

Archives (Records of the Parliament) Regulations 1995 No. 91

EXPLANATORY STATEMENT

STATUTORY RULES 1995 No. 91

Issued by the Authority of the Minister for Communications and the Arts

Archives Act 1983

Archives (Records of the Parliament) Regulations

Section 71 of the *Archives Act* 1983 (the Act) provides for the Governor-General to make regulations for the purposes of the Act.

Currently, section 18 of the Act, provides that Divisions 2 and 3 of Part V of the Act, which are concerned with the access to, alteration, disposal and transfer of Commonwealth records, do not apply, to the records of the Parliament or a parliamentary department.

Subsection 20(1) of the Act provides for the making of regulations to modify and apply the provisions of Divisions 2 and 3 of Part V to all or any of the records of Parliament. Subsection 20(2) ensures that regulations covering the records of the Parliament will not be made without consultation between the Minister, the President of the Senate and the Speaker of the House of Representatives.

The Regulations modify and apply the provisions of Divisions 2 and 3 of Part V in order to provide a basis for the sound and professional management of the records of the Parliament. The Regulations also endeavour to ensure that any activities related to the management of the records of the Parliament will be undertaken in a manner which reflects the position of the Parliament within the Commonwealth and the different powers and functions of the Parliament and the Executive Government of the Commonwealth.

In accordance with subsection 20(2) of the Act the Regulations have been drafted after consultation between the Minister, the President of the Senate and the Speaker of the House of Representatives.

Section 21 of the Act provides that, subject to any regulations made under section 20, parliamentary officers, who control the custody of parliamentary records, may enter into arrangements with the Australian Archives with respect to custody of those records. The records of the Parliament which have already been transferred to the Archives' custody have been done so by administrative arrangement made under this section. However the arrangements for the transfer of these records have been, largely ad hoc and there remains some confusion around the status of the records once transferred. The Regulations will remove this confusion and provide an independent and permanent legal framework for the transfer and disposal of and access to parliamentary records.

In order to preserve Parliament's absolute control over certain records, the records of the Parliament will be divided into two categories - Class A and Class B.

Class A records are those which relate directly to the Parliament's performance of its functions and are therefore to remain within the exclusive control of Parliament. They include the *Votes and Proceedings of the House of Representatives*, the *Journals of the Senate*, records which have been laid before or tabled in either House, records of a parliamentary committee, which are presented in camera or on an in-confidence or restricted basis to the parliamentary committee and which have not been authorised for publication by the committee, and records, prepared by

an officer or other employee of a parliamentary department, that relate to records presented to a parliamentary committee.

Class B records are all those records of the Parliament or a parliamentary department which are not Class A records.

The Regulations will regulate the disposal, destruction and transfer of both Class A and Class B records with the aim of preventing their premature destruction and ensuring the identification and preservation of Class A and Class B records which warrant permanent retention for administrative, legal, community, research or educational purposes.

Where Class A and Class B records are no longer needed for immediate use by parliamentary institutions they will be able to be transferred to the custody of the Archives. Class A and Class B records more than twenty-five years of age will not be able to be altered, except where alterations are made in accordance with the exceptions provided for in the proposed Regulations. Under the Regulations officers of the Australian Archives will be able to have access to Class A and Class B records and it will be possible to exempt certain Class A or Class B records from the requirement to transfer records contained in Regulation 5. Class A or Class B records transferred to the custody of the Archives will also be made available as reasonably required to the parliamentary institution of origin.

In relation to Class B records only, the proposed Regulations will ensure that where Class B records have been in existence for more than twenty-five years they will either be transferred to the custody of the Archives or destroyed lawfully and that all Class B records, except exempt records, will be made available for public access when they become thirty years old. The Regulations will set out the grounds on which Class B records can be classified as exempt records, and establish the arrangements under which Class B records will be examined to determine whether they are exempt from the requirement to make them available for public access.

The Regulations will regulate the form of public access given to, Class B records and the grounds upon which a request for access in a particular form can be refused. They will give the Director-General of the Archives the power to set reasonable conditions on the granting of access to Class B records, and where only part of a Class B record is exempt, they will allow access to that part of the record which is not exempt. They will empower the Archives to neither confirm nor deny the existence of a Class B record if to do so would result in the release of information which, if included in a Class B record, would be classed as exempt. The Regulations will ensure that the Advisory Council on Australian Archives is informed of practices relating to the destruction or other disposal of Class B records.

Finally, in relation to public access to Class A records, the Regulations make provision for access where it is a parliamentary practice to make them available, where permission is granted by the appropriate Presiding Officer, or in the case of a Class A record laid before the Senate, the Senate passes a resolution permitting access to it.

Details of the Regulations are set out in the Attachment.

The Regulations commenced on gazettal.

ATTACHMENT TO EXPLANATORY STATEMENT

Citation

Regulation 1 provides for the Regulations to be cited as the Archives (Records of the Parliament) Regulations.

Object of the Regulations

Regulation 2 states the objective of the Archives (Records of the Parliament) Regulations (the Regulations), which is to ensure the effective and efficient management and preservation of the records of the Parliament, whilst at the same time acknowledging the special position of the Parliament within the Commonwealth and the different powers and functions of the Executive Government.

Interpretation

Regulation 3 defines and sets out the interpretation of important terms found in the Regulations:

- "Class A records" are defined to include records received in confidence or on a restricted basis, the Votes and Proceedings of the House of Representatives, the Journals of the Senate and other sensitive records.
- "Class B records" are records which are not Class A records.
- "Committee" refers to any committee composed of Senators, Members of the House of Representatives or a joint committee of both the Senate and the House of Representatives.

Records to which the Regulations do not apply

Regulation 4 states that the Parliamentary Library collection and the Parliament's art collection will not be subject to the transfer, disposal or access provisions of the Archives Act.

Application of provisions of the Act to certain records in the possession of the Parliament or a parliamentary department

Regulation 5 provides for the application, omission and modification of certain provisions of Divisions 2 and 3 of Part V to Class A and Class B records for the purposes of subsection 20(1) of the Act. The manner in which Divisions 2 and 3 are to apply to these records is set out in the Schedule to the Regulations.

Regulation 5 lists those provisions in Divisions 2 and 3 of Part V of the Archives Act which will not apply at all or will be modified in their application to parliamentary records. The modifications are set out in an attached schedule. The modifications will not apply to other Commonwealth records which will remain subject to the existing provisions in those Divisions of the Act. Those which will not apply are:

- Subsections 29(2) and 29(4). See Schedule Item 7 (subsection 29(1)) for power to make determinations.
- Subsection 29(5). See Schedule Item 7 (subsections 29(1A) and (1B)) for notification in respect of Class B records.
- Subsections 29(6) and 29(7). The subsections are consequential to section 34, which provides for ministerial certificates. Section 34 will not apply to parliamentary records.

- Subsection 29(8). The section refers to organisations which are irrelevant to the management of the records of Parliament.
- Subsection 31(3). See Schedule Item 9 (subsection 31(2) which states that Class B records are subject to the open access provisions of section 31.
- Section 32. The section provides for consultation between Ministers and state governments and is therefore not relevant to parliamentary records.
- Section 34. The section provides for a Minister to issue a conclusive certificate in respect of certain exemptions. This would not be appropriate for parliamentary records.

SCHEDULE

Regulation 5

MODIFICATIONS OF THE ACT

Item 1 - New Sections 23A and 23B

This item inserts two new sections - 23A and 23B.

Section 23A defines and sets out the interpretation of important terms found in the Regulations:

- "Class A records" are defined to reflect Parliament's position within the Commonwealth and the special recognition and treatment which should be given to particular records. The records of the Parliament will be divided into two categories - Class A and Class B.

Class A records are those which relate directly to the Parliament's performance of its functions and are to remain within the exclusive control of Parliament. They include the *Votes and Proceedings of the House of Representatives*, the *Journals of the Senate*, records which have been laid before or tabled in either House, records of a parliamentary committee, which are presented in camera or on an in-confidence or restricted basis to the parliamentary committee and which have not been authorised for publication by the committee, and records, prepared by an officer or other employee of a parliamentary department, that relate to records presented to a parliamentary committee.

- "Class B records" are those records which are not Class A records.
- "Committee" refers to any committee of the Parliament that consists of Senators and Members of the House of Representatives or a joint committee of both the Senate and the House of Representatives.
- A "disapproved practice" is defined as an administrative practice of a parliamentary department of which the Archives has notified the department that it disapproves.
- The definition of "Head of the Department" varies according the records concerned:
 - if the records are in the possession of the Department of the Senate, the Head of Department is the Clerk of the Senate;
 - if the records are in the possession of the Department of the House of Representatives, the Head of Department is the Clerk of the House of Representatives;

- if the records are in the possession of the joint House Department, the Head of Department is the Secretary to the joint House Department;
- if the records are in the possession of the Parliamentary Library, the Head of Department is the Parliamentary Librarian;
- if the records are in the possession of the Department of the Parliamentary Reporting Staff, the Head of Department is the Principal Parliamentary Reporter.

- A "Parliamentary practice" is one of the following practices:

(i) a normal administrative practice, of a parliamentary department, which is not a disapproved practice (see definition of "disapproved practice" above);

(ii) a practice required by, or necessary to implement, a Standing or Sessional Order of either House;

(iii) a practice necessary to implement a resolution adopted by either House;

(iv) a practice necessary to implement a ruling of the President or the Speaker; or

(v) a practice approved by the President or the Speaker.

- "President" means the President of the Senate, the Deputy President and Chairman of Committees when performing the duties of the President, any person deemed to be the President in accordance with the *Parliamentary Presiding Officers Act 1965* or a Senator elected by the Senate to preside over the Senate in the absence of the President and the Deputy President and Chairman of Committees.

- "Presiding Officer" depends on the records concerned:

- in the case of records in possession of the Senate, a Committee of the Senate or the Department of the Senate, the Presiding Officer is the President (see definition of President above);

- in the case of records held by the House of Representatives, a Committee of the House of Representatives or the Department of the House of Representatives, the Presiding Officer is the Speaker (see definition of Speaker below);

- in the case of records in the possession of a Committee that consists of both senators and members, or of the joint House Department, the Department of the Parliamentary Library or the Department of the Parliamentary Reporting Staff, the Presiding Officer is the President and the Speaker.

- "Speaker" means the Speaker of the House of Representatives, the Deputy Speaker when performing the duties of Speaker or any person deemed to be Speaker of the House of Representatives in accordance with the *Parliamentary Presiding Officers Act 1965*.

Section 23B indicates the subsections of the Act which apply to Class A and Class B records without modification.

Subsection 23B(1) states that subsection 24(5) of the Act is applied in order to ensure that all Class A and Class B records which are held in machine readable form (eg. records held on computer tape or disk) are covered under section 24. It makes it clear that any alteration or destruction of the data held in this form is to be regulated under section 24.

Subsection 23B(2) lists the provisions of the Act which apply without modification to Class B records.

Item 2 - Section 24 (Disposal, destruction, etc of Commonwealth records)

Item 2.1 modifies subsection 24(1) to prohibit the disposal, destruction or transfer of custody or ownership of Class A or Class B records except as provided for in item 2.2. The objectives of these provisions are to

- prevent the premature destruction of records which should be retained for a limited period to satisfy legal, financial, accountability and other requirements of public administration; and
- ensure the identification and preservation of records which warrant permanent retention for administrative, legal, community, research or educational purposes.

Item 2.1 ensures that no Class A and Class B records will be disposed of or destroyed without proper practices being followed and that records will not be deposited out of official custody.

Item 2.2 modifies the practices outlined in subsection 24(2) and specifies different practices for Class A and Class B records.

Class A records: subsection 24(2) has been modified to reflect the wishes of the parliamentary departments that they maintain absolute control over those records. Subsection 24(2) sanctions destruction or other disposal of Class A records:

- in accordance with a law;
- with the permission of:
 - the Senate by resolution (in the case of journals, records and documents laid before the Senate);
 - or the Presiding Officer (in any other case);
- in accordance with a parliamentary practice which is not disapproved by the Archives; or
- to give the record to the Head of the Department or a committee (as defined) for the purposes of the department or Committee.

This modification reserves to Parliament the power to decide to dispose of, destroy or transfer Class A records.

Class B records: subsection 24(2A) modifies subsection 24(2) of the Act in a manner which recognises the Archives' role in respect of Class B records. Special provision has been made to ensure that the normal parliamentary administrative practices are recognised. This provision sanctions destruction or disposal of Class B records in similar terms as for other Commonwealth records except for the reference to parliamentary practice and to the return of a record to the custody of a parliamentary committee or department. It also requires the consent in writing of the Presiding Officer to disposal of Class B records.

Item 3 - Section 25 (Advice to Council on disposal practices)

Item 3 modifies section 25 of the Act to apply to Class B records only. This will ensure that, as in the case of other Commonwealth records, the Advisory Council is informed of those practices

relating to the destruction or other disposal of Class B records which are currently in force. The Council is also to be advised of any alterations to current practices or of any new practices.

Item 4 - Section 26 (Alteration of Class A and Class B records)

Item 4 modifies section 26 of the Act in respect of Class A and Class B records more than 25 years old.

Item 4.1 modifies subsection 26(1) of the Act to apply to both Class A and Class B records. Under section 26 as modified, records of this age are not to be added to or altered except:

- in relation to Class A records,
 - in situations generally similar to those set out at Item 2.2 for destruction, disposal or transfer of records; and
- in relation to Class B records,
 - in situations similar to those for other Commonwealth records.

Item 5 -Section 27 (Transfer of Class A and Class B records to the Archives)

Item 5 modifies the provisions of section 27 of the Act to facilitate the transfer to the Archives of Class A and Class B records which are no longer required to be readily available.

Modified subsections 27(1) and (2) apply to Class A records and permit the Director-General to enter into a written agreement with the Presiding Officer

- to allow Class A records to be transferred to the Archives and
- to require the Archives to hold these records under the arrangements specified in the agreement, being arrangements consistent with Part V.

Under subsection 27(2) the body holding a Class A record may at its discretion transfer to the Archives those Class A records which are not required to be readily available.

Subsection 27(3) applies to Class B records. This provision requires the transfer, or lawful destruction, of all Class B records when they are no longer required. Subsection 27(4) ensures that all Class B records which have been in existence for more than 25 years are transferred to the custody of the Archives as soon as practicable. This is similar to the position for other Commonwealth records.

The aim of these modifications is to ensure that there will be effective and efficient management of Class A and Class B records; proper control over disposal of unwanted records and preservation of permanently valuable material; and a reduced need for expensive office storage space at parliamentary institutions or for other inappropriate storage arrangements. It also ensures that the Archives has sufficient opportunity to arrange, describe and organise the examination of records under section 35.

Item 6 - Section 28 (Archives to have access to records)

Item 6 substitutes a modified version of section 28 of the Act to make provision for Archives to have access to Class A and Class B records. Class A and Class B records are treated separately to ensure that control of access to Class A records remains firmly in the hands of Parliament.

Subsection 28(1) allows the staff of the Archives to have access to Class A records in the possession of the Senate, the House of Representatives or a parliamentary department

- with the written consent of the Presiding Officer or the Head of a Department;
- at reasonable times; and
- in accordance with conditions that the Presiding Officer or the Head of the Department determines in writing.

Subsection 28(2) allows the staff of the Archives to have reasonable access to all Class B records in the possession of the Senate, the House of Representatives or a parliamentary department in order to discharge all the functions and powers conferred on the Archives in respect of Class B records by these regulations.

Certain Class A and Class B records can be exempted from the operation of the provision under section 29, as modified.

Item 7 - Section 29 (Exemption of certain records)

Item 7 modifies subsection 29(1) of the Act to enable the Senate or the House of Representatives to determine by resolution that certain Class A records will not be transferred to the custody of the Archives, that Archives is not to have access to certain Class A records or that Archives can only have access to certain Class A records under certain conditions.

Item 7 also modifies subsection 29(1) of the Act to permit a Presiding Officer to make a similar determination, with the consent of the Archives, in relation to Class B records.

Item 7 inserts subsections 29(1A) and (1B) which modify subsections 29(4) and (5) of the Act. These provisions allow a person responsible for the custody of a Class B record to deny access to the staff of the Archives for up to one month to Class B records which have not been exempted but in respect of which the person considers a determination should be made under subsection 29(1). Under these provisions, the person concerned

- must notify the Archives of his/her opinion and
- notify the Presiding Officer to allow the Presiding Officer to consider whether a determination should be made.

Lastly item 7 modifies subsection 29(3) of the Act to enable the Archives to accept the transfer of Class A and Class B records on conditions set down in an agreement between the Director-General and the Presiding Officer or Officers, provided the conditions are consistent with the provisions in Part V of the Act relating to disposal and access to records.

Item 8 - Section 30 (Class A and Class B records to be available to parliamentary institutions)

Item 8 modifies subsection 30(1) of the Act to apply to Class A and Class B records. This provision ensures that Class A and Class B records which have been transferred to the custody of the Archives are to be made available as reasonably required for the purposes of the body from which it received the records.

Subsection 30(2) has been modified to provide that records more than 25 years old which are made available for public access by the body concerned, will normally be made available only at the Archives premises.

Item 9 - Section 31 (Class B records in open access period to be publicly available)

Item 9 modifies subsection 31(1) of the Act to require the Archives to make available for public access all Class B records in the open access period, other than exempt records, in the custody of the Archives or the Senate, the House of Representatives, a Committee or a parliamentary department. Subsection 31(2) has been modified to require the Presiding Officer to make such arrangements with the Archives as will enable the Archives to fulfil its obligations under subsection 31(1).

Subsection 31(4) has been modified to enable Archives to postpone the release of Class B records for a reasonable time pending examination under section 35.

Lastly, item 9 adds a new subsection 31(5) to provide that a Class A record may be made available for public access only where permission is granted by the appropriate Presiding Officer, or in the case of a record laid before the Senate, where the Senate passes a resolution permitting access to it, or where it is a parliamentary practice to make it available.

Item 10 - Section 33 (Exempt Records)

Item 10 modifies section 33 of the Act to exempt Class A records from public access, and to define the kinds of information or matter by reason of which Class B records are to be exempted from the requirement that they be made available for public access under subsection 31(1). They are:

- where the release of the information or matter would prejudice defence, security or international relations.
- where the disclosure of the information or matter, communicated in confidence by or on behalf of a foreign Government, or by or on behalf of an international organisation, would be a breach of that confidence.
- where the release of the information or matter would adversely affect the Commonwealth's financial or property

interests, and would not, on balance, be in the public interest.

- where the release of the information or matter would be a breach of confidence.
- where the release of information or matter would or could reasonably be expected to prejudice the investigation of a breach of or the administration of or enforcement of a law in a particular case or to endanger the life or safety of any person.
- where the release of information or matter would or could reasonably be expected to prejudice the handling of breaches of the law or of the protection of public safety.
- where the release of the information or matter would unreasonably disclose information about the private affairs of a person.
- where the disclosure of information or matter would or could reasonably be expected to destroy or diminish its commercial value.
- where the disclosure of information or matter would or could be expected to have an unreasonably adverse effect on an individual's lawful business or professional affairs or on the lawful business, commercial or financial affairs of an organisation or undertaking.

Under this item, subsection 33(2) of the Act is modified to enable a Class B record to be withheld from access if in legal proceedings it would be privileged from production on the grounds of legal professional privilege or if its disclosure would be contrary to the public interest.

Subsection 33(3) is also applied to enable a Class B record to be withheld from access if it contains information or matter relating to the personal or business or professional affairs of any person (including a deceased person) or to the business, commercial or financial affairs of an organisation or undertaking and if there is in force a law relating to taxation that applies specifically to information or matter of that kind and prohibits persons referred to in that law from disclosing information or matter of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

Item 11 - Section 35 (Identification of Exempt Records)

Item 11 modifies section 35 of the Act to enable the identification of exempt Class B records prior to their release for public use.

In the modified form of section 35(1) the reference to "the responsible Minister or person authorised by the responsible Minister" has been replaced by "the Presiding Officer". This will enable the Director-General of the Archives, in consultation with the appropriate Presiding Officer, to make arrangements for examining records to determine which Class B records older than 30 years of age shall be deemed to be exempt records and, in the case of exempt records, the extent (if any) to which partial access can be given under section 38.

Decisions made under the provision will be reviewable under section 42 of the Act and a refusal to grant access to class B records based on a decision made under this clause will be subject to a right of appeal under section 43 of the Act.

Under the modified form of section 35(5) the Archives is required to deal with all requests for public access in accordance with determinations made under the provision. The Archives' decision is subject to review under section 43, by the Administrative Appeals Tribunal.

Item 12 - Section 36 (Forms of Access)

Item 12 modifies section 36 of the Act to regulate the forms of access in which Class B records will be made available. Under this regulation, a person is entitled to access to a non-exempt Class B record in any of the following forms: by inspection, photocopy etc, unless the giving of access in the required form would:

- interfere unreasonably with the operation of the Archives or of the Senate, the House of Representatives, a committee or a parliamentary department;
- not be appropriate having regard to the physical nature of the record;
- be detrimental to the physical preservation of the record;
- involve an infringement of copyright subsisting in the record.

All decisions other than on the basis of detriment to the physical preservation of the record, are subject to review by the Administrative Appeals Tribunal.

Item 13 - Section 37 (Conditions in respect of proper care of records)

Item 13 modifies section 37 of the Act to allow the Director-General of the Archives to specify the conditions under which Class B records are made available for use by the public. This

provision is made in order to ensure the safe custody and proper preservation of records. Where original Class B records are withheld, copies will be mad

e available.

Decisions under this regulation are subject to review by the Administrative Appeals Tribunal.

Item 14 - Section 38 (Access to part of exempt record)

Item 14 modifies section 38 of the Act to provide that, where a portion of an exempt Class B record can be released without disclosing exempt information, that portion may be made available for public access.

Decisions made under this regulation are to be made in accordance with arrangements under section 35 and are subject to review by the Administrative Appeals Tribunal.

Item 15 - Section 39 (Information as to existence of certain documents)

Item 15 modifies section 39 of the Act to ensure that the Archives is not required to confirm or deny the existence of a Class B record if to do so would result in the release of exempt information under subsections 33(1)(a) (National Security), 33(1)(b) (confidential information from foreign governments), or 33(1)(e) (current law enforcement or confidential sources).

This will allow the Archives to state that it neither confirms nor denies the existence of a record sought under section 31 of the Act. The Archives' decision is reviewable by the Administrative Appeals Tribunal.