

EXPLANATORY STATEMENT

Select Legislative Instrument No. , 2018

Issued by the authority of the Attorney-General

Archives Regulations 2018

Introduction

The *Archives Act 1983* (the Act) establishes the National Archives of Australia (the Archives). The Archives has in its custody approximately 40 million items and is responsible for accepting, preserving and making Commonwealth records of archival value accessible for current and future generations. It also has a significant role in overseeing, and setting standards around, Commonwealth record-keeping by providing advice and assistance to Commonwealth institutions.

Section 71 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Archives is required under the Archives Act to cause Commonwealth records in the open access period, which are not exempt, to be made available for public access. The open access period for current records is 20 years from the record's date of creation. The Archives identifies records that appear to have a greater public interest and prioritises the proactive disclosure of those records. Members of the public may also request access to the Commonwealth records in the open access period that have not yet been made publicly available by the Archives.

Purpose and Operation of the Instrument

The *Archives Regulations* (the current Regulations) provide procedural and technical support for the framework relating to the creation, destruction and archiving of Commonwealth records set out in the Archives Act by providing for:

- the Archives to issue a written notice requesting information about Commonwealth records held by a Commonwealth institution;
- the manner in which the Archives is to give permission to deal with Commonwealth records;
- the manner in which the Act applies to the records of specified custodial institutions;
- the circumstances in which a person may be given special access to certain Commonwealth records;
- the types of discretionary services provided by the Archives for persons other than Commonwealth institutions; and
- the Archives' charging regime.

The purpose of the *Archives Regulations 2018* (the new Regulations) is to remake the current Regulations with the same effect to ensure their continued operation. Minor modifications have been made to ensure fitness for purpose, consistency with current drafting practices, and remove obsolete or unnecessary provisions.

Consultation

Consistent with the requirements of the *Legislation Act 2003*, the Archives was consulted on the proposed Regulations and agrees with them. The Archives also consulted relevant custodial institutions referred to in the proposed Regulations and advised there were no concerns raised. Broader consultation was not undertaken as the new Regulations have substantially the same effect as the current Regulations.

The Office of Best Practice Regulation (OBPR) was consulted and advised that a Regulation Impact Statement is not required. The OBPR reference is ID: 23015.

Other Details

Details of the new Regulations are at **Attachment A**.

A Statement of Compatibility under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* is at **Attachment B**.

The new Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

Details of the *Archives Regulations 2018*

Part 1 – Preliminary

Section 1 – Name

This section provides that the title of the Regulations is the *Archives Regulations 2018*.

Section 2 – Commencement

This section provides for the Regulations to commence on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the *Archives Regulations 2018* are made under the *Archives Act 1983*.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Section 5 – Definitions

This section provides definitions for a number of expressions used in the Regulations as follows:

- ‘Act’ is defined as the *Archives Act 1983*;
- ‘memorial collection’ is defined as having the same meaning as in the *Australian War Memorial Act 1980*;
- ‘metre’ is defined as having the same meaning as subsection 15(3), that is a linear metre of shelf space occupied by the records;
- ‘official records’ is defined as records that would be Commonwealth records if they were not included in the Australian War Memorial collection;
- ‘old regulations’ is defined as the *Archives Regulations*;
- ‘relevant office’ is defined as having the same meaning as subsection 14(2), that is any of the office of the Governor-General, Minister, or Secretary under the *Public Service Act 1999* and any other officer declared under the Regulations;
- ‘sentence’ is defined as having the meaning in subsection 15(4), that is records are sentenced by the process of identifying and classifying records to determine the value of the records and the appropriate management of the records; and
- ‘staff member’ is defined as a member of the staff of the Archives.

Part 2 – Application of the Act

Section 6 – Exempt material – custodial institutions

Subsection 3(1) of the Archives Act defines exempt material as material in the collections of certain custodial institutions. It also includes material in a collection maintained by an institution declared by the regulations to be a custodial institution. Exempt material is excluded from the operation of the Archives Act. This recognises that it is the duty of these custodial institutions to publicly exhibit material in their collections.

This section provides a definition for the Australian National Maritime Museum as a custodial institution. This means that material in its collection is exempt from the operation of the Archives Act.

Section 7 – Certain records deemed to be Commonwealth records

Subsection 3(6) of the Archives Act provides that the regulations may provide that certain records in the possession of a Commonwealth institution, that would otherwise be exempt material, are Commonwealth records for the purposes of the Act.

Section 7 of the Regulations applies the access provisions in Part V of the Act to certain information or material of an official nature held in the memorial collection of the Australian War Memorial of an official nature. This section has the same effect as regulation 7AA and Schedule 1AA of the previous Regulations.

Part 3 – Dealings with Commonwealth institutions

Section 8 – Purpose of this Part

This section prescribes the purpose of this Part; that is specifying the arrangements for Archives dealings with Commonwealth institutions in accordance with the objects of the Archives Act and the exercise of functions and powers of the Archives.

Section 9 – Requesting for information from Commonwealth institutions

This section provides for the Archives to request information from a Commonwealth institution about Commonwealth records held by the institution, including information to determine whether the records are part of the archival resources of the Commonwealth. Subsection 9(3) requires an institution to comply with a request for information as soon as is reasonably practicable. This section has the same effect as regulation 3 of the previous Regulations; however, section 9 has been drafted in a less prescriptive manner removing unnecessary provisions.

Section 10 – Notice in relation to dealings with Commonwealth records

Section 24 of the Archives Act prohibits the disposal or destruction of Commonwealth records except as required by law, with permission of the Archives or in accordance with normal administrative practice. Section 26 of the Act similarly prohibits the alteration of certain Commonwealth records.

Section 10 of the Regulations prescribes the manner in which the Archives may give permission, approve or disapprove of practices and procedures for the purposes of sections 24 and 26 of the Act. Subsection 10(2) provides that this must be given by a written notice signed by the Director-General of the Archives, or a person authorised by the Director-General.

An authorised person would be able to authorise the destruction of Commonwealth records. Given the significance of this power, it is important for a person authorised by the Director-General to hold subject matter expertise, or other appropriate skills and qualifications and attributes required of an authorised person.

Subsection 10(3) provides that the Director-General may authorise a person to sign the written notice. Under current arrangement, the Director-General has authorised the Assistant Director-General, Access and Communication Branch and the Director of Commonwealth Information Policy. The persons occupying these positions have the seniority and subject matter expertise necessary to approve the giving of the permission, notification or authorisation.

In accordance with the *Legislation (Exemptions and Other Matters) Regulation 2015* such an authorisation would not be a legislative instrument. Item 4 of the table in section 6 of that Regulation provides that ‘an instrument that has the effect of authorising or approving a particular person to take a particular action in a particular way’ is not a legislative instrument.

Section 10 has the same effect as regulation 4 of the previous Regulations.

Section 11 – Dealings with Commonwealth records by Commonwealth institutions

This section requires Commonwealth institutions to keep information, in writing, relating to the destruction or other disposal, transfer of custody or ownership or damage to or alteration of Commonwealth records held by the institution.

Section 11 remake regulations 5 and 7 of the previous Regulations in an amended form. It removes the obligation for institutions to provide confirmation of arrangements for dealing with records, replacing it with the requirement to keep written information about dealings with Commonwealth records. This information would then be provided to the Archives if the Commonwealth institution is requested to do so.

Section 12 – Consent to destruction or disposal of certain Commonwealth records

This section requires a Commonwealth institution to provide written consent to the destruction of temporary records in the custody of the Archives or to provide a written request to the Archives that such records be retained. Section 12 has the same effect as regulation 6 of the previous Regulations.

Part 4 – Access to Commonwealth records

Section 13 – Charges for access to records

Section 36 of the Archives Act sets out how a person may be provided with access to records made publicly available under the Act. Section 36 of the Act also provides for

charges for access to be paid in accordance with the regulations. Section 13 of the Regulations provides for the Archives' charging regime.

Subsection 13(1) provides that the Archives may charge on a cost recovery basis for giving access to a record under paragraphs 36(b)-(d) of the Act. Subsections 13(2) and (3) provide that the Director-General of the Archives may waive or reduce charges in certain circumstances, including on financial hardship grounds or when it is in the public interest.

Subsection 13(4) provides for an application to the Administrative Appeals Tribunal (AAT) for review of a decision of the Director-General to refuse to waive or reduce a charge.

Section 13 has the same effect as part of regulation 11 in the previous Regulations for charges relating to giving public access to records. Charges for discretionary services to persons other than Commonwealth institutions are dealt with in section 15 of the Regulations.

Section 14 – Specified circumstances for access to restricted Commonwealth records

Subsection 56(2) of the Archives Act provides for special access to Commonwealth records in circumstances set out in the Regulations. This includes access to records not yet in the open access period and records assessed as being exempt from public access.

Section 14 of the Regulations prescribes the circumstances in which a person may be given special access to restricted Commonwealth records for the purposes of subsection 56(2) of the Act (see circumstances in items 1-4 of the table in subsection 14(1)).

Item 4 of the table in subsection 14(1) provides that if a person is researching a work for publication that person may have access to relevant Commonwealth records, not otherwise available for public access, if the work is declared as work likely to make a substantial contribution to the recording and assessment of events in Australia's development. Subsection 14(4) provides for the Minister (or an authorised person) to declare a work as likely make a substantial contribution to the recording and assessment of events in Australia's development.

A declaration made under subsection 14(4) would not be a legislative instrument as it would merely apply the law (as set out in subsection 14(1) to a particular circumstance (being the work in question)), rather than determining or altering the content of the law.

It is also not appropriate for a declaration under subsection 14(4) to be a notifiable instrument. A declaration under subsection 14(4) may include;

- details of sensitive or confidential records that may still be in the closed access period, or if in the open access period would come within the categories of exempt records under section 33 of the Archives Act;
- personal information about the person seeking access, or
- confidential details about the proposed research.

It is neither desirable nor practicable for this information to be made available to the public.

Section 14 has the same effect as regulation 9 in the previous Regulations.

Part 5 – Discretionary Services

Section 15 – Discretionary services for persons other than Commonwealth institutions

Section 15 of the Regulations prescribes the types of discretionary services provided by the Archives for persons other than Commonwealth institutions and provide for the charges payable in relation to those services. Section 15 has the same effect as regulation 10, part of regulation 11 and Schedule 1 of the previous Regulations.

Part 6 – Transitional provisions

Section 16 – Things done under the old regulations

Section 16 provides a transitional provision for things done under the previous regulations. This section provides that if anything was done for a particular purpose under the previous Regulations, and that thing could be done under the current Regulations, then that thing would continue to have effect under the current Regulations. This section applies to a notice, application or other instrument being given or made under the previous Regulations.

Section 17 – Review by the Administrative Appeals Tribunal of certain decisions of the Director-General

This section deals with unresolved applications to the Director-General for waiver or reduction of charges under regulation 11 of the previous Regulations.

Section 17 preserves the right of applicants to apply to the AAT for a review of a decision to waive or reduce a charge made before the commencement of the current Regulations. Subsection 17 (2) preserves the operation of sub regulation 11(7) of the previous Regulations so that applicants may still exercise their right to seek a review of such decisions by the AAT.

Schedule 1 – Repeals

This Schedule repeals the current Regulations, the *Archives Regulations*.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Archives Regulations 2018

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The *Archives Regulations 2018* (the new Regulations) remakes the *Archives Regulations* (the current Regulations) to provide technical and procedural support for the framework relating to the creation, destruction and archiving of Commonwealth records set out in the Archives Act by providing for:

- Commonwealth institutions to keep written information about Commonwealth records held by the institution;
- the manner in which the Archives is to give permission to deal with Commonwealth records;
- the manner in which the Act applies to the records of specified custodial institutions;
- the circumstances in which a person may be given special access to certain Commonwealth records;
- the types of discretionary services provided by the Archives for persons other than Commonwealth institutions; and
- the Archives' charging regime.

The new Regulations remake the current Regulations with the same effect to ensure their continued operation. Minor amendments have been made to ensure fitness for purpose, consistency with current drafting practices, and remove obsolete or unnecessary provisions.

Human rights implications

The new Regulations engage the right to information in Article 19(2) of the *International Covenant on Civil and Political Rights*. The right to information is not absolute. Relevantly, Article 19(2) provides:

‘Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.’

In General Comment No. 34 on Article 19 (CCPR/C/GC/34) the Human Rights Committee noted the importance of States parties proactively putting into the public domain Government information of public interest to give effect to the right of access to information and the need to make every effort to ensure easy, prompt, effective and practical access to such information (at paragraph 19). The new Regulations are consistent with these requirements and the objects of the Archives Act.

The General Comment also provides at paragraph 19 that fees for requests for information should not be such as to constitute an unreasonable impediment to access. The new Regulations are consistent with these requirements and the role of the Archives in encouraging public use and access to Commonwealth records as a vital element in documenting the history of the nation and the rights and entitlements of citizens.

The new Regulations are compatible with the right to information in that it provides for ongoing practical and administrative processes associated with the Archives Act. Any limitation of the right to information is a reasonable, necessary and proportionate means to provide manageable and sustainable access to Commonwealth records.

These measures are not intended to prevent or limit access to records or be intrusive and do not disproportionately affect any particular group.

Conclusion

This Legislative Instrument engages the right to information. It is compatible with human rights because it is consistent with the right to information and, to the extent that it may limit the right to information, those limitations are reasonable, necessary and proportionate.