure a range of fantastic figures, each one celebrating subplots and embellishing inferences scribbled in the margins of these site’s official histories.

By merging with SARA to form MHNSW, SLM will gain access to an unparalleled collection, which could be appropriately curated to both highlight the historical places for which it is responsible, and the intriguing history of the State cohesively and engagingly.

Museums of History | NSW – Overview



Objectives of MHNSW

The principal objectives, functions, and powers of MHNSW will be formed from the realisation of the combined focus of the two existing organisations, being the legislated objectives and powers of SLM and some of the existing functions of SARA (those that pertain to the State Archives Collection). This will ensure that the same level of care is taken for the portfolio of significant assets that exists and is displayed under the current legislative arrangements. The proposed split of responsibilities between archival and recordkeeping functions is detailed in part 2 of this paper.

The principal objectives of MHNSW are proposed to include provisions similar to the below:

- (1) The principal objects of the Trust are to:
 - (a) collect, manage and preserve the Collection of State Archives, significant buildings, places, objects and materials in their care;
 - (b) increase public knowledge and enjoyment of, and access to the Collection; and
 - (c) promote knowledge and appreciation of history throughout the state.
- (2) *When acting in pursuance of its objects, the Trust shall give particular emphasis to the archives, places and stories that shape the social, historical, political and cultural identity of NSW.*

It is crucial that MHNSW embraces the state of NSW, beyond its metropolitan centres. This will flow from the objectives of the legislation through to the operations of the new Institution. MHNSW will tell stories about and illuminate the history of NSW, including First Nations and CALD perspectives, regional and remote communities, and the various versions of its state borders.

Additionally, it is proposed that MHNSW have a commercial remit, already a strong part of the fabric of SARA and SLM. It is intended that such a remit might be similar to section 8(h) of the *Royal Botanic Gardens and Domain Trust Act 1980* which overtly contemplates the commerciality of the entity by giving it powers to charge for fees for goods and services and that those fees be retained by the entity. Both SLM and SARA have commercial operations that underpin the financial sustainability of the organisations and the fulfilment of the objectives of SLM (that is, promoting the enjoyment of the places under its care). SARA provides commercial records storage, consultancy, and digitisation solutions for public offices. SLM has a successful commercial venue hire business, and operates food and beverage offers at several of its museums.

Repeal of the *Historic Houses Act 1980*

It is intended that the current functions of the Trust prescribed in the HHT Act will be retained in the new legislation that will be introduced into Parliament to establish the MHNSW and repeal the HHT Act. It is proposed that all of the assets and real property owned by the Historic Houses Trust of New South Wales will be transferred to MHNSW.

Interaction with the *State Records Act 1998*

Unlike the HHT Act, it is proposed that the SR Act will not be repealed by the legislation establishing the MHNSW. Instead, and that the SR Act be amended in line with the changes articulated in part two of this paper. The parts of the SR Act related to recordkeeping policy and regulation will be administered by the agency established under the SR Act and parts relating to the custody, care and access of the State Archives Collection will be administered by MHNSW.

The responsibility for the policy and regulation of recordkeeping in NSW will be administered by the State Records Authority of New South Wales (SRANSW) which, as a result of these changes, will be empowered to set standards for recordkeeping and monitor compliance with more authority than ever before. This is detailed further in Part Four of this paper.

Executive Agency Status

It is proposed that MHNSW is afforded Executive Agency status. Of the six NSW State Cultural Institutions, Sydney Living Museums is the only Institution that does not currently have Executive Agency status within the meaning of the *Government Sector Employment Act 2013* (GSE Act).

The finding in the report handed down by the Social Issues Committee on 15 October 2020 was strongly supportive of the proposal for SARA and SLM to form a new NSW State Cultural Institution with Executive Agency status.

This will be pursued with the Premier to ensure the statutory body is afforded this status.

'Significant' Buildings

It is proposed that references to 'historic buildings' made under sections 7, 7A, 8, 10, 20 and 23 of the *Historic Houses Act 1980* be amended to reflect a transition to referring to properties according to their significance rather than their historicity, to enable the property-related remit of the newly formed entity to exist without the pre-conception that it only relates to Colonial-era places. This will be consistent with the broadened remit of the new entity. A term such as 'significant', as opposed to 'historic', does not have any suggestion of age, but indicates the importance or relevance of the site to our collective history.

This would also allow for specific categorisation (for example, social significance, historical significance, cultural significance etc.) and expands the prospects for the entity to engage people in our history without limiting connotations. The potential to acquire properties of contemporary significance will also allow MHNSW to interpret spaces and tell stories of relevance to a more modern Australia, from our enduring Indigenous history to our patterns of migration and the contemporary social issues we collectively face.

Governance of the new CI

The proposed governance model for MHNSW is similar to that of the Australian Museum (under the *Australian Museum Trust Act 1975*) and Art Gallery of NSW (under the *Art Gallery of New South Wales Act 1980*). The successful governance structures for these comparable cultural institutions will serve as a strong model for the legislation establishing MHNSW.

A single governing Board will be responsible for the strategic direction of MHNSW. This Board will comprise 11 members. This number matches the number of trustees for the Australian Museum and the Art Gallery of NSW. Board members shall be appointed by the Governor on the recommendation of the Minister, consistent with the appointment process for other NSW State Cultural Institutions. One member of the Board will be appointed as Chair by the Minister.

The Board members must include:

- (a) at least one person who has knowledge of, or experience in, History;
- (b) at least one person who has knowledge of, or experience in, Heritage; and
- (c) at least one person who has knowledge of, or experience in, First Nations culture.

The Board will have the power to establish advisory committees as and when it thinks fit for the purpose of assisting it to exercise its powers and authorities and perform its duties and functions.

Currently, the Board of SLM has several committees established under such a power. An example of this is the Heritage and Collections Advisory Committee. The members of this committee are experts in fields that include Heritage, Architecture, First Nations culture and Planning, and provide advice to the Board to aid in its decision-making.

Financial sustainability of MHNSW

SARA is a non-budget dependent agency, funding the delivery of its functions largely through the commercial revenues of the GRR. In 2018/19, 89% of SARA's budget was funded through its commercial revenue. In contrast SLM receives approximately 77% of its revenue from Government grants.

An independent financial analysis has demonstrated that the creation of MHNSW will not significantly impact on the subsidy provided to SARA and SLM, meaning that the position of MHNSW is already competitive amongst its peers in NSW, despite the need for a modest amount of additional funding.

If approved without amendment, it is projected that a one-off cost to transition to the new agency would be in the order of \$3.86m. With the increased remit and structural efficiencies of MHNSW, a \$4.37m increase to the existing annual government subsidy of SLM and SARA would be required to adequately fund the new cultural institution. It has been confirmed that these additional costs can be provided within the current budget allocation of the Community Engagement Group within the Department of Premier and Cabinet.

Although this funding gap will be met, MHNSW proposes to increase its income generation through expanded commercial activities and the activation of its asset portfolio. The short to medium term aim is to increase commercial revenue to offset the additional recurrent funding required of MHNSW. The long-term aim of ultimately maintaining a self-funding financial position in so far as is possible will remain a priority.

Part Three

Strengthening the State Records Act



Balancing the two legislative functions of the State Records Act 1998 – being the custodial and the regulatory – is being adequately achieved by the current SARA. The proposal to strengthen focus on recordkeeping and realise the extraordinary potential of the State Archives Collection, within a single entity, threatens to upset this balance. This feedback was given very strongly in the hearings conducted by the Social Issues Committee in 2020. Rather than compromising one or both of these ambitions, the separation of the management of and access to the Collection from the support and oversight of public office recordkeeping provides a solution that allows both aims to be achieved.

Separation of responsibilities under the State Records Act 1998

In principle, the following table breaks down the various sections of the State Records Act 1998 and the proposed allocation of their functions, all of which will endure under the proposed model (albeit some with updated aspects).

Responsibility	Current Act References	Proposed Accountability
Records management responsibilities of public offices (including records retention and disposal)	Part 2	SRANSW and Board
Protection of State records	Part 3	SRANSW and Board
Control of State records not currently in use	Part 4	MHNSW
Recovery of estrays and other State archives/records	Part 5	MHNSW
Public access to State records	Part 6	MHNSW
Record retention	s13 & s21, s70(b)	SRANSW and Board
Record disposal	s13 & s21, s70(b)	SRANSW and Board

The Board of the State Records Authority

A nine-person SRANSW Board will have statutory responsibility for advising on and approving recordkeeping standards and the retention and disposal of records. This function is currently the responsibility of the existing SARA Board and is proposed to be preserved under the amended *State Records Act 1998*.

The SARA Board, established under section 69 of the Act, currently prescribes the requirements for each of the nine members of the Board. In response to the evidence submitted to the Social Issues Committee inquiry, it is proposed that only four of the members have prescribed skills to allow the Minister administering the Act the ability to recommend such appointees that reflect the interests of the NSW public as they vary from time to time. Board members shall be appointed by the Governor on the recommendation of the Minister.

The prescribed positions of the Board will be:

- a) the CEO of the MHNSW;
- b) at least one person who has knowledge of, or experience in, History;
- c) at least one person who has knowledge of, or experience in, the use of NSW Government Archives; and
- d) at least one person who has knowledge of, or experience in, First Nations Culture.

One member of the Board will be appointed as Chair by the Minister.

As is the case under the current legislation, the Executive Director of SRANSW will be entitled to attend and participate in discussions at meetings of the Board but is not entitled to vote at any such meeting.

Other Considerations

As the majority of functions and responsibilities of the current SARA will be transferred to MHNSW, so too will the majority of the headcount and associated budget.

The remaining staff and budget to operate the SRANSW will be sufficient to ensure the current services and staff are able to continue. Provision for a small number of additional staff may need to be made, in line with the increased obligation for monitoring of compliance with recordkeeping requirements proposed to be included in the legislation (which are outlined later in this part).

The structure of the legislation and the level of independence that SRANSW will continue to allow SRANSW to advise NSW public offices on their obligations and respond to allegations of breaches of the Act with the current level of independence.

Additionally, the new monitoring powers to direct a public office to investigate and report on its recordkeeping practices will provide an enhanced level of compliance assessment and monitoring.

Monitoring Powers

This proposal seeks to strengthen recordkeeping in NSW by giving SRANSW the powers to issue a notice to require a public office to investigate its recordkeeping practices (whether generally or specifically) and report back on its findings to SRANSW. Such a change will support efficient and effective regulation and monitoring of compliance with recordkeeping legislation within NSW public offices.

Compliance with obligations to create, protect and (as permitted) dispose of public office records is critical to the effective and efficient operation of public offices. This compliance protects public offices by ensuring the existence and appropriate management of evidence of business activity, and subsequently supports the accountability of government.

The ability for the current SARA to monitor and enforce this compliance with legislation is limited. The proposal increases the capability to assess and hold public offices to account without substantially increasing the cost of regulation (within either SRANSW or the relevant public office), and the ability to compel reporting is an increasingly common and useful tool within a modern regulatory framework that appropriately shifts responsibility in line with accountability for compliance.

The proposed changes to legislation would enable more effective monitoring through:

- preventative reporting based on self-assessment tools; and
- reactive assessment and reporting issued through notices in response to complaints or other evidence of non-compliance.

Reactive notices will commence within the first year of the amendments to the legislation, whereas programs of strategically relevant directed self-assessment will not commence until the second year.

This proposal was strongly supported in submissions and evidence provided to the Social Issues Committee. The support was concentrated around a recognition that the existing SARA should have its abilities to hold public offices accountable strengthened and that this was a step towards enabling a more modern and appropriate regulatory position.

Targeted consultation with NSW public offices has revealed that creating obligations and enforcing assessments against compliance criteria was desired by public office information managers as a way of gaining internal senior executive support through objective assessment of their performance.

There is concern around the capacity and capability to perform such assessments in a standardised way and the associated costs imposed by these notices. Public offices support the changes, but only if appropriate tools and support are provided to enable them to easily understand how they may comply.

It is proposed that minimum standards be set in relation to who can perform a recordkeeping investigation and report back to SRANSW. In the case of the former, this will allow public offices a range of options to respond adequately to SRANSW's direction to investigate. These options would include employing a qualified external party or having qualified people on staff, thereby increasing maturity, and understanding of obligations as a matter of course.

Additionally, SRANSW may wish to provide these services on a commercial basis.

Reporting following a notice to assess would also have a set of minimum standards to comply with to satisfy SRANSW, and the public, that the findings were robust. In serious cases of non-compliance, it may be required that recordkeeping audits/assessments are conducted via internal audit plans and resources where available. Additionally, unsatisfactory reporting and/or results under this section of the SR Act may trigger publication in annual reports and/or the referral of non-compliance by SRANSW to an appropriate NSW integrity agency in line with the current obligations of public servants to report any issues of maladministration or corruption to the relevant integrity agency.

The policy proposal would require amendments to Part 2 of the *State Records Act 1998* to provide legislative obligations that compel public offices to report on their compliance to SRANSW in response to notices. SRANSW will develop an updated regulatory model with relevant standards, procedures, processes, tools and templates to efficiently and effectively support public offices in their compliance with the new requirements.

Open access after 20 years

This policy proposal would cause, unless other arrangements are made, State records to be open to public access by default when they enter the open access period. It is further proposed that the open access period be reduced from 30 years to 20 years.

This will provide the citizens of NSW with timely public access to records documenting the activities and decisions that shape NSW while still protecting sensitive and confidential information for an appropriate period.

Under Part 6 of the current *State Records Act 1998*, State records come into the 'open access period' after 30 years. Public offices responsible for the records are then required to provide an Open to Public Access Direction (OPA) or a Closed to Public Access Direction (CPA). Public offices are also able to make an early access authorisation for records less than 30 years old.

There is a presumption in the legislation that State records older than 30 years should be open to public access. This is based on the understanding that most records no longer affect significant interests and are not considered sensitive after this time has passed. However, the effect of the *State Records Act 1998* is that records in the open access period are closed to public access unless they are the subject of an OPA direction. As a result, there are many records in the State Archives Collection that are in the open access period yet effectively closed due to not having an explicit open access direction placed on them, including records containing information that is, or was, publicly available. This outcome is at odds with the intention of the legislation and community expectations around accessibility to records after a suitable period of time has elapsed.

The current arrangements also place an additional impost on public offices, which must provide an access direction for their records, whether open or closed to public access. The reform will significantly reduce this impost, as public offices will only need to provide CPAs or early access authorisations. There will no longer be a need for public offices to provide OPAs.

This has been acknowledged in other jurisdictions. Most notably in the Commonwealth, where, in 2010, amendments to the *Archives Act 1983* reduced the open access period for Commonwealth records from 30 years to 20 years. The reform to reduce the open access period not only provides a more contemporary approach to information access, it also promotes the principle of open government. It will also allow greater return on investment of the State Archives Collection by allowing a greater quantity of records to be accessible.

The policy proposal, and implementation schedule to assist public offices with the transition, will require amendments to Part 6 of the SR Act (Public access to State records after 30 years).

The intended policy outcomes include:

1. Reduction of the open access period to 20 years.
2. Enabling records in the open access period to be open to the public by default, while ensuring that public offices retain the ability to close the record to public access where appropriate.
3. As part of transitional arrangements, the carry forward of:
 - a. Those records already open under an OPA (30 years) will remain open during the transition and be covered by the new provisions of the legislation (20 years) after the transition.
 - b. Those records which are subject to a CPA or an access condition under the previous *Archives Act 1960*, which closed or restricted access to those records, will remain closed, and those previous CPAs and conditions will have affect under the proposed new provisions of the legislation.

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- c. Those records which are subject to an Early Access Direction will have effect under the proposed new provisions of the legislation.
 - d. All records with no access directions (effectively rendering them closed) will remain closed during the transition period of 12 months, after which time, unless a closed direction has been set, these records will default to open.
4. The transition arrangements will allow for MHNSW to provide guidance and support to public offices and will preserve appropriate protection to sensitive information, such as patient-identifying records made by NSW Health.
 5. Confirmation that proposed provisions do not have the unintended consequence of impacting the operation of, or are inconsistent with, other legislation, including the *Government Information (Public Access) Act 2009*; the *Privacy and Personal Information Protection Act 1998*; and the *Health Records and Information Privacy Act 2002*.

Transfer planning

The NSW Government proposes that public offices will be required to make and implement plans to transfer control of records of enduring value that are no longer in active business use to MHNSW. The plans may involve the immediate or postponed transfer of custody. These changes will ensure that the preservation and protection of records of enduring value (State archives) is secured, by requiring plans to be developed which will articulate when transfer to the State Archives Collection will take place.

Records of enduring value are valuable assets to the citizens of NSW. It is vital that they are protected. A key factor for their protection is the transfer of custody and control to the State Archives Collection.

Current arrangements do not provide sufficient powers for the existing SARA to effect transfer or knowledge of the volume and location of archives in the custody of public offices. The transfer of records is entirely dependent on the relevant public office and is often done in a responsive rather than a planned way and outside the control or forecast of the existing SARA.

This frequently means that records that would be more appropriately located as part of the State Archives Collection in suitable storage conditions are stored inappropriately and not controlled sufficiently. Ultimately, these public assets are not being adequately managed.

Issues surrounding management of records of enduring value are exacerbated for records 'born digital'. In a growing digital environment, where more government records are 'born digital', the preservation of such records for long periods of time presents challenges. As digital file formats evolve, records must be migrated or converted from old formats to new.

Section 14 of the State Records Act 1998 requires public offices to maintain accessibility of technology-dependent records while the public office has control of the record or has the record in its custody or possession under an agreement with SARA. This means that digital records must be kept in a format that is accessible by contemporary technology. This requires resources, and ultimately, it would be better for the required records to be transferred into the State Archives Collection and within the control of its management systems prior to the obsolescence of technology becoming a significant risk and cost to maintaining access.

This proposal requires amendments to Part 4 of the current SR Act. Specifically, the proposal requires the addition of provisions requiring public offices to develop regular transfer plans and amendments to provisions that prescribe that the trigger for transfer of records of enduring value to MHNSW is on completion of business use.

As a result of consultation with public offices, it is proposed that mandating these plans happens after a 12-month transition period from the legislation's amendment, to allow for the development of transfer plans with significant support and tools provided by MHNSW, which will be receiving new material into the Collection.

Other changes to the existing Part 4 of the legislation are required to ensure there is no perceived impediment to the transfer of archives. Specifically, under section 28, a State record is to be regarded as no longer in use for official purposes if the record is more than 25 years old, unless a 'still in use' determination is made by the public office.

The current provision has created the misunderstanding that archives less than 25 years old cannot be transferred.

Changes are therefore planned which will remove the 25-year requirements and put more of a focus on 'official use'. This will place the focus of transfer on when a public office is finished with a State archive rather than an arbitrary time period. This is particularly important in the more agile environment of 'born-digital' records, where whole systems may need to be transferred.

Additional amendments to the State Records Act 1998

Through the consultation process, and as a result of minor impracticalities that exist within the current legislation, a number of other minor changes to improve and enhance its operation are proposed. The following proposed changes impact provisions which would remain in the amended State Records Act 1998 and serve to improve the understanding of, and create certainty around, the purpose and use of these sections.

Clarify the Definition of ‘Public office’

Section 3(1)(b) of the SR Act needs to be better defined so that it is clear that it does not apply to private individuals or organisations, and particularly not-for-profit or charitable organisations.

Section 3(1)(b) currently identifies that “a body (whether or not incorporated) established for a public purpose” is a public office. The lack of specificity in the definition has unintended applications, being the potential to capture private sector, not-for-profit or charitable organisations within the scope of the SR Act. Such entities were never intended to be captured under the definition of the SR Act and it is SARA’s position that a strict reading of the current definition allows for the interpretation that up to 700 additional not-for-profit and community-based organisations are bound by the requirements of the SR Act. This unintended consequence of the broad definition is not the intent of the legislation, as evidenced in the [Second Reading Speech to the Legislative Council on 21 May 1998](#), which noted that the “new legislation will apply only to public offices and their records and not to private individuals or organisations.”

Clarify the Definition of ‘State record’

The current definition in section 3 of the SR Act for ‘State record’ is:

‘any record made and kept, or received and kept, by any person in the course of the exercise of official functions in a public office, or for any purpose of a public office, or for the use of a public office, whether before or after the commencement of this section.’

It is proposed that this definition be clarified so as to avoid any possible confusion that a record that is made but destroyed, or received but destroyed, does not inadvertently fall outside the definition of a State record. Removing ‘and kept’ from the definition of state record would clarify that any record made or received for use by a public office (and in the other circumstances outlined in the definition) is a state record for the purposes of the Act whether it was kept or not.

Clarify the Obligation in Section 10 and the Definition of ‘Chief Executive’

Section 10 places an important duty on the chief executive of each public office to ensure compliance with the SR Act and regulations. While this important feature of the legislation should be retained, there is an opportunity to redraft this provision to ensure there is clarity around what constitutes a chief executive and better describe the nature of the obligation. The current provision is difficult to interpret and does not aid in compliance.

It is proposed that a mechanism be inserted to allow for the definition of the chief executive’s responsibility to be further articulated in the Standards set by SRANSW from time to time pursuant to the current section 13 of the SR Act. As not all public offices have a position titled ‘Chief Executive’ being able to amend the definition of this role in the Standards would allow such a definition to keep pace with changing terminology for the head of a public office.

Clarifying Records Management Obligations in Section 12(1)

To improve compliance with section 12(1) of the SR Act, it is proposed that the technical jargon from this provision be removed (i.e. 'full and accurate').

Subsection 12(1) of the SR Act states, 'Each public office must make and keep full and accurate records of the activities of the office.' [emphasis added]. The phrase 'full and accurate' is drawn from the records and archives management terminology of the 1990s. It was previously used to define the criteria for what constituted a 'good' record but is now outdated.

The use of 'full and accurate' has the practical effect of diminishing clarity and reducing the types of records kept by public offices. This descriptor does not take into account the ways in which 'records' may shift over time with changing recordkeeping practices and technological improvements. Removing these words will strengthen this provision and may improve compliance.

Amend Section 21(1) (Penalty Provisions) and Section 78(2) (Commencing Proceedings within Two Years of the Offence)

In March 2021, the Independent Commission Against Corruption (ICAC) released its report relating to Canterbury City Council and allegations concerning former councillors and other public officials (Operation Dasha).

Recommendation nine of this report recommended the creation of a new offence relating to the wilful non-creation of records, an increase to penalties for offences and an increase to the time limitation to bring proceedings. Following review and productive engagement with the Information and Privacy Commission, the NSW Ombudsman and the Independent Commission Against Corruption, it is proposed that:

- The maximum penalty for an offence committed under section 21(1) be increased from 50 penalty units to 75 penalty units (equating to \$8250 currently). The larger penalty is in line with other comparable jurisdictions and better conveys the significance of the breach. Currently the average financial penalty across the eight other Australian jurisdictions is \$9848 compared with the current NSW penalty of \$5500. Western Australia, South Australia, the Northern Territory and Queensland all have fines of, or in excess of, \$10,000.
- The time limitation to commence proceedings under section 78(2) of the Act be increased from within two years from when the offence was alleged to have been committed to within three years in recognition of the length of time investigations undertaken by integrity agencies can take. An integrity agency is often considering a number of breaches across multiple acts and the complexity of these investigations mean that the two-year limit can result in breaches not being progressed as the overall investigation process takes longer than two years to make recommendations and commence action. This is a modest increase.
- No new or further offence provisions are to be added. The wilful non-creation of records in the context of corruption as an offence referred to in the Dasha Report does not align with SARA's regulatory framework or standards and therefore is not suitable for the SR Act. The current offence provisions in the SR Act do not consider intent as the focus is on the compliant creation and retention of records as the impact to the State Archives Collection and the business of public offices' is the same regardless of the intent. An offence for the wilful non-creation of records within the SR Act has the potential to weaken the seriousness of instances of non-compliance under section 12 as it elevates the non-creation of records in certain circumstances. This position is understood by the ICAC and SARA does not oppose the creation of such an offence in other legislation.

Section 36A (Copies of the State Archives) and Section 62 (Protection from Liability)

The following changes impact provisions of the current *State Records Act 1998* which will become the responsibility of MHNSW. For ease of reference, the provisions of the current legislation are used to highlight the changes required.

Currently, SARA may enter into commercial arrangements, as contemplated by section 36A(2), to facilitate the copying and publication of, or access to, the State archives under contract. While this is already provided for in the current legislation, the intent is that an amended section 36(A) would allow MHNSW to permit or prohibit, in the scope of the access arrangements provided in section 36A, end users of the copied archives to edit, adapt or alter those copies. Such an express power should not nullify compliance with relevant copyright law, but merely clarify the powers of MHNSW to authorise or prohibit adaptations of the copies of the State archives.

In making such a change it would also be appropriate to amend the protections currently provided under section 62, which extend protection from defamation or breach of confidence suits when access is facilitated, to make clear that the new entity is protected when entering an access agreement under which publishing and other uses of copied records are permitted.

Conclusion



Currently SARA and SLM work in a partnership model but remain separate statutory bodies, with independent and complex governance arrangements, except for the role of the shared Executive Director. Although some administrative and shared services functions have been adopted, SARA and SLM still function largely as two separate entities, compromising the level of profile and achievement that enhanced interoperability would allow. Current organisational arrangements are functional in the short term, however the partnership model does not represent a permanent, practical organisational structure over the medium or longer term.

Uncertainty around the future of the organisations and the realisation of the new CI is limiting each organisation's ability to optimise operations and implement longer term strategic initiatives. Broader public perception and a lack of clarity around the dedication to history that the 'Museums of History NSW' concept would deliver is compromising the organisations as they are, particularly SLM, to compete and influence amongst the other CIs and with donors and philanthropic funding sources.

Failure to resolve the implementation of the new CI and ensure a separate body is established for the administrative and regulatory functions of SARA, will lead to staff disengagement and reputational damage to each organisation over the longer term.

The policy positions and amendments outlined in this paper will fill the gap that exists in the NSW Cultural Institution landscape and combine two proud organisations focused on history into one, delivering improved outcomes for the people of NSW. In addition, these amendments will strengthen recordkeeping in NSW, supporting public office compliance and accountability and ensuring the vital records of the state are retained, stored and accessible for future generations.