

Proposed Public Records Bill:

Frequently Asked Questions

The following is additional information on the proposed Public Records Bill which addresses some issues that have been raised in response to the consultation process.

Custodial role of Archives New Zealand

- *What is the difference between the functional and the custodial models? Which is being proposed?*

A custodial model gives agencies responsibility for records in their custody and archives responsibility for records transferred into its custody. A functional model gives both agencies and archives separate responsibilities and functions in respect of **all records**. The functional model opens the door to a standards regime, including the metadata standards necessary for electronic records. In practice, all legislation will include both custodial and functional features. A continued custodial approach to paper records is proposed while some new functional provisions may be needed for the effective management of electronic records.

- *Are government agencies going to have to look after their own records? Isn't that Archives New Zealand's job?*

A **continued custodial approach** for paper records is proposed. In regard to electronic records, no final position has been adopted while a major study is being undertaken to recommend a robust strategy. Results of this exercise will be made available to those with an interest in the issues. The proposed legislation will give an opportunity to implement some non-custodial solutions, if that is what is decided. The issues are complex, and there is no international consensus on the ideal approach. In some cases electronic records may be at greater risk of loss, or may be inaccessible, if transferred to Archives. This is most likely where the records are created in complex and highly specialised systems. To address such circumstances, provisions are being considered which would empower Archives to require the responsible agency to maintain and give access to electronic records at Archives' expense.

Distributed Custody

- *There has been mention of Distributed Custody. What does this mean and will it only apply to electronic records?*

The notion of “distributed custody” for public records is not new. The 1957 Act already contains several provisions for this model - s8 dealing with “deferred deposits” (where agencies retain their own records) and s19 dealing with “approved libraries and museums” (where public records are held by third parties). It is proposed that the new Bill will give Archives New Zealand more say over how records held under deferred deposit or in approved repositories are preserved, managed, and accessed. What is being proposed here is about gaining (and regaining) control over archives.

It is also proposed the Bill will contain provisions giving Archives New Zealand the option of pursuing a distributed custody regime for some or all electronic records. It is not proposed to extend a “distributed custody” regime more widely over records in traditional formats. As noted earlier the issues surrounding electronic records are complex. We simply don't know whether traditional custodial or functional/distributed custody methods will work. However, respectable professional opinion here and overseas acknowledges that distributed custody is one possible approach (amongst others) that archives programmes may have to use when dealing with electronic records.

All that is being proposed now is that Archives New Zealand should have the option of doing whatever professional opinion finally decides is best - taking non custodial approaches to electronic records if that turns out to be the right thing to do. This does not mean that such a regime will be introduced. No decision has yet been made.

Variable Coverage

- *What is the process for varying coverage of the legislation by Order in Council and how easy will it be to remove an agency or class of records from the ambit of the legislation?*

The 1957 Act already includes an Order in Council provision for variable coverage. The process for obtaining an Order in Council involves: developing policy, consulting within government, and obtaining approval from the Cabinet Legislation Committee, Cabinet and finally the Executive Council before the order is signed by the Governor-General. Orders in Council varying the scope of legislation are subject to scrutiny by Parliaments Regulations Review Select Committee. This scrutiny ensures a transparent public process, with Orders tabled in the House before they come into effect.

What is now being proposed is to include in the public records legislation the use of a similar mechanism to provide for future Governments who want to vary the coverage of the Act in order to meet changing circumstances. The mechanism will enable them to do so without removing agencies or classes of records wholly from the operation of the Act by statute. Various options for the precise mechanism - including variation by Order in Council - are being considered.

- *Could an agency be excluded from the Act by Order in Council to avoid getting the permission of the Chief Archivist to dispose of records?*

No. The one provision that the deeming-out mechanism will not cover is the disposal provision. It will not be possible to use this mechanism to deem any record or government office out of the operation of the disposal provisions.

The 1996 Departmental draft Bill

- *Why did Archives New Zealand not seek to progress the 1996 Departmental Draft Bill? Why was a 'blue sky' approach preferred, and what does that phrase mean anyway?*

Almost all of what was proposed in the 1996 Departmental Draft Bill is to be found in the proposals now being discussed. The 1996 Draft Bill, however, is now over five years old and is a compendium of proposed amendments to the 1957 Act, some of which dated back many years. It is considered that these had ceased to represent a single cohesive whole. The way in which government operates, and the technology used, has changed dramatically and a fresh start was needed. 'Blue sky' is a colloquialism meant to convey a sense that Archives New Zealand was considering all options in developing proposals.

Appraisal and Disposal

- *Is the proposed legislation going to diminish the regulatory role that Archives New Zealand has in terms of the disposal of public records? Does this mean agencies will have more power in deciding what is retained?*

Under current legislation, the Archives Act 1957, Archives has a statutory decision-making role in regard to the disposal of public records and archives. **No change** is anticipated as a result of the proposed Public Records Bill.

- *The Discussion Paper mentions 'disposal' a lot. Is this just another term for destruction? How does 'disposal' differ from 'appraisal'?*

'Disposal' and 'appraisal' are not synonyms for destruction. 'Disposal' encompasses transfer of ownership, control, custody, management or location, as well as destruction. Appraisal is the process by which records are evaluated to determine if they are worthy of retention. A record can be 'disposed of' by being sent to Archives to be preserved and made accessible.

- *Does new legislation mean that Archives New Zealand is planning on reappraising the archives it already holds in order to throw some out?*

A total reappraisal of all holdings at Archives New Zealand **has not been, and is not being**, contemplated either as part of the proposed Public Records Bill, or as an overall strategy for Archives New Zealand. The position under the proposed new legislation will be no different from that under the 1957 Archives Act.

- *Does the mention of general disposal schedules mean that Archives New Zealand will no longer examine every record?*

The 1957 Act allows for records to be disposed of by schedule and this has been practice in New Zealand for the last 40 years. As at present, the legislation will provide for robust evaluation of records before any decision is made on their retention and destruction. General schedules are only used for records of similar kind in many agencies (e.g. common accounting records).

Census Records

- *Are census records endangered by the proposed legislation?*

Census records and other statistical schedules are excluded from the operation of the Archives Act 1957. Questions about the management of census records should be addressed to Statistics New Zealand. Consideration is being given to whether or not these records should continue to be excluded from the operation of any new legislation.

The Consultation Process

- *Has Archives New Zealand received advice from stakeholders other than through the Discussion Paper?*

An **Ad Hoc Advisory Group** was established in February 2001, and included representatives of the New Zealand Society of Genealogists, the Archives and Records Association of New Zealand, and the Association of Records Managers and Administrators, alongside government agencies, historians and other stakeholders. The input received so far has been invaluable.

- *What place does the Discussion Paper occupy in the consultation process that Archives New Zealand has undertaken in preparing new legislation?*

The Discussion Paper was circulated to gather comments and submissions which will be taken into account in the development of proposed new Public Records legislation. The Discussion Paper is not a draft of the proposed Public Records Bill nor is it government policy, rather it is intended to summarise some of the ideas being considered for new legislation. It is one of several strands of consultation being carried out. Copies of the Discussion Paper are available from the Archives New Zealand web-site www.archives.govt.nz or from any Archives New Zealand office.

- *Has there been consultation with Maori?*

The Discussion Paper (para 15) noted the need for further discussion on issues raised by Maori as of importance to them in relation to public recordkeeping. A focus group meeting was held on 6 August 2001 at Archives New Zealand to explore these matters with Maori experts in information management. The group was reconvened on 22 November 2001 for a further meeting, which also covered Archives New Zealand's strategic planning processes. It is intended to meet about three times a year to discuss and get advice on matters of importance to Maori.

[For an update on the consultation.](#)

Public Access

- *What is wrong with the current situation?*

Access under the 1957 Act is completely discretionary - the agency and the Chief Archivist can agree to close anything they want, they don't have to state their reasons, and their decisions are not appealable. These are no longer acceptable features of a public access regime in 2002 and need to be replaced by a statutory right involving transparent decision-making in which decisions can be appealed to another authority.

- *What are the implications of the proposed changes to access?*

The proposed new access provisions replace the old system with one which is radically different. Instead of applying only to records which have been transferred, the new access provisions will establish a statutory right of access to all records after 25 years or upon transfer (whichever is sooner). This means that archival access will be available to records still held in agencies even if they are not transferred. The proposed new legislation will oblige agencies to make a decision after consultation with the Chief Archivist and that decision must be registered with the Chief Archivist who must make it publicly known. The agency will be required to give the reasons for any decisions to restrict access. If an agency fails to make a decision, the records will be deemed to be open.

- *Could agencies leave files open, closed or refuse to transfer records to Archives New Zealand to deny access?*

Records that are closed under public records legislation will be discoverable under the Official Information Act. What is being proposed is a system which sifts classes of records into an open access regime (using bulk clearance) and which leaves the remaining classes of records to be accessed under OIA until such time as they too move (as a class) into the open access regime.

- *Do the proposed new access provisions exclude the Chief Archivist from a role in determining access to records?*

It is being proposed that public access decisions over archives deposited with Archives New Zealand cease to be by agreement between the depositing agency and the Chief Archivist. This does not exclude the Chief Archivist from any role in determining access. Standards or guidelines issued under the new legislation will be used to influence agency decisions. Other options that are being proposed by Archives New Zealand include a requirement for agencies to include reasons for closure as part of any access decision, and to consult with the Chief Archivist.
