

EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

Archives (Records of the Parliament) Regulations 2019

Introduction

The *Archives Act 1983* (the Act) establishes the National Archives of Australia (the National Archives). The National 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.

Section 18 of the Act provides that, subject to sections 20 and 21, Divisions 2 and 3 of Part V of the Act, which are concerned with the access to, alteration, destruction or other disposal and transfer of Commonwealth records, do not apply to records in the possession of the Senate, the House of Representatives 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 the Parliament and Parliamentary Departments. 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.

Purpose and Operation of the Instrument

The *Archives (Records of the Parliament) Regulations* (the previous Regulations) modify and apply the provisions of Divisions 2 and 3 of Part V to records in the possession of the Senate, the House of Representatives and the Parliamentary Departments in order to provide a basis for the sound and professional management of the records of the Parliament. They balance the need for the Parliament and Parliamentary institutions to retain control of their records with the role of the National Archives to identify and retain records of archival significance in perpetuity and make them publicly accessible. The object of the previous Regulations is to provide for the preservation, management and use of the records of the Parliament in a manner that reflects:

- i. the position of the Parliament within the Commonwealth;
- ii. the special recognition and treatment that should be given to particular records of the Parliament; and

- iii. the different powers and functions of the Parliament and the Executive Government of the Commonwealth.

The purpose of the *Archives (Records of the Parliament) Regulations 2019* (the new Regulations) is to remake the previous Regulations with the same effect to ensure their continued operation. Modifications have been made to ensure fitness for purpose and consistency with current drafting practices, update various provisions to reflect the current terms of the Act and the Parliamentary Service Act 1999, and remove obsolete or unnecessary provisions.

Consultation

Consistent with the requirements of the *Legislation Act 2003*, the National Archives was consulted in the making of the Regulations and agree with them. The Attorney-General's Department also consulted relevant Parliamentary institutions referred to in the new Regulations with suggested and agreed amendments incorporated in the new Regulations.

In March 2017, the Parliamentary Administration Advisory Group initiated a working group to conduct a review of the previous Regulations based on the experience of the Parliamentary Departments. This group worked collaboratively with the National Archives with a view to forming a common set of recommendations in consultation with the Attorney-General's Department to inform the drafting of the new Regulations and determined the best approach was to modify the operation of the Act by delegated legislation.

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.

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. Broader consultation was not undertaken on the new Regulations as they have substantially the same effect as the previous Regulations. Accordingly, the new Regulations do not raise any issues of significant contention such as to require enactment via primary legislation.

The Office of Best Practice Regulation (OBPR) was consulted and advised that a Regulation Impact Statement is not required. The OBPR reference is ID: 23969.

Other Details

Details of the remade 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 remade Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

Details of the *Archives (Records of the Parliament) Regulations 2019*

Part 1- Preliminary

Section 1 – Name

This section provides that the title of the Regulations is the *Archives (Records of the Parliament) Regulations 2019*.

Section 2 – Commencement

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

Subsection (1) provides that each provision in the instrument specified in column 1 of the table commences in accordance with column 2 of the table, and that any other statement in column 2 has effect according to its terms. Columns 1 and 2 provide that the Regulations commence the day after the instrument is registered.

The note to subsection (1) clarifies that the table only relates to the provisions of this instrument as originally made, and that it will not be amended to deal with any later amendments to the instrument.

Subsection (2) provides that information in column 3 of the table is not part of the instrument. It is designed to assist readers, and may be updated or changed in any published version of these Regulations. Column 3 is empty at the time of making the instrument.

Section 3 – Authority

This section provides that the *Archives (Records of the Parliament) Regulations 2019* are made under the *Archives Act 1983*.

Section 4 – Schedule 2

This section provides that each instrument that is specified in Schedule 2 to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in that Schedule has effect according to its terms.

Section 5 – Object of this instrument

This section provides that the object of the Regulations is to provide for the preservation, management and use of the records of the Parliament in a manner that reflects the position of the Parliament within the Commonwealth; the special recognition and treatment that should be given to particular records of the Parliament and the different powers and functions of the Parliament and the Executive Government of the Commonwealth.

Section 6 – Definitions

This note provides that a number of expressions used in the instrument are defined in the Act, including Parliamentary Department and record. This section also provides that, in this instrument, Act means the *Archives Act 1983*.

Part 2 – Application of Divisions 2 and 3 of Part V of the Act

Section 7 – Application of provisions of the Act to certain records in the possession of the Parliament or a Parliamentary Department

This section provides for the application, omission, repeal and modification of certain provisions of Division 2 and 3 of Part V to records in the possession of the Senate, the House of Representatives or a Parliamentary Department for the purposes of subsection 20(1) of the Act.

Subsection (3) provides that the manner in which Divisions 2 and 3 are to apply to these records is set out in Schedule 1 to the Regulations.

Subsection (4) provides that Divisions 2 and 3 do not apply to records in:

- the library collection for which the Parliamentary Librarian has responsibility; or
- the art collection of the Parliament.

Schedule 1 – Modifications of Divisions 2 and 3 of Part V of the Act

Item 1 modifies the heading in Division 2—Dealings with Commonwealth records of Part V to substitute “Commonwealth Records” with “Class A records, Class B records and Class C records”.

Item 2 modifies the Act by inserting definitions in section 23A of the Act. Section 23A defines and sets out the interpretation of important terms found in the Regulations.

Subsection (1) defines the following terms in Divisions 2 and 3 of Part V:

- “Class A records” are defined to reflect Parliament’s position within the Commonwealth and the recognition and treatment which should be given to particular records. The records of the Parliament will be divided into three categories – Class A, Class B and Class C.

“Class A records” are those records which relate directly to the Parliament’s performance of its functions and are to remain within the exclusive control of Parliament. They include:

- the *Journals of the Senate* in the possession of the Senate;
- the *Votes and Proceedings of the House of the Representatives* in the possession of the House of Representatives;
- a record that is laid before or tabled in and in the possession of the Senate or the House of Representatives;
- a record that is presented to a committee and that is in the possession of the committee, the Senate or the House of Representatives and that the

- committee, the Senate or the House of Representatives respectively has not authorised to be published;
- a record that was prepared by an officer of a Parliamentary Department or a person employed in, or performing duties for, a Parliamentary Department; and either minutes the proceedings of a committee or relates to a record that was presented to a committee; and is in the possession of the committee, the Senate, the House of Representatives or a Parliamentary Department.
- “Class B records” are those records in the possession of the Senate, the House of Representatives or a Parliamentary Department that are not a Class A record, a Class C record or an excluded record.
 - “Class C records” are those records in the possession of the Senate, the House of Representatives or a Parliamentary Department except a record that is an excluded record, comprising the following:
 - a record containing information that section 64V of the *Parliamentary Service Act 1999* prohibits an entrusted person from disclosing (except for purposes described in subsection 64V(3) or (4B));
 - a record determined as a Class C record under the process set out in subsection (2) of section 23A.
 - “committee” refers to a committee of the Parliament that consists of Senators and Members of the House of Representatives or a committee of the Senate or of the House of Representatives.
 - “excluded record” refers to a record in the library collection for which the Parliamentary Librarian has responsibility or the art collection of the Parliament.
 - “Head of the Department” refers to in the case of records that are in the possession of the Department of the Senate—the Clerk of the Senate; or in the case of records that are in the possession of the Department of the House of Representatives—the Clerk of the House of Representatives; or in the case of records that are in the possession of the Department of Parliamentary Services (except records described in the next paragraph)—the Secretary of that Department; or in the case of records that are in the possession of the Department of Parliamentary Services because they are in the possession of the Parliamentary Librarian or another Parliamentary Service employee in that Department assisting the Parliamentary Librarian—the Parliamentary Librarian; or in the case of records that are in the possession of the Department of the Parliamentary Budget Office—the Parliamentary Budget Officer.
 - “old” in relation to a provision refers to a provision as it applied with modifications because of the *Archives (Records of the Parliament) Regulations* as in force immediately before the commencement of the *Archives (Records of the Parliament) Regulations 2019*.
 - “parliamentary body” refers to the Senate, the House of Representatives, a committee or a Parliamentary Department.
 - “parliamentary practice” refers to a normal administrative practice of a Parliamentary Department; or a practice required by, or to implement:

- a Standing Order of either House of the Parliament; or
 - a Sessional Order of either House of the Parliament; or
 - a resolution adopted by either House of the Parliament; or
 - a ruling of the President or the Speaker; or
 - a practice approved by the President or the Speaker.
- “President” refers to the President of the Senate.
 - “Presiding Officer” refers to
 - in the case of records that are in the possession or custody of the Senate; or a committee of the Senate; or the Department of the Senate—the President; or
 - in the case of records that are in the possession or custody of the House of Representatives; or a committee of the House of Representatives; or the Department of the House of Representatives—the Speaker; or
 - in the case of records that are in the possession or custody of a committee of the Parliament that consists of Senators and Members of the House of Representatives; or the Department of Parliamentary Services; or the Department of the Parliamentary Budget Office—the President and the Speaker.
 - “Speaker” refers to the Speaker of the House of Representatives

Subsection (2) provides that the Presiding Officer may, by legislative instrument, determine a record to be a Class C record if satisfied that the record relates to the provision of advice to a Senator or a Member of the House of Representatives, and the record should remain under the control of the Parliament because of a duty of confidentiality under the *Parliamentary Service Act 1999*; and the Director-General agrees with the proposed determination.

The note to subsection (2) clarifies that Class C records may be determined individually or by reference to a class. This is consistent with subsection 13(3) of the *Legislation Act 2003*.

Item 3 modifies the heading in section 24—Disposal, destruction etc. of Commonwealth records to substitute “Commonwealth records” with “Class A records, Class B records and Class C records”.

Item 4 modifies subsections 24(1) and (1A) to substitute “Commonwealth record” with “Class A record, Class B record or Class C record”. This prohibits the destruction or other disposal, transfer of custody or ownership, or damage to or alteration of a Class A record, Class B record or Class C record except as provided for in item 5. The objectives of these provisions are to ensure the:

- retention of temporary value records only for as long as required;
- identification and preservation of the archival resources of the Commonwealth, to facilitate public access and support;
- government authority, action and accountability;
- individual and community identity, rights and entitlements and interaction with government; and
- national and community knowledge and memory.

Item 4 ensures that no Class A, Class B or Class C records are disposed of or destroyed without proper practices being followed and that records will not be deposited out of official custody.

Item 5 repeals subsection 24(2) to substitute new subsection 24(2) to specify different practices for Class A, Class B and Class C records. New subsection 24(2) provides that subsection 24(1) does not apply (in effect, that destruction or other disposal of these records is sanctioned) to anything:

- done in relation to a Class A record, a Class B record or Class C record in accordance with a law;
- done in relation to a Class A record that is a record laid before the Senate, or the *Journals of the Senate*, with the permission of the Senate by resolution or any other Class A record or Class C record with the permission of the Presiding Officer or a Class B record with the permission of the National Archives;
- done in relation to a Class A record, a Class B record or a Class C record in accordance with a parliamentary practice other than a normal administrative practice of a Parliamentary Department that is a normal administrative practice of which National Archives has notified that Department in writing that it disapproves;
- done in relation to a Class A record or a Class C record to place the record in the custody of a committee for the purposes of the committee;
- done in relation to a Class A record or a Class C record to place the record in the custody of the Clerk of the Senate for the purposes of the Department of the Senate; or the Clerk of the House of Representatives for the purposes of the Department of the House of Representatives; the Secretary of the Department of Parliamentary Services for the purposes of that Department; or the Parliamentary Librarian for the purposes of performing the Parliamentary Librarian's functions; or the Parliamentary Budget Officer for the purposes of the Department of the Parliamentary Budget Office; or
- done in relation to a Class A record, a Class B record or a Class C record, that is not in the custody of a committee or a Parliamentary Department that is entitled to custody of the record, to place the record in the custody of the committee or Department.

Item 6 modifies subsection 24(3) to substitute “Commonwealth record” with a “Class A record, Class B record or Class C record”. This in effect sanctions the destruction or disposal of Class A, Class B and Class C records if the circumstances of subsection 24(3) apply.

Item 7 repeals subsection 24(4) and substitutes it with new subsection 24(4) which provides that this section does not authorise the National Archives to permit the destruction or other disposal of a Class B record without the consent, in writing, of the Presiding Officer. This requires the written consent of the Presiding Officer prior to any disposal of Class B records.

Item 8 modifies subsection 24(5) to substitute “record” with a “Class A record, a Class B record or a Class C record”.

Item 9 repeals paragraph 25(1)(a).

Item 10 modifies paragraph 25(1)(b) to omit “of a kind referred to in paragraph (a)” (which is repealed by item 9) and replace this with “followed by, or approved by, the National Archives in respect of the destruction or other disposal of Class B records”. Item 10 (along

with item 12) modifies section 25 of the Act to apply to Class B records only. This ensures 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 11 modifies paragraph 25(1)(b) to substitute “Commonwealth institution” with “Presiding Officer”.

Item 12 modifies paragraph 25(1)(c) to substitute “Commonwealth records” with “Class B records”. Similar to item 10, item 12 modifies section 25 of the Act to apply to Class B records only.

Item 13 modifies paragraph 25(1)(c) to substitute a “Commonwealth institution” with “Presiding Officer”.

Item 14 modifies subsection 25(2) to substitute a “Commonwealth institution” with “Presiding Officer”.

Item 15 modifies subsection 25(2) to substitute “that institution” with “the Presiding Officer”.

Item 16 modifies the heading in section 26 – Alternation of Commonwealth records to substitute “Commonwealth records” with “Class A record, Class B record and Class C record”.

Item 17 would modify paragraph 26(1)(a) to substitute “Commonwealth record” with “Class A record, Class B record or Class C record”. This would prohibit the addition to or alteration of Class A record, Class B record or Class C record in existence for more than 15 years except as provided for in item 18.

Item 18 modifies section 26 to insert a new subsection 26(1B) to provide that subsection 26(1) does not apply (in effect, that addition or other alteration to these records is sanctioned) to anything done in relation to a Class A record or a Class C record:

- in accordance with a law; or
- with the permission, in writing, of the Presiding Officer; or
- if the record is either a record laid before the Senate or the *Journals of the Senate*— in accordance with a resolution of the Senate; or
- in accordance with a parliamentary practice other than a normal administrative practice of a Parliamentary Department that is a normal administrative practice of which the National Archives has notified that Department in writing that it disapproves.

Item 19 modifies subsection 26(2) to insert “in relation to a Class B record” after done which has the effect of sanctioning the addition or other alteration to Class B records in situations similar to those for other Commonwealth records.

Item 20 repeals sections 27, 28, 28A, 29 and 30 of the Act and substitutes each provision as below:

Section 27 - Transfer of certain records to care of Archives

Modified section 27 facilitates the transfer to the National Archives of Class A, Class B and Class C records as follows:

With respect to Class A records and Class C records the Presiding Officer may make a written agreement with the Director-General to allow Class A records and Class C records to be transferred to the care of the National Archives. Subject to this Part if a Class A record or Class C record is not required to be readily available for the purposes of the parliamentary body that has custody of the record, the body may transfer the record to the care of the National Archives in accordance with the agreement.

With respect to Class B records if the record is in the custody of a parliamentary body and has been determined to be part of the archival resources of the Commonwealth under section 3C, the person responsible for the custody of the record must cause the record to be transferred to the care of the National Archives in accordance with arrangements approved by the National Archives. The record must be transferred if the record ceases to be required to be readily available for the purposes of a parliamentary body as soon as practicable after that cessation and in any event—within 15 years of the record coming into existence. As noted, the record would not need to be transferred if the Presiding Officer determines, with the concurrence of the Director-General, in accordance with subsection 29(1) that the record is not to be transferred.

The aim of these modifications to section 27 is to ensure effective and efficient management of significant Class A, Class B and Class C records; proper control over disposal of records of temporary value and preservation of the archival resources of the Commonwealth; It also ensures that the National Archives has sufficient opportunity to arrange, describe and organise the examination of Class B records under section 35.

Section 28 – Archives to have access to records

Modified section 28 makes provision for National Archives to have access to Class A, Class B and Class C records. These records are treated separately to ensure that control of access to Class A or Class C records remains firmly in the hands of Parliament.

Subject to this Part, the National Archives is entitled to have access to a Class A record or a Class C record with the consent, in writing, of the Presiding Officer or the Head of the Department and at a reasonable time and in accordance with conditions that the Presiding Officer or the Head of the Department determines in writing. In addition, subject to this Part, the National Archives' is entitled to have access at a reasonable time to a Class B record in the possession of a parliamentary body.

Certain Class A, Class B and Class C records are able to be exempted from the operation of section 28 under section 29 (as modified).

Section 29 – Special rules about availability of and dealing with records

Modified section 29 provides that if the Senate or the House of Representatives determines by resolution that certain Class A records will not be transferred to the custody of the National Archives, then the National Archives is not to have access to certain Class A

records or may only have access to certain Class A records under certain conditions. A Presiding Officer may make a similar determination in relation to Class B (with the concurrence of the Director-General) or Class C records.

Subsection 29(1) provides that the National Archives must comply with a determination where

- the Senate or the House of Representatives determines by resolution that a Class A record is, for a period specified in the resolution:
 - a record that is not to be transferred to the care of the National Archives; or
 - a record to which the National Archives is not entitled to have access; or
 - a record to which the National Archives is not entitled to have access unless the conditions that are specified in the resolution or determination are complied with;or
- the Presiding Officer makes a similar determination in writing, with the concurrence of the Director-General, in relation to a Class B record; or
- the Presiding Officer makes a similar determination in writing in relation to a Class C record.

Subsection 29(1A) provides that where the National Archives seeks access to a Class B record, or a Class C record, that is not in the care of the National Archives, and a person responsible for the custody of the record considers that it may be appropriate for the Presiding Officer to make a determination in relation to the record, the person must notify the National Archives of the person's opinion and notify the Presiding Officer to allow the Presiding Officer to consider whether a determination should be made.

Subsection 29(1B) provides that, if notified under subsection 29(1A), the National Archives will not be entitled to access the record until the earlier of the end of 1 month from the day the National Archives is notified and the day the notification is withdrawn.

In effect subsections 29(1A) and (1B) allow a person responsible for the custody of a Class B or Class C record to deny access to the staff of the National Archives for up to one month to Class B or Class C records which have not been exempted but in respect of which the person considers a determination should be made under subsection 29(1).

Subsection 29(3) allows the Presiding Officer to make a written agreement conforming to subsection (3A) with the Director-General about Class A, Class B or Class records.

The aim of the modifications to section 29 – through the insertion of new subsections 29(3) and 29(3A) – is to ensure that the appropriate arrangements can be made in between the National Archives and the parliamentary bodies to meet their mutual access obligations, and to support the preservation and accessibility of the archival resources of the Commonwealth.

Section 30 – Class A records, Class B records and Class C records to be available to Parliament

Modified section 30 ensures that Class A, Class B and Class C records which have been transferred to the custody of the National Archives are to be made available as reasonably required for the purposes of the parliamentary body from which it received the records.

Subsection 30(1) provides that the National Archives must ensure that all Class A records, Class B records and Class C records transferred to its care from a parliamentary body are made available, as reasonably required, for use by, or at the direction of, the body.

Subsection 30(2) provides that records more than 15 years old must not be made available to a parliamentary body under subsection (1) in a manner that involves its leaving the custody of the person who has the custody of the record, except as necessary for the proper conduct of the business of the body.

Item 21 modifies subsections 30A(1) and (2) to substitute “record” with “Class A record, Class B record or Class C record”.

Item 22 modifies the heading of Division 3 – Access to Commonwealth records of Part V to substitute “Commonwealth records” with “Class A records, Class B records and Class C records”.

Item 23 modifies the heading in section 31 to substitute “Records” with “Class B records”.

Item 24 modifies subsection 31(1A) to substitute “Commonwealth record” with “Class B record”. Read together with subsection 31(1), this item (along with item 25) has the effect of requiring the National Archives to make available for public access all Class B records in the open access period, other than exempt records, in the care of the National Archives or the custody of the Senate, the House of Representatives, a Committee or a parliamentary department.

Item 25 modifies paragraph 31(1A)(b) to substitute “Commonwealth institution” with “parliamentary body”.

Item 26 modifies subsection 31(2) to substitute “Commonwealth institution, the institution” with “parliamentary body, the Presiding Officer”. This requires the Presiding Officer to make such arrangements with the National Archives as will enable the National Archives to fulfil its obligations under subsection 31(1).

Item 27 repeals subsection 31(3).

Item 28 modifies subsection 31(4) to substitute “Commonwealth record or a class of Commonwealth records from public access” with “from public access a record, or class of records, described in subsection (1A)”. This enables the National Archives to postpone the release of Class B records for a reasonable time pending examination under section 35.

Item 29 repeals section 32 and substitute with a new section 31A which in effect provides that Class A records and Class C records may be made publicly available with the permission of the Senate or a Presiding Officer (as relevant) or in accordance with parliamentary practice, other than a normal administrative practice of a Parliamentary Department that is a normal administrative practice of which the National Archives has notified that Department in writing that it disapproves.

Item 30 modifies subsection 33 to insert a new subsection 33(1AA) to exempt Class A records and Class C records from public access.

Item 31 modifies subsection 33(1) to substitute “Commonwealth record” with “Class B record”.

Item 32 modifies subparagraph 33(1)(b)(i) to substitute “or to a person who received the communication on behalf of the Commonwealth or an authority of the Commonwealth”, with “to a parliamentary body or to a person who received the communication on behalf of the Commonwealth, an authority of the Commonwealth or a parliamentary body”.

Items 31 and 32 have the effect of defining 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 include, by way of example, where the release of the information or matter could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth.

Item 33 modifies subsections 33(2) and (3) to substitute “Commonwealth record” with “Class B record”. Under this item, subsection 33(2) enables a Class B record to be withheld from access if it would be privileged from production in legal proceedings on the grounds of legal professional privilege and its disclosure would be contrary to the public interest. Subsection 33(3) enables 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.

Items 34 to 36 modify section 35 of the Act to enable the identification of exempt Class B records prior to their release for public use.

Item 34 modifies subsection 35(1) to substitute “responsible Minister or a person authorized by the responsible Minister” with “Presiding Officer”. This enables the Director-General of the National Archives, in consultation with the appropriate Presiding Officer, to make arrangements for examining records to determine which Class B records are to be treated by the National Archives as exempt records and, in the case of exempt records, the extent (if any) to which partial access can be given under section 38.

Item 35 modifies subsection 35(1) to substitute Commonwealth records (whenever occurring) with Class B records. Due to the operation of subsection 35(4), decisions made under subsection 35(1) are reviewable under section 42 of the Act.

Item 36 modifies subsection 35(5) to substitute “Commonwealth records” with “Class B records”. This in effect requires the National Archives to deal with all requests for public access in accordance with determinations made under the provision. For example, a refusal to grant access to Class B records based on a decision made in accordance with a determination under this section is subject to a right of appeal under section 43 of the Act.

Items 37 to 40 modify section 36 of the Act to regulate the forms of access in which Class B records are made available.

Item 37 modifies subsections 36(1) and (2) to substitute “a record” with a “Class B record”.

Item 38 would modify subsection 36(3) to insert “to a Class B record” after applied for access.

Item 39 would modify subsection 36(4) to insert “to a Class B record” after access (first occurring).

Item 40 modifies paragraph 36(4)(a) to substitute “another Commonwealth institution” with “a parliamentary body”. Modified subsection 36(4) has the effect that a person is entitled to access to a non-exempt Class B record by inspection, photocopy etc, unless the giving of access in the required form would, for example, interfere unreasonably with the operations of the National Archives or of a parliamentary body that has the custody of the record. All decisions other than refusal of access on the basis of detriment to the physical preservation of the record are subject to review by the Administrative Appeals Tribunal.

Item 41 modifies the heading in section 37 to substitute “records” with “Class B records”.

Item 42 modifies subsection 37(1) to substitute “any record” with a “Class B record”. This allows the Director-General of the National Archives to specify the conditions under which Class B records are made available for use by the public. This provision helps ensure the safe custody and proper preservation of records. Decisions under modified section 37 are subject to review by the Administrative Appeals Tribunal.

Item 43 modifies section 38 to substitute “a record” with a “Class B record”. This has the effect 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 modified section 38 are subject to review by the Administrative Appeals Tribunal.

Items 44 to 48 modify section 39 of the Act to ensure that the National 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 paragraphs 33(1)(a) (National Security), 33(1)(b) (confidential information from foreign governments), or 33(1)(e) (current law enforcement or confidential sources). The effect of these items allows the National 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.

Item 44 modifies subsection 39(1) to substitute “a record” with a “Class B record”.

Item 45 modifies subsection 39(1) to substitute “Commonwealth record” with a “Class B record”.

Item 46 modifies subsection 39(2) to substitute ‘a record’ (first and second occurring) with a ‘Class B record’.

Item 47 modifies subsection 39(2) to substitute “Commonwealth record” with “Class B record”.

Item 48 would modify subsection 39(2) to substitute “such a record” with a “such a Class B record”.

Modified sections 33 to 40 would each operate where applications are made to the National Archives for access to Class B records.

Item 49 inserts at the end of Division 3 of Part V:

- section 40C transitional provisions – continuation of permissions, approvals and agreements.
- section 40D transitional provisions – disapproved administrative practices of Parliamentary Departments
- section 40E transitional provisions – determinations about transfer and access

These provisions would have the effect that if these things were done under the current Regulations, and can be done under the proposed Regulations, then those things would continue to have effect under the proposed Regulations.

Schedule 2 – Repeals

This Schedule repeals the previous Regulations, the *Archives (Records of the Parliament) Regulations*.

Statement of Compatibility with Human Rights

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

Archives (Records of the Parliament) Regulations 2019

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 Disallowable Legislative Instrument remakes the *Archives (Records of the Parliament) Regulations 2019* to provide the National Archives of Australia (National Archives) with ongoing effect to a number of key provisions and processes identified in the *Archives Act 1983* (Archives Act). The Archives (Records of the Parliament) Regulations modify and apply the provisions of Divisions 2 and 3 of Part V to records in the possession of the Senate, the House of Representatives and the Parliamentary Departments in order to provide a basis for the sound and professional management of the records of the Parliament. They balance the need for the Parliament and Parliamentary institutions to retain control of their records with the role of the National Archives to identify and retain records of archival significance in perpetuity and make them publicly accessible.

The new Regulations remake the previous Regulations with the same effect to ensure their continued operation. Minor modifications have been made to ensure fitness for purpose and consistency with current drafting practices, update various provisions to reflect the current terms of the Archives Act and to remove obsolete or unnecessary provisions. The new Regulations have been retitled in accordance with contemporary drafting practice.

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 new Regulations are compatible with the right to information in that it provides for ongoing practical and administrative processes associated with the Archives Act. The Regulations allow for the Parliament and Parliamentary institutions to retain control of their records with the role of the Archives to identify and retain records of archival significance in perpetuity and make them publicly accessible.

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.