THE TASMANIAN ARCHIVES ACT, 1965

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The Tasmanian Public Records Act (now repealed by the Act which is the subject of this article) was passed in 1943, and was the second such measure to be enacted in Australia. The 1943 Act was, in fact, copied very closely from Part VI of the South Australian Public Library, Museum and Art Gallery and Institutes Act, 1936 (consolidating the Act of 1925). However, the emphasis of the Tasmanian Government's motives seem to have been rather different, and it is clear that there was very limited appreciation of the purposes of an archives organization as these have come to be recognized.

Introducing that bill on 30 March 1943, the Chief Secretary dwelt on the importance of the historical aspects of Tasmania's tourist attractions, and concluded that it was necessary "for the Government to take action to prevent the removal and destruction of historical documents relating to the State's development". That he illustrated his argument with examples of the flight from the State of records that did not fall within the bill's definition of public records — parts of the Knopwood diary — apparently did not strike his hearers as odd.

This emphasis on means to prevent the distressing loss of Tasmaniana, and on its recovery if lost, was a major argument in 1943; events leading up to the passage of the 1965 Act show that there was essentially little change in the common notion of the functions of an archives establishment in the intervening twenty-two years. In 1943, as in 1965, concern was publicly expressed that the provisions in the respective bills for the recovery of public records would be oppressive; then, the Leader of the Opposition, Mr Henry Baker, called it a bill for compulsory acquisition without compensation; another member declared, "It is nothing but grab, grab, grab. I'll oppose it if I have to stand alone." This is what he did, and the bill, though amended in committee to allow compensation for the acquisition of public records, passed without alteration in April 1943.

From that date until 1949, the Public Records Act remained largely a dead letter; a nominal appointment of Archives Officer was made under it, but there is no indication that it was invoked either to prevent destruction of public records, or to recover any that had left official custody.

Following representations from the late Professor E. Morris Miller and a group of Hobart historians, the State Library assumed responsibility for the administration of the Act when the first full-time Archives Officer was appointed to its staff in 1949. From then until 1965, many of the practices in records and archives administration that became established were largely without statutory foundation, but they were close enough to what was regarded as its intention that the Act could have remained the authority for the State Archives for many years, had it not been for the McGinniss case.

On several occasions the Archives Officer had invoked the Act to recover, with compensation, public records found in private hands. One such case was in 1959, when nineteen documents of Convict Department provenance were recovered from a private museum at Port Arthur, the former penal settlement preserved as a tourist attraction by the Government. In 1963, after several reports were received that the same museum was again displaying similar documents, the Archives Officer investigated and found seventeen items of a similar nature to those of 1959, and the pro-

prietress was accordingly asked to deposit them and invited to seek compensation. Through her solicitors, she refused, contending that the items sought were not in fact public records as defined by the Act.

Though the documents themselves were relatively minor, this challenge to one of the few important principles in the Act had to be met; the arguments of the defence were not known, but if the contention could be sustained, it would mean that title in a great many records in the State Archives was unsound, and many other unfortunate consequences could result. So it was decided to put the matter to the test, a complaint was lodged, the museum proprietress was summonsed, and the case was heard before a stipendiary magistrate in Petty Sessions on 29 October 1963.

To anyone who had had experience with such records it was self-evident that the documents were as averred: records whose provenance was the Van Diemen's Land Convict and Police Departments. But to *prove* this to the satisfaction of a court was quite another matter; though some documents bore "received" date stamps and other evidence of departmental ownership, though other documents of precisely similar nature could be produced from archival custody, and though the administrative circumstances resulting in the production of the documents could be described in detail, positive identification as public records could not be made; they could, for example (as defendant's Queen's Counsel suggested), have been skilful forgeries. The magistrate dismissed the case, and the documents were returned to the defendant.

To have sought a reversal of this decision by means of an appeal would, of course, have meant running the risk of merely confirming the earlier defeat. It appeared that the recovery provision in the Act was useless. The decision, much as one might be disposed to argue with it, served to emphasize the difficulty, perhaps the impossibility, of proving beyond doubt that a given document is a "public" one, even in apparently clear-cut examples. Take the three classical kinds of records: letters received, copies of letters sent, and internal memoranda. A letter alleged to be the original may bear all the marks of having been received by a public authority, but it is still conceivable, in the absence of *personal* knowledge to the contrary, that it is a copy kept by the writer. Single copies of a public authority's outward correspondence are likely to have even less internal evidence that they are what they are alleged to be, and such internal memoranda as registers of transactions can easily lose the marks of their provenance, such as their binding labels. If we are dealing with documents more than a century old, where first-hand evidence is not available, if defendants in such cases can rely on the presumption of innocency (as they can), and if the Court will accept any reasonable explanation that ingenious counsel can contrive for the defendant's possession of the documents (as it will), then the obstacles on the road to success appear formidable.

What is the remedy? One possibility is the creation of a board of assessors whose function would be to declare documents in dispute, "public" or not; but since there would have to be some machinery for appeal from their decision, this is no solution at all, only a removal of the problem from one level to another. A second alternative was to find some way to even up the balance of chances of success in a dispute, since they appeared to be weighted in favour of the defendant. The reversal of the burden of proof from the plaintiff to the defendant would have this effect, and this seemed to be the answer.

A defeat in the courts was, then, the immediate reason for seeking to amend the Act: not to pursue that particular case, which would have been unchivalrous and in any event unprofitable, but to overcome the obvious defect of the Act's failure to confer the power that its makers had intended. At the same time it was clear that in matters other than recovery, relatively a minor aspect of archival legislation anyway, the 1943 Act lagged behind developments in archives management. Replacement rather than piecemeal amendment was therefore indicated.

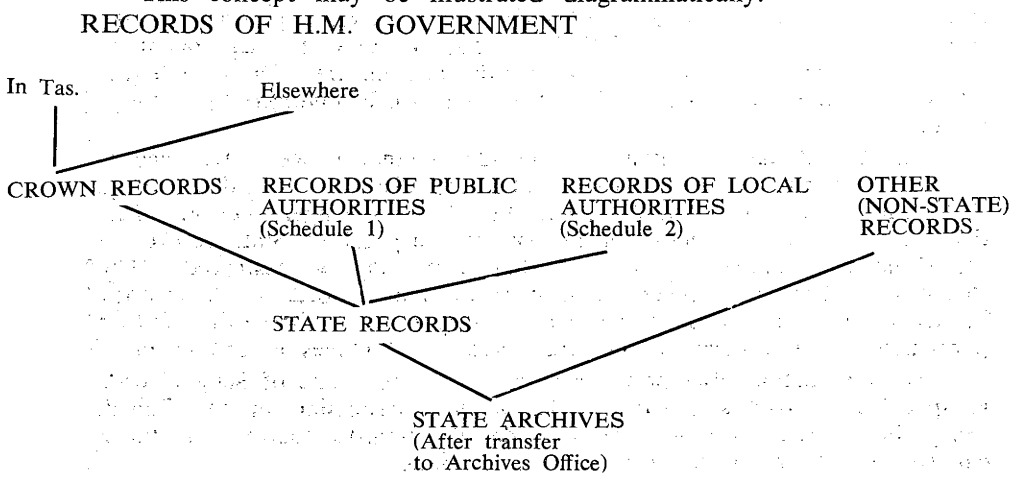
The old Act was prohibitory rather than enabling legislation — negative rather than positive. It was out of date in that many facts and practices that had developed since the early 'fifties had no statutory basis. It made only indirect reference to a repository, of which there were two by 1962; no-one was charged with the care of public records as archives; no mention was made of the Tasmanian Library Board or of the State Library Department, whose responsibility it had long been to provide staff and accommodation; no provision for such matters as access, departmental borrowing, authentication of copies; no prohibition against the irregular sending out of the State of public records (an easy way to evade the recovery clauses); no mention of records management, or of the acquisition of other records than public ones.

Recent legislation of Great Britain and New South Wales was studied and freely borrowed from, and though the recovery sections were the only ones that most people knew or cared about, the enabling and interpretative content of the Act is of far greater importance in providing a charter for the Archives Office. As we shall see, recovery is unlikely to be much easier under the new legislation, as it finally emerged, than under the old.

Precise definition is a feature of the new Act. The old one used the term "public records" and made it mean the records of "any office, department, branch, board, commission, institution [sic], or instrumentality of the State", including municipalities and "any body, corporate and unincorporate, which has at any time been subsidized by the State". This obviously could lead to absurdity, or worse, oppressive administration. The new Act takes "State records" and divides them into three categories: (1) Crown records, which are records made for the use of the Crown (thus excluding those made for other purposes, such as the top copy of an outward letter), and which include (a) the records of any department of Her Majesty's government in Tasmania, and (b) records in Tasmania of any department of Her Majesty's government anywhere. This rather surprising extension covers the records of Imperial departments (e.g., Convict Department, Customs or the Commissariat) which functioned in the colony in the nineteenth century, independently of the local administration. (2) Records of public authorities, which are named in Schedule 1 and include predecessors and successors in function. Such statutory corporations as the Hydro-Electric Commission and the University are examples. (3) Records of local authorities, also named in a schedule and including others of like kind; municipalities and other local governing bodies, many of them defunct, having limited geographical jurisdiction, are intended.

Any of these categories may, but need not, be public records, which are defined as "registers and other records kept in pursuance of an Act for the information of the public and available thereunder for public inspection". Finally, State archives are any of the above records, together with any others (such as private or business records), that are held in the Archives Office.

This concept may be illustrated diagrammatically:



The term "records" is comprehensively defined, following current legislation and the multiplicity of modern recording methods.

The Act then proceeds to sanction the existing situation and establishes a repository, with allowance for branches, for the preservation of State archives under the Tasmanian Library Board, and ensures that, subject to existing agreements, all records accumulated under the old Act shall be preserved as State archives; the appointment in the State Library Department of a Principal Archivist and staff for the Archives Office is authorized, and the care of State archives is placed with the Principal Archivist. The Board is given the responsibility of preserving State archives, and is enabled to carry out various appropriate functions, such as the compilation and publication of finding aids, transcripts and other related works, the regulation, subject to other sections, of public access, the acceptance of materials other than State records, the loan of items for display; and to put into the State archives State records and other materials held or acquired by it otherwise than under this Act. The range of matters upon which regulations may be made includes the general management of the Archives Office, the sale of publcations, the duties of the Principal Archivist, the storage of State records and their disposal on the termination or transfer of the functions of public or local authorities.

The Board has to provide a seal for the use of the Principal Archivist in authenticating copies of State records or in certifying that they have been destroyed; this saves a good deal of wear and tear on records that would otherwise have to be taken to courts in the original, and makes possible the admission of secondary evidence if originals or authenticated copies are not available.

Sections 7 and 8 are designed to see that State records are not destroyed without authority, and to give a legal foundation to the practices that have evolved to regulate the flow of State records to the Archives Office. Subsections allow the inspection of records for which a department gives notice of disposal; require that the records wanted by the Archives shall be transferred in the same form and order as they were maintained;

protects departmental officers from breaches of any Act prohibiting the disclosure of information in their department's records, by reason of the transfer of the records out of their custody; enables the department to determine access to its transferred records; and ensures that confidential information in such records shall not be improperly divulged by servants of the Board.

The Board has two months to decide whether it wants the records which a department notifies its intention to dispose of, and if within that time it has not required them, the Act no longer prevents their disposal; and the Act does not prevent the disposal of State records if the Principal Archivist has certified that they may be destroyed. The Board may destroy or otherwise dispose of State records in its custody in accordance with such a certificate. Departmental borrowing (either permanent or temporary) of files transferred to Archives is authorized.

The destruction, sale or the sending out of the State of State records is specifically disallowed without the written permission of the Board, except in the case of those records under the Board's control, and those carried by officers in the course of their duties.

Section 13 enables the transfer to the Archives Office of the records "not in common use" from such departments as the Supreme Court, the Lands' Titles Office and the Registrar-General's Department, notwithstanding any legislation which might prohibit the heads of such departments from allowing their records to leave their custody; and if the records so transferred are public, they are to be available for public inspection in the Archives Office to the same extent as previously, but without fee. The following Section provides that the legal validity of any record removed under this or the old Act remains sound.

The former Act contained a rather pious clause to the effect that heads should see that "complete and accurate" records should be kept of their departments' activities; this had little practical significance, and the present Act is content to provide that heads shall cause all their departments' records to be preserved in the department until dealt with under the Act, and allows them to take proceedings to recover them. Subsections allow the Principal Archivist or his deputy to enter and inspect any place where State records are kept, and to give written advice on their "keeping, organization and preservation".

The Board is enabled to accept gifts from living persons, from those in the expectation of death, and by bequest, and to agree to any conditions attached; such gifts are put on the same footing as those made to charity, exempt from stamp or death duties.

The Auditor-General's approval is necessary, as under the old Act, for the destruction of records which by statute must be referred to him.

The old Act entirely exempted from its application the records of Parliament. Without seeking to invade jealously guarded privileges, the new Act confirms the exclusion to Parliamentary records while they remain in the custody of either House, and obliges the return of any that have come into the Archives Office if Parliament so requests. Other exclusions are the records transferred from the State to the Commonwealth under Section 85 of the Commonwealth Constitution; and the records of any Commonwealth department.

Sections 16 and 17, concerning the recovery of Crown and State records found out of proper custody and placing on the defendant the onus to prove that they were not as alleged, were the sections seized

upon by the press and the parliamentary opposition; their significance was exaggerated out of all proportion and the controversy aroused finally led to the rejection of the onus of proof clauses.

In May the bill was read a first time and in June, rather a dull month politically, the Hobart *Mercury's* columnist paraphrased the provision of one "which, in effect, places the onus of proof on people having historical items to show that they are not of public interest. If the bill goes through in the present form it could spell the end of private museums in Tasmania. The Opposition . . . will fight hard to protect the rights of individuals who are likely to lose a livelihood through Government acquisition of historical relics".

The Government decided not to proceed with the bill in that session, but in August, before the opening of the next, the *Mercury* repeated its comment. When the bill came on for its second reading on 1 September the Minister pointed out the strictly defined areas the bill was intended to be concerned with, and as an earnest of good faith promised a written undertaking to the Port Arthur Museum that it would not be used to re-open that particular case. The opposition admitted that this promise largely removed their objections, and the bill went through the committee stage without amendment and passed the lower House on party lines.

Then followed a series of letters to the press, playing variations on the theme of oppressive legislation, not untinged with political interest, and not above misrepresenting the facts. Press comment culminated on 3 September when the *Mercury* ran a leader on the subject, rather better informed than its earlier comment:

> One of the main objections to the bill, . . . concerns the onus of proof clause making it obligatory on the owner of a document to prove it is not a Crown record. On the face of it, if the Government is satisfied that a Crown document is sufficiently historical in value to be preserved in the State Archives, then it would seem more desirable that it should be its duty to prove that it is in fact a Crown record.

The bill went to the Legislative Council on 8 September, and though the Chief Secretary attempted to put its provisions back into perspective, the debate turned on the onus of proof clauses. The Minister, while insisting that the Government's view was that they were in the best interest, hinted that it would accept an amendment on the point if the Council insisted.

Further letters to the press appeared before the Council resumed consideration of the bill in committee, and new fears, such as the safety of private stamp collections, were expressed.

Immediately the Council resumed the President, Sir Henry Baker, spoke strongly against the onus of proof clauses, and the temper of the chamber, where the Government does not hold a majority, made it clear that they would not survive; when they came to a vote, the Chief Secretary's voice alone was raised in their favour. The remainder of the bill passed with only minor amendment.

Thus, what had been represented as the *raison d'etre* of the new legislation was lost, and it is doubtful whether any future court proceedings arising from attempts to recover State records will be more favourable to the Crown than those of 1963. But if it is agreed that such matters are of comparatively minor importance in the total archival picture, then there can be no doubt that the new charter of the Archives Office of Tasmania is a more adequate instrument than the one it replaced.