

VICTORY IN VICTORIA

An Outsider's Comments on the Public Records Act, 1973 of that State.

AN EDITORIAL ARTICLE BY R. C. SHARMAN

An analysis of the Public Records Act, 1973, passed by the Victorian Parliament in April. The Act provides for the establishment of a Public Record Office as a Branch of the Chief Secretary's Department, and for the appointment of a Keeper of Public Records. For the first time in Australia, a State archives authority will be established which is quite separate from any library authority, and which is not dependent upon a librarian for its executive action.

The Act breaks new ground in several other ways, particularly with respect to the procedures it lays down for the recovery of archival estrays (or at least for the obtaining of copies, and the eventual recovery of the documents) and its formula for permitting access to public documents. The Keeper is empowered to establish standards for the transfer of public records to archival custody, and the writer wonders to what extent the Keeper will be able to make the acceptance of such standards obligatory on government departments.

It would be very remiss indeed of a journal such as this if it did not comment on the passage of the Victorian Public Records Act of 1973, an Act with respect to the Establishment of a Public Record Office and the Preservation, Management and Utilisation of the Public Records of the State (No. 8418) (enacted on April 17 of this year). It has fallen to the Editor of this journal to prepare the notes that follow, for frequent requests addressed, over the past five years or more, to practising archivists in Victoria for information on the Victorian State Archives and in particular for news of the progress of the new archives legislation have almost invariably met with a response which can best be summed up in a single word, "None".

The new Act has been a long time in the making. In Bill form, it was the subject of controversy in the *Melbourne Age* in February this year. On the 21st of that month, on p.8, Leonard Radic reported that the Labor opposition in State Parliament, supported (or aided and abetted) by some university officials, antiquarian booksellers, local councils and historical societies were concerned about the provisions of the Bill. Their concern was centred around the power given to the Governor-in-Council to prescribe a public record which is not in official custody, and to require the owner of such a record to produce it at the Public Record Office so that it might be copied. Mr. Kenneth Hince, antiquarian bookseller, is quoted in the article as saying that the Bill, if passed, would penalise the legitimate activities of collectors of books and documents.

At the core of the misgivings expressed by university officials was the definition of "public record" and the further definition of a "public office" on which the definition of "public record" depended. A public office means "(a) any department branch or office of the Government of Victoria; [and] (b) any public statutory body corporate or unincorporate . . ." This definition would presumably encompass the universities, and Melbourne University Archivist Frank Strahan was moved to condemn the Bill in terms familiar to those of us who have known Mr. Strahan in moments of arousal. The *Age* quoted him as saying "[The Bill] is loosely framed. It would allow autocratic centralised control over information and access to it. It would infringe personal liberties, as well as the autonomy of the universities, to an intolerable degree."

When it was in Bill form, the legislation threatened to give the Governor-in-Council power to prescribe a "record" (it did not say a "public record", or a record which, but for the fact that it was out of custody, would have been a public record) and imposed upon the owner of such a record the obligation to lodge a notice of possession with the Keeper of Public Records within 60 days. The Keeper was empowered to require the prescribed record to

be lodged with him for copying and to give directions as to its safe-keeping. The owner of the prescribed record was prohibited from disposing of it, and upon his death it was to become the property of the State – though there was provision for his estate to be compensated.

The debate does not appear to have reached the abysmal depths attained by the journalists and politicians in Victoria's mother colony on the other side of Bass Strait in September, 1965, where, according to P. R. Eldershaw ⁽¹⁾, it was even argued that the threatened passage of the Tasmanian Archives Act (in an earlier form) would put private stamp collections at risk. Indeed, Victoria's State Librarian K. A. R. Horn tried to restore sanity to the discussion by stating that it was nonsense to say that under the proposed legislation any private individual might have his records confiscated. "It is not anybody's intention that any record which does not come within the definition of a public one should be prescribed as one" ⁽²⁾

The Bill had, however, to be changed, to make the government's intention quite plain. The Act as finally passed by both Houses of Parliament makes it quite clear that no record can be prescribed unless it would be a public record but for the fact it is beneficially owned by a person or body other than the Crown or a public office. What is more, the relevant Section (S.16) lays down a provision that a prescribed record must be one that is of special historical significance to Victoria. The Government will not take action to prescribe records unless a recommendation to do so has been approved by the Public Records Advisory Council.

The rights of beneficial owners were further protected by an amendment to the Bill relating to the copying of prescribed records. Sub-sub-section 16 (3) (a) still empowers the Keeper of Public Records to require that a prescribed record be lodged with him for copying, but subsection (5) of the same Section provides that the Keeper shall not cause or permit any copy of the record retained by him to be published or a facsimile of any such copy to be made by a member of the public. The insertion of a phrase such as "except with the consent of the beneficial owner" in this sub-section of the Act might well have been a wise move. As it stands it seems that under no circumstance can the Keeper publish a copy of a prescribed record, though there might well be circumstances in which this would be very desirable. The following example is purely hypothetical, but may well be paralleled by events in the future. The Keeper discovers, shall we say, that a letter-book of an early Superintendent of the Port Phillip Settlement is out of official custody. He recommends to the Public Records Advisory Committee that it be prescribed: the Committee accepts his recommendation, and conveys it to the Governor-in-Council, which prescribes the record. The Keeper may then require it to be lodged for copying. However, the record is also of interest to the Archives Authority of New South Wales, in the territory of which Colony the Port Phillip District lay at the time the Superintendent was in office. It seems that, even with the consent of the beneficial owner, the Keeper could not "publish" the letter-book (e.g., on microfilm) for the Archives Office of New South Wales.

The Act has a Section (17), which was apparently introduced as an amendment to the Bill, relating to the possibility of a beneficial owner seeking to sell a prescribed record. In Bill form, the legislation (Section 16 (4)) merely prohibited sale or other disposal except with the consent of the Keeper. The Act up-grades the level at which permission may be granted for other disposal (it is now the prerogative of the Minister to grant permission) but provides for a mechanism for sale. Broadly speaking, the mechanism is that of a notified agreement. The owner of the prescribed record may sell it, but he must lodge a copy of the agreement for sale with the Minister, stating the name and address of the vendor and the purchaser, a full description of the record, and the sale price. The Minister may prohibit the sale; if he does so, he may acquire the prescribed record for the Public Record Office at the price named in the agreement. The Act retains the provision, as set out in the Bill, for a prescribed record to revert to the property of the Crown on the death of its owner, and for compensation

to be paid to his estate. The Minister shall appoint an independent valuer to assess compensation: if there is an appeal against this the matter is to be referred to a Magistrate's Court whose decision shall be final (Section 18).

The public debate on the Bill seems to have centred around the question of prescription of archival estrays; yet every archivist knows that this aspect of archival legislation is somewhat peripheral. The main question is "Who shall control the archives office?" A second question is "Shall the archives authority have power to compel a public authority to transfer archives to its custody?". On both these questions the Public Records Act comes up with some interesting answers.

Section 3 of the Act establishes a Public Record Office, which shall be within the Chief Secretary's Department. So the new archival authority will be separate from the Library Council and State Library of Victoria. This is a remarkable achievement and, curiously enough, seems to be in line with a recommendation of the Library Council itself. From the wording of the Act, it seems that for the first time in Australia a State Archives institution will be administered (subject, of course, to ministerial oversight, and presumably to some supervision by the permanent head of the Chief Secretary's Department) by archivists, rather than by librarians. Cynics will say that a reading of the N.S.W. Archives Act of 1960 would lead to the same conclusions about the Archives Office of N.S.W. as I have come to regarding the Public Record Office of Victoria. The N.S.W. Act establishes an Archives Authority, and does not give an inkling that the Authority will depend for its executive action upon the services of a librarian. The procedure whereby the Principal Librarian of the Library of N.S.W. was named as Principal Archivist of the Archives Authority of that State has been described as Australia's great library confidence trick at the expense of archives and archivists in the 20th Century. Could not the same thing happen in Victoria?

The present writer regards himself as an optimist, though his enemies may characterise this trait as simple gullibility. The impression I have gained is that it is unlikely the Victorian legislation will lead to the great debacle that took place in its sister State north of the Murray. The Public Records Act has been drawn up in conformity with the recommendations of the 1970 Report of the Public Records Advisory Committee of the Library Council of Victoria. That Committee's report, accepted by the Library Council, contained a recommendation that:

1. Since public records are produced by a government, they are peculiarly its resource and should be administered directly by the government itself. The care of public records is a public obligation. The Committee recommends that a separate public records authority be established called the Public Record Office.

The recommendations go on to suggest that the Public Record Office be given a central place in the government administration that will enable it to deal effectively and independently with all units of government, and that while ultimately it may be directly responsible to a minister, it should for the moment be a branch of a department.

There is every reason to believe that, in terms of Victorian legislation, that State will have a State Archives institution which will be independent of the control of librarians. For this reason the Library Council of Victoria, its Public Records Committee, archivists and legislators in that State deserve our congratulations.

There is provision in the Act, however, for the full-time practitioner to take advice. As we have seen, the existence of a Public Records Advisory Council has been mentioned. Under Section 4, the Advisory Council shall consist of seven members, appointed by the Governor-in-Council, of whom four shall be persons holding the position of permanent head of a department, one shall be appointed from a panel of names submitted by the Municipal Association of Victoria, one shall be a senior academic in a tertiary institution in Victoria, and one shall be the State Librarian or his deputy. The functions of the Advisory Council are laid

down in Section 5. It *shall*, in consultation with the Keeper, promote co-operation between the Public Record Office and public offices, and it *may* report and make recommendations to the Minister. Only Sections 16 and 17 provide practical examples of the matters in which the Advisory Council is to advise the Minister. 16 (1) as we have already seen stipulates that the Governor-in-Council will act on a proposal to prescribe records "upon the recommendation of the Public Records Advisory Council". 17 (5) provides that, before the Minister decides whether or not he consents to the sale of a prescribed record, and whether or not he will purchase it on behalf of the Crown, he must consult with the Advisory Council. There does not seem to be any requirement that the Advisory Council shall accept any initiatives over such matters as public access, the conditions under which members of the public may use public records or the circumstances under which records may be transferred to the Public Record Office.

The Keeper of Public Records is specifically empowered to do a number of things which in New South Wales can be done only by the Archives Authority. As G. D. Richardson points out,⁽³⁾ in N.S.W. no public records may be destroyed or disposed of without the consent of the Authority, and it is that body, and that alone, which has power to determine whether or not a public record is to be preserved as a State archive. The Victorian Act, however, says (Section 6 (2)) that subject to it, and to the general direction and control of the Minister, the Keeper shall have "the management and control of the Public Record Office and of all public records therein". The Keeper is responsible for preservation and security, for logical and orderly classification, duplication and reproduction, and authentication of copies. (Section 7, amplified by Section 8).

The ninth and tenth sections of the Act provide very instructive reading for those concerned about public access to public records. In these Sections, the Keeper is not mentioned: relevant decisions are taken by the Minister, in consultation, where necessary, with the ministers of other departments. But Section 9 begins by referring to "records required by this Act to be transferred from a public office to the Public Record Office", and one can only wonder who it is who is going to decide that the Act "requires" a public department or other office to transfer records. If the "requirement" is based upon the powers given to the Keeper under Section 12 (of which more anon), then that official is going to be in a very powerful position indeed.

To revert, however, to access. Basically there is a presumption of free access to records within five years of their transfer to the P.R.O. This is a departure from established practice in other States, where the date from which one begins to count the age of records, and therefore to establish whether or not they may be made available to students, is the date of their compilation. The Minister, in consultation with ministers of other relevant departments, may place a restriction on any records which "contain matters of such a private or personal nature that they should not be open for public inspection". The Minister (after again resorting to the sorts of consultation referred to above) may vary the declaration he has already made about access to such confidential records. But for the general run of records Section 10 seems to establish a presumption in favour of access. If there is to be a restriction, it is to be for five years only; it can then be renewed for five years, but each renewal can be of no longer duration than five years. Once the original restriction has been renewed four times (i.e., the records have been in archival custody for 25 years) it is only the confidential records provided for in Section 9 which can be restricted.

Section 11 merely places upon the Keeper an obligation to provide reasonable facilities for public inspection of the records. Section 12, however, contains the crux of the matter as far as compulsory transfer of public records is concerned. It does not say that the Keeper may compel a public office to transfer records; nor does it imply (as other Australian legislation does) that the initiative is left to the heads of the various offices. It says that the Keeper shall "establish standards" relating to, amongst other things, the transfer of public records to the Public Record Office, and that he shall "assist public officers in

applying these standards". When is a standard a requirement? If the Keeper can establish a standard, can he say that the head of a department must abide by it? There may well be many arguments centred around the Keeper's powers under Section 12, and one hopes that the appointment of Keeper is given to a person of sagacity, tact and experience and that he practises all those virtues in implementing that Section.

An obligation is laid upon the head of each public office, in Section 13, to "cause to be made and kept full and accurate records . . .", to implement a programme of records management, and to recover public records removed from lawful custody. This is the pious hope section of the Act, of which no more need be said. Section 14 gives the Minister power to establish branch or regional repositories, as is possible under Section 11 of the N.S.W. Archives Act. Section 15 empowers the Keeper to purchase "any record which in his opinion is worthy of preservation" (but this does not mean compulsory purchase).

Selective destruction or disposal of public records is provided for in Sections 12 and 20. In 12, it is one of the aspects of records management for which the Keeper may establish standards. In Section 20 his powers relate to records which have been transferred to the Public Record Office, but whose continued preservation is not considered desirable. In this case, he has to consult with the officer in charge of the public office responsible for the functions performed by those who compiled the records, or with the office which transferred them.

Sections 21 and 22 of the Act refer to the Keeper's responsibility to report to the Minister and to the use of public records as evidence in courts of law. They need not concern us here, except to say that the Section on the Keeper's report might well (for the benefit of students of archives throughout Australia) have insisted that the report, after having been presented to Parliament, should also be printed. Section 23, the final one, deals with the Governor's power to make regulations.

Certain differences between the Bill and the Act leap to the notice: there are, in the interpretations in Section 2, two sub-sections which have been added to the Act, and these suggest that Parliament accepted the argument that the powers proposed to be given in the Bill were capable of being misused. The first is a clear disclaimer that the term "public record" could possibly be applied to records outside public ownership. "Public record", says the definitions, "does not include a record which is beneficially owned by a person or body other than the Crown or a public office". In other words, Sections 16-18 are there to deal with archival estrays which are not owned by any public office. Let the Crown use those Sections in order to re-establish ownership over such items, but let not the servants of the government use powers meant to enable them to maintain control over public records for the purposes of re-establishing that control once it has been lost.

The second seems to have been introduced in order to put at ease the jitters of the local councils, universities and other public bodies who foresaw the day when a greedy Public Record Office was going to swallow up the rest of Victoria's historical collections. It is sub-section 2 (4) which says:

This Act does not apply to or in relation to a record transferred for the purpose of preservation to a public office by a person or body other than the Crown or a public office.

Hence the treasures of the La Trobe Library, for instance, seem to be immune from the activities of the Public Record Office. The Act can presumably apply to the administrative records of a library; but not to those that have been accumulated by that library from private sources. And, as the University of Melbourne and the Beechworth Council would appear both to be "public offices", the historical materials brought together as archives collections and museum exhibits by those two institutions are safe: their own administrative records may not be.

As a general criticism of the Act the present observer ventures to suggest that it appears to set up, as arbiters, too many different authorities. There are

some decisions which can only be made by the Governor-in-Council. Example: The Governor-in-Council may determine (a) that any office or body is not a public office within the meaning of this Act. (Part of sub-section 2 (2)). Others can be made by the Minister, either acting alone or in consultation with a fellow minister or on the advice of the Advisory Council. Others may be made by the Advisory Council, though it does not appear to have any unbridled executive authority. Others again may be made by the Keeper. It is not clear from the Act whether the Advisory Council is there to advise the Minister, the Keeper, or whom. There is certainly no evidence to suggest that the Keeper has to approach the Minister through the permanent head of the Chief Secretary's Department, nor that he has to keep the Advisory Council informed of what he is doing.

These are possibly only minor criticisms, though they may give rise to friction in the future. The important point is that archives legislation has at last been passed by the Victorian Parliament, and that, in common with the Tasmanian legislation of 1965 and the N.S.W. Act of 1960, it comes to grips with some of the major pre-occupations of the profession archivist. In my view, the Victorian Act does most things better than either of its above-named predecessors.

1. P. R. Eldershaw — "The Tasmanian Archives Act, 1965", in *Archives and Manuscripts* 3 (4), May, 1967, p.10.
2. *The Age*, 21 Feb., 1973, p.8.
3. G. D. Richardson — "A note on the practice of the Archives Authority of New South Wales". *Archives and Manuscripts* 3 (4) May, 1967, p.12.

MISCELLANY

It is proposed to publish regularly under this heading notes on products, publications, people, techniques and events likely to be of interest to archivists which would not otherwise be dealt with in the pages of *Archives and Manuscripts* or which deserve mention because of their topicality pending more detailed treatment in an article.

Items for this section may be forwarded to Michael Saclier, Research School of Social Sciences, A.N.U., P.O. Box 4, Canberra, A.C.T. 2600. All material used will be acknowledged.

Formation of Conservation Group

A "Committee for the Conservation of Cultural Property" has been formed in Canberra to promote "the science and art of the conservation of cultural property" by the encouragement of co-operation, information exchange, "the establishment of a national body to create and promote co-operation and information exchange on a national basis" and by the creation of public awareness of the need for greater Government participation in the conservation of cultural property. A news and information bulletin is to be published of which the first issue has now appeared. Membership is open to all persons interested in furthering the aims of the committee, the subscription having been set at five dollars per year. It is hoped the formation of a national body may be put in train at the national seminar on the conservation of cultural material to be held in Perth (6-11 August) which is being sponsored by the Visual Art Board of the Australian Council for the Arts. Although the seminar is primarily concerned with paintings and sculpture the discussion is certain to move into the general field of conservation including the problems which concern the archivist.