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**REVIEW OF THE ALLEGATIONS ATTRIBUTED TO THE FORMER STATE ARCHIVIST ABOUT THE  
QUEENSLAND STATE ARCHIVES' ANNUAL REPORTS FOR 2017-18, 2018-19 AND 2019-20**

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**Annexure 1 Terms of Reference**

## I EXECUTIVE SUMMARY

1. On 4 February 2022, Terms of Reference were issued for an independent review of allegations concerning the annual reports of the Queensland State Archives for 2017-18, 2018-19 and 2019-20.
2. The allegations were that:
  - (a) the State Archivist was pressured to remove any content from his draft of the Queensland State Archives' annual reports for 2017-18 and 2018-19 that could be perceived negatively;
  - (b) for two years he was directed to create misleading annual reports to Parliament by then Department of Housing and Public Works' senior officials to avoid anything embarrassing or damaging to the Government; and
  - (c) his attempts to raise concerns through the annual report were interfered with in both 2017-18 and 2019-20.
3. The review was required to:
  - (a) gather and examine relevant documentation held by Government departments relating to the drafting and finalisation of the Queensland State Archives' annual reports for 2017-18, 2018-19 and 2019-20;
  - (b) consider whether there are any matters that involve, or may involve, corrupt conduct that require referral to the Crime and Corrupt Commission under section 38 of the *Crime and Corruption Act 2001*;
  - (c) consider whether there are any matters that involve, or may involve, misconduct under the *Public Service Act 2008*; and
  - (d) consider whether there are any matters that may otherwise warrant disciplinary action under the *Public Service Act 2008*.
4. On 8 February 2020, I was retained by the Crown Solicitor to undertake this review for the State.
5. To conduct this review, a set of the relevant contemporaneous documents has been collected.
6. This set of documents includes any contemporaneous legal advice which was potentially relevant for this review. Where the substance of this advice was in fact found to be material, permission has been obtained from the State to refer to its contents in this review. In all other respects, the confidential and privileged nature of any legal advice is being maintained.

7. Assistance has also been provided by the two key officials who were involved in the relevant course of events:
  - (a) the former State Archivist (Mr Mike Summerell); and
  - (b) the senior officer of the Department of Housing and Public Works (**Department**), who was the State Archivist's principal point of contact at the Department in relation to the annual reports.
8. These two officials assisted Crown Law in ensuring that the relevant documents had been collected and in explaining the course of events.
9. In my assessment, this process has produced a reasonably clear account of the objective course of events and the context in which they occurred.
10. In particular, the documents provide a reasonably reliable record of:
  - (a) the original version of the annual reports, as prepared by Queensland State Archives;
  - (b) the final version of the annual reports, as produced by the State Archivist and tabled in the Legislative Assembly; and
  - (c) the course of events which resulted in any changes to the original version being suggested or made.
11. To permit others to make their own assessment of these matters, this review sets out the detail of this evidence (**Part III**).
12. For privacy reasons, I have referred to individual officers of the public service by use of neutral descriptions. They are identified by name in the confidential glossary which is attached to this report.
13. On my review of this evidence, the key conclusions which I have reached are that:
  - (a) each of the three annual reports, which were originally prepared by the Queensland State Archives, were reviewed by departmental officers of the Department before they were finalised by the State Archivist.
  - (b) these reviews were conducted at a departmental level, without any involvement of the Minister or his staff.
  - (c) these reviews were conducted as part of the work usually undertaken by the departmental officers in preparing the set of annual reports which relate to the Department.
  - (d) these reviews were seeking to produce reports which are concise, accurate and reliable.

- (e) in conducting these reviews, the departmental officers did not *direct* that any changes be made to the text of the Queensland State Archives annual reports.
  - (f) the departmental officers only ever requested, in a respectful way, that the State Archivist consider making particular changes to these reports.
  - (g) all of these requests were reasonable and appropriate and were not motivated by improper or irrelevant considerations.
  - (h) they were all requests which the State Archivist was reasonably and appropriately entitled to act upon.
  - (i) in making these requests, the departmental officers did not impose improper pressure upon the State Archivist or otherwise act inappropriately.
  - (j) any changes which ultimately were made to these annual reports were approved by the State Archivist.
  - (k) the changes did not result in the annual reports becoming misleading or concealing any material facts.
  - (l) the changes to the annual reports for 2018-19 and 2019-20 did result in the deletion, from within the introductory section (*Message from the State Archivist*), of statements by the State Archivist in support of his opinion that the *Public Records Act 2002* required “urgent” reform because it was “unfit for purpose” or had significant “shortcomings”.
  - (m) however, in my view, it was appropriate that these statements were queried by the Department, as these strongly-worded statements: (i) were not supported by the information or analysis provided in the body of the report; (ii) were not based upon the results of any disciplined study of the current operation of the Act and the options available to deal with any shortcomings; (iii) were not supported by the Department or by government policy; and (iv) were not supported by the Public Records Review Committee which, in the light of government policy, had decided that no further advice in relation to this issue should be given by the Committee.
  - (n) in summary, there is no reasonable suspicion that any of the persons involved in the preparation of these annual reports acted other than lawfully and appropriately.
14. In coming to these conclusions, I accept that the State Archivist was genuinely concerned to fulfil his statutory role in an honourable, vigorous and independent manner.
15. I also accept that the State Archivist was right to insist that the final text of these annual reports was his responsibility alone – and that others had no legal right to change the text of his reports or to direct him to do so.

16. However, the position of State Archivist has never been an independent statutory office. The State Archivist has always been a member of the public service. Accordingly, there are others in government who also have a legal responsibility for the work of the Queensland State Archives. At the very least, this requires a degree of supervision and scrutiny of the work of the Queensland State Archives, including the review of its annual reports before they are finalised.
17. From the outset, the Department sought and obtained legal advice from Crown Law about the nature of the legal framework which governed the relationship between the State Archivist and the Department. In summary, the advice received was that:

“In brief, the State Archivist is for most purposes in the same position as any other Executive Director in the department. Specifically, he is subject to direction by the Director-General in most respects, and by the Minister in relation to his control of the Queensland State Archives”.
18. In my view, this legal advice was correct.
19. More difficult questions arose, however, when general advice of this kind was sought to be put into practice – including in the finalisation of annual reports.
20. The Department sought and obtained legal advice to assist them with this process, but the advice they received evolved over time.
21. On 12 October 2018, the initial legal advice which the Department received, from the legal office within the Department, was that the State Archivist was legally subject to the direction of the Director-General in the preparation of the annual reports.
22. In my view, this legal advice was not correct. Fortunately, it was not acted upon.
23. On 22 May 2020, more detailed legal advice about this issue was obtained from Crown Law, at the request of the Public Records Review Committee.
24. This advice accepted that the State Archivist was *generally* subject to the control and direction of the Minister or Director-General as a public service employee, but that responsibility for the *specific* task of preparing annual reports was vested in the State Archivist. As a result, the Minister or Director-General could properly set the parameters of the types of matters to be included in the report, but should not specifically direct that particular matters be excluded from the report.
25. In my view, this advice was correct.
26. On 25 September 2020, the legal position was further clarified by advice from the legal office within the Department. This advice confirmed that the Department was entitled to query and seek appropriate changes to an annual report, particularly in respect of opinions which did not seem to be supported by the text of the report.
27. In my view, this advice was correct.

28. In my view, senior officers of the Department were entitled to subject drafts of annual reports of the Queensland State Archives to the same level of scrutiny that was applied to all other annual reports for the Department – and to make appropriate suggestions for amendment. Indeed, this would seem to be good administrative practice.
29. In the end, however, the final text of annual reports of the Queensland State Archives is required to be produced by the State Archivist – and so the final decision as to the content of these reports must always rest with that officer.
30. In my view, each of the annual reports were properly prepared in conformity with these legal requirements.

## II BACKGROUND

31. On 4 February 2020, Terms of Reference were issued for an independent review of three specific allegations concerning the annual reports of the Queensland State Archives for the years 2017-18, 2018-19 and 2019-20<sup>1</sup>.
32. On 8 February 2020, I was retained by the Crown Solicitor to conduct this review for the State.
33. Prior to this retainer, I had no professional involvement with the Queensland State Archives. Nor do I have any personal knowledge of, or connexion with, any of the individuals whose conduct is to be considered in this review.
34. In conducting this review, I have been primarily assisted by a Deputy Crown Solicitor, who has a great deal of experience in the broader operation of government in Queensland, but who has had no previous involvement in this matter.
35. In gathering together evidence for this review, we received the full co-operation of all who were consulted.
36. My approach to the fact finding for this review has involved four main steps.
37. The first step involved identifying the original versions of the annual reports, as prepared by the Queensland State Archives before any review was undertaken by the Department. These versions were then compared to the final versions of the annual reports as tabled in the Legislative Assembly. The object of this step was to identify all changes in the annual reports which might be attributable to any Departmental review.
38. The second step involved gathering together the relevant documentation, held by government departments, which recorded the relevant course of events. The object of this step was to identify: (a) the objective course of events that led to any changes in the reports being suggested or made; (b) the reasons for any changes being

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<sup>1</sup> The *Terms of Reference* are attached in Appendix 1.

suggested or made; and (c) whether the interactions between the Department and the Queensland State Archives were in any way improper (eg involving pressure, direction etc).

39. The third step involved obtaining assistance from the two key individuals involved in this course of events – the State Archivist and the principal official from the Department who dealt with the State Archivist in relation to this issue. The object of this step was to ensure that I had: (a) a complete set of the relevant documents; and (b) an understanding of any relevant conversations or meetings which took place.
40. The final step involved gaining an understanding of the context in which these events occurred. The context is important because these events did not occur in a vacuum. They were part of a delicate ongoing relationship between the Queensland State Archives and the Department.
41. Since its establishment, the Queensland State Archives has always been constituted as an organ of some broader administrative unit of the State Government – with the State Archivist, and all staff, being members of the public service.
42. As a consequence, some measure of lawful supervision and management of the Queensland State Archives has always been required from those who have legal responsibility for the management of this part of the public service.
43. The Queensland State Archives, of course, has been concerned to maintain a degree of independence from the rest of government.
44. On the evidence available to me, this concern appears to have been understood and respected by the relevant officers of the Department.
45. Nevertheless, both sides of this relationship were still required to carry out their respective roles and responsibilities – with the obvious potential for differences of opinion to occasionally arise.
46. The relevant context which needs to be considered has three main components.
47. *First*, there is the legal and administrative context. This includes:
  - (a) the legal framework which governs the Queensland State Archives;
  - (b) the legal framework which governs the administration of the Queensland State Archives within the Department; and
  - (c) the legal framework which governs annual reporting to Parliament, including the usual practices which are adopted in relation to this reporting.
48. *Secondly*, there is the relevant factual context. The main object of an annual report is to provide an account of the work undertaken in a particular year and the work to be undertaken in future. Accordingly, most issues about the content of an annual report

can only be understood after obtaining an understanding of the work which was the subject of the report.

49. *Thirdly*, there are the previous annual reports which had been produced by the Queensland State Archives. To the extent that matters had already been reported, it would not ordinarily be necessary or appropriate to repeat this information. Accordingly, it is important to understand what had already been reported by the Queensland State Archives before considering the content of further reports.

### ***Legal and Administrative Context***

50. The legislation which currently governs the Queensland State Archives is the *Public Records Act 2002 (PRA)*.
51. Since at least 1958, similar statutes have regulated the preservation of public records in Queensland<sup>2</sup>.
52. The basic framework of these statutes:
- (a) requires public authorities to make and keep records of their activities<sup>3</sup>;
  - (b) imposes restrictions on the disposal of public records<sup>4</sup>;
  - (c) allows for public records to be held in official archives<sup>5</sup>; and
  - (d) facilitates public inspection of these records<sup>6</sup>.
53. During this period, the administrative arrangements to carry these requirements into effect were also similar. These statutes facilitated the appointment of a State Archivist. However, the State Archivist has never served as an independent statutory authority. Rather, the State Archivist has always been appointed as an employee of the State, under the general terms of the public service legislation.
54. Accordingly, in many respects, the State Archivists have always been subject to lawful supervision and direction by others who have responsibility for the proper administration of government.
55. The original statutory framework was established under the *Libraries Act 1943 (Qld)*. This legislation established a Library Board of Queensland (s 5(1)), with a State Librarian as its executive officer (s 7). The operation of the Board was generally

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<sup>2</sup> See, generally, A Sweet *Preserving the Public Record: Review of Archives Legislation of Queensland* (Queensland Parliamentary Library) 1996; *Public Records Bill 2001 Explanatory Notes*, at 1-4.

<sup>3</sup> eg *PRA* ss 6, 7.

<sup>4</sup> eg *PRA* s 13.

<sup>5</sup> eg *PRA* ss 10, 11.

<sup>6</sup> eg *PRA* s 15 ff.



subject to the control of the relevant Minister (ss 6, 9, 10). The Board was required to provide an annual report of the proceeding of the Board to the Minister, which was to be laid before Parliament (s 25).

56. This legislation contained provisions concerning the preservation of public records (Part IV). However, this Part of the statute did not come into force until 15 years later (1958). It did not explicitly provide for the appointment of a State Archivist, but an officer with this role was appointed pursuant to the general terms of this legislation and the *Public Service Act 1922*<sup>7</sup>.
57. In 1988, the *Libraries Act 1943* was replaced by the *Libraries and Archives Act 1988*. This legislation provided for the Library Board of Queensland to continue in existence (s 8). The Board continued to be subject to the control and direction of the Minister, save when making recommendations to the Minister (s 28). The Queensland State Archives continued to be part of the State Library (s 5), with the State Archivist continuing to hold office under the *Public Service Act 1922* (s 51). Under this legislation, more detailed provisions were enacted for the preservation of public records (s 52 ff). Again, the Board was required to provide the Minister with an annual report on its operations (s 47).
58. In the early 1990s, this legislation was the subject of formal review<sup>8</sup>. This led to a series of Bills being placed before Parliament to separately govern the operation of the Queensland State Archives and the obligations relating to public records. However, it was not until 2002 that legislative change was introduced with the enactment of the *Public Records Act 2002*.

#### *Public Records Act 2002*

59. The *Public Records Act 2002* established a new office called the “Queensland State Archives”<sup>9</sup>.
60. In concept, this office is constituted by its staff:

“The [Queensland State Archives] consists of the State Archivist and the staff of the [Queensland State Archives]”<sup>10</sup>.
61. The State Archivist and the staff are to be “appointed and employed under the *Public Service Act 2008*”<sup>11</sup>.
62. Section 23 of this statute provides that:

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<sup>7</sup> *Libraries and Archives Act 1988* s 51.

<sup>8</sup> *Public Records Bill 2001 Explanatory Notes*, at 1-4.

<sup>9</sup> *PRA* s 21(2).

<sup>10</sup> *PRA* s 21(3).

<sup>11</sup> *PRA* s 22.

“Subject to the Minister and the chief executive, the [State Archivist] is to control the [Queensland State Archives].” (emphasis added)

63. The purpose of this provision is to create an administrative structure for the Queensland State Archives which is integrated within the general administrative arrangements for government in Queensland.
64. These general arrangements are discussed in more detail below. In essence, the ultimate responsibility for the due administration of each organ of government rests with the relevant Minister who is appointed to that role by the Governor in Council. Then, under the supervision of the responsible Ministers, various departments of government are established which are each led by a chief executive, who usually holds the office of Director-General. The chief executive, in turn, is responsible for the due administration of the department.
65. The effect of these arrangements, in general, is that the responsible Minister and Director-General have a responsibility to lawfully control and supervise the work of their department.
66. Accordingly, in s 23, these references to “the Minister” and the “chief executive” are references to the relevant Minister and chief executive who have been given statutory responsibility for administering the Queensland State Archives<sup>12</sup>.
67. Section 23 operates to:
  - (a) vest primary responsibility for the control of the Queensland State Archives in the State Archivist; but
  - (b) confirm that, in general, any such control is subject to the overriding statutory powers of the relevant Minister and the chief executive to lawfully administer the department of government which incorporates the Queensland State Archives.
68. As the provisions of s 23 are general in their nature, they are subject to any specific exceptions created by the terms of the *Public Records Act 2002*.
69. Section 27 contains the only express exception:

**“27 Independence in relation to disposal decisions**

  - (1) The [State Archivist] and the staff of the [State Archives] are not subject to the control or direction of a Minister or a department in relation to making decisions about the disposal of public records.
  - (2) Subsection (1) has effect despite section 23.”
70. However, other exceptions may arise as a matter of implication, on the true construction of the statute.

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<sup>12</sup> *Acts Interpretation Act 1954* s 33.

71. Apart from this role in relation to disposals, the State Archivist is given a number of general statutory functions, including<sup>13</sup>:
- (a) “to develop and promote efficient and effective methods, procedures and systems for making, managing, keeping, storing, disposing of, preserving and using public records”.
  - (b) “to identify public records of enduring value and require that they be retained in a useable form, whether or not the records are in the custody of the archives”.
  - (c) “to manage, keep and preserve records for public authorities and other entities”.
72. The State Archivist is also given broad powers to carry these functions into effect<sup>14</sup>.
73. Section 56 is the provision which governs annual reports. It provides that:
- “56 Annual report**
- (1) Within 4 months after the end of each financial year, the [State Archivist] must give to the Minister a report on the administration of this Act during the year.
  - (2) Without limiting subsection (1), the report may include details of the extent to which public authorities are complying with the Act, including, for example, instances of noncompliance, if any, and measures taken, or the archivist recommends be taken, to prevent, or reduce, noncompliance with the Act.
  - (3) The Minister must table a copy of the report in the Legislative Assembly within 14 sitting days after the Minister receives it.”
74. As is apparent from its terms, this provision does not define the extent to which the relevant Minister or chief executive has a role to play in the preparation of the annual report. Nor does there seem to be any caselaw which provides any useful guidance about provisions of this nature.
75. In my view, however, the effect of the provision is as follows.
76. Section 56 contemplates that the report will contain a statement, by the State Archivist to the Minister, of facts which he or she believes to be true and opinions which are honestly held. That is because the ultimate purpose of the statement is for tabling in the Legislative Assembly, to provide a record of information which can be relied upon in the due administration of government.

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<sup>13</sup> PRA s 24.

<sup>14</sup> PRA s 25.

77. It would be impermissible for anyone to direct the State Archivist to include in the report any statements which he or she did not believe to be true or opinions which were not actually held.
78. Equally, in my view, it would be impermissible for anyone to direct the State Archivist to omit from the report any material statement of a kind which he or she was lawfully entitled to include. As with a false statement, a material omission impacts upon whether the statement is properly a “report on the administration of the Act during the year” as required by the statute.
79. However, there is no requirement for the State Archivist to personally draft the entire contents of the annual report. The State Archivist is entitled to request assistance from his or her staff in the preparation of the report. Similarly, the relevant departmental staff are entitled to ask to see a draft of the report and make suggestions for its contents.
80. The key point is that the final text of the report must be a “report on the administration of this Act” given by the State Archivist.
81. A more difficult question arises in relation to the “recommendations” of the State Archivist which are contemplated by s 56(2), in circumstances where the State Archivist knows that the policy direction which he or she personally favours is not one which is supported by government.
82. In this situation, in my view, a State Archivist is lawfully entitled to confine his or her recommendations to measures which are designed to carry into effect the existing legislation in accordance with a policy approach which is supported by the Minister. Indeed, this is the kind of recommendation which would ordinarily be made in annual reports, because policy decisions are properly within the province of the elected government.
83. Nevertheless, if the State Archivist honestly believed that the administration of the Act under its current terms or policies is deficient, he or she would be lawfully entitled to record that view and any consequent recommendations in the annual report.
84. It should be noted, however, that an independent Public Records Review Committee (*PRRC*) exists to deal with difficult issues of this kind<sup>15</sup>. The PRRC has eight members, including a nominee of the Chief Justice of Queensland<sup>16</sup> and one of its core functions is:
- “(a) to advise the [State Archivist] and the Minister about issues affecting the administration or enforcement of the Act.”
85. Accordingly, it would ordinarily be expected that the support of the PRRC would be obtained before any State Archivist would record in the annual report their opinion –

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<sup>15</sup> *PRA* s 29.

<sup>16</sup> *PRA* s 29(3).

which was not shared by the Department - that the administration or enforcement of the Act was seriously deficient and in need of urgent statutory reform.

#### *Broader Framework of Government Administration*

86. The *Public Records Act 2002* fits within the broader framework of government administration in the following way.
87. Under the *Public Service Act 2008 (PSA)*, departments of government are established by the Governor in Council pursuant to gazette notices<sup>17</sup>.
88. Gazette notices also operate to assign to government departments their particular functions<sup>18</sup>.
89. Under the State Constitution, Ministers may be given responsibility for the administration of particular statutes and departments by order of the Governor in Council<sup>19</sup>.
90. After each State election, it is the practice for a new Ministry to be appointed. During this process, it is common for arrangements to be made for a new allocation of responsibilities amongst the new Ministers.
91. This occurred after the State election on 25 November 2017.
92. One of the established departments of government was the Department of Housing and Public Works (*Department*). The responsible Minister for that Department was the Hon Mick de Brenni and the Director-General was Ms Liza Carroll.
93. Prior to the election, the Queensland State Archives was administered as part of a different department - the Department of Science, Information Technology and Innovation (*DSITI*), under the Hon Leanne Enoch as Minister, and Mr Jamie Merrick as Director-General.
94. In December 2017, however, new administrative arrangements were made in relation to the Queensland State Archives. It became a government entity which was amalgamated with and declared to be part of the Department<sup>20</sup> and the Minister for Housing and Public Works (the Hon Michael de Brenni) was given the responsibility for administering<sup>21</sup>:
  - (a) the administrative unit constituted by the Department.
  - (b) the Queensland State Archives; and

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<sup>17</sup> *PSA* s 15.

<sup>18</sup> *PSA* s 16.

<sup>19</sup> *Constitution of Queensland 2001* s 44.

<sup>20</sup> *Public Service Departmental Arrangements Notice (No 3) 2017* para 54.

<sup>21</sup> *Administrative Arrangements Order (No 4) 2017* and subsequent Orders in Council.

(c) the *Public Records Act 2002* (Qld).

**95.** The legal effect of these arrangements was that:

- (a) the Minister for Housing and Public Works became the Minister with individual responsibility for the proper administration of the Department and the PRA.
- (b) this Minister, in general, had power to give directions to the chief executive of the Department in relation to the management of the Department (including the Queensland State Archives)<sup>22</sup>.
- (c) the Director-General of the Department, as chief executive, was responsible for the employment of public service employees of the Department and the management of the Department in a way that promoted the effective, efficient and appropriate management of public resources<sup>23</sup>.
- (d) all of the public service employees of the Department were generally responsible to the Director-General in relation to their employment<sup>24</sup>.
- (e) this included the State Archivist and the staff of the Queensland State Archives, as public service employees of the Department<sup>25</sup>.

#### *Operational Practice*

**96.** Despite the existence of these formal powers of control, it is a quite different question as to how any such powers are exercised in practice.

**97.** In practice, at least in the period to March 2018, the State Archivist was given a large degree of operational independence<sup>26</sup>.

**98.** As will appear from the analysis outlined below, I consider that this respectful approach by the Department continued during the period under consideration.

**99.** However, a key source of tension in the relationship was a difference of opinion about a number of matters, including whether significant changes in the *Public Records Act 2002* were required.

#### *Annual Reporting Requirements*

**100.** There is a long history, in the public administration of Queensland, of requiring the principal agencies of government to provide annual reports to Parliament.

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<sup>22</sup> PSA s 100(1).

<sup>23</sup> PSA ss 11, 98.

<sup>24</sup> PSA s 11.

<sup>25</sup> PSA s 5, 6.

<sup>26</sup> Information supplied by State Archivist.

101. In recent years, the primary reporting obligation is to be found in the *Financial Accountability Act 2009 (FAA)*.
102. This requires the chief executives of all departments and all statutory bodies to prepare an annual report to be given to their responsible Minister, who is then required to table the report in the Legislative Assembly (*FAA Reports*)<sup>27</sup>.
103. The content of the FAA Reports is prescribed, in considerable detail, under a number of governing instruments<sup>28</sup>.
104. These instruments require the preparation of reports which are concise, accurate, balanced and reliable, avoiding unnecessary or redundant information<sup>29</sup>.
105. As the Queensland State Archives is an office within the Department, the Director-General of the Department was required to include the activities of the Queensland State Archives within its annual FAA Report.
106. In addition to these reporting obligations under the FAA, there are a number of more specialised reports required by particular statutes (*Specialist Reports*).
107. The annual report required for the Queensland State Archives is of this second kind.
108. Specialist Reports are not formally governed by the same requirements as FAA Reports. Indeed, as with s 56 of the *Public Records Act 2002*, there is usually very little statutory guidance as to their form and content.
109. However, it is apparent from the many Specialist Reports which have been published over the years, including those for the Queensland State Archives, that they follow broadly similar conventions to the FAA Reports.
110. They generally seek to be concise, accurate, balanced and reliable, avoiding unnecessary or redundant information.
111. They do not conventionally discuss the differences of opinion, which may be held within government, as to which particular policy approach should be taken. The convention is simply to report the material policy approaches which are in fact being taken, and the material steps taken or proposed to be taken to implement that policy.
112. In practice, these two types of reports usually have a similar reporting deadline and are subject to a similar reviewing process within the responsible department.

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<sup>27</sup> FAA ss 60, 63.

<sup>28</sup> FAA; *Financial and Performance Management Standard 2009*, 2019 s 46; *Annual Report Requirements for Queensland Government Agencies*.

<sup>29</sup> *Annual Report Requirements for Queensland Government Agencies*, Section 3 ("Purpose of Annual Reports").

113. This involves senior officers of the department reviewing the drafts which have been prepared, with a view to ensuring that all reports meet the legal and conventional standards.
114. This was the approach which was in fact taken within the Department, when reviewing the annual reports<sup>30</sup>.

#### ***Factual Context and Prior Annual Reports***

115. Having outlined the legal context, attention may now be given to the factual context in which the first annual report (for 2017-18) was prepared.
116. Mr Summerell was appointed State Archivist in March 2016<sup>31</sup>.
117. The focus of the work of the Queensland State Archives, during the period immediately after his appointment, can be seen from the Annual Report for 2015-16<sup>32</sup>. This work focussed upon facilitating community access to the archives and assisting government to develop a record-keeping and disposal system which was efficient in a digital age. A strategic review was also being undertaken to set the direction and future priorities for the organisation, including a review of *Public Records Act 2002*<sup>33</sup>.

#### ***Issues About the Use of Private Email Accounts***

118. In 2017, new issues arose as a result of public allegations that a particular Minister (the Hon Mark Bailey) may have been using a private email account (***Email Account***) for government business<sup>34</sup>.
119. When these allegations were first made in January 2017, the Premier responded by publicly directing all Minister to cease using private email accounts for official business. The Email Account was then closed.
120. In March 2017, with some publicity, these allegations were referred to the Crime and Corruption Commission (***CCC***).
121. The CCC then directed the Department of the Premier and Cabinet (***DPC***) to work collaboratively with the State Archivist to review the emails retrieved from the Email Account to: (a) determine if any of them constituted a public record as defined by the *Public Records Act 2002*; and if so, (b) whether the records were dealt with correctly in accordance with the *Public Records Act 2002*.

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<sup>30</sup> Information supplied by Departmental Officer DO3.

<sup>31</sup> Annual Report, Queensland State Archives 2015-16, at 18.

<sup>32</sup> Annual Report, Queensland State Archives 2015-16, "Key Achievement" at 8 ff.

<sup>33</sup> Annual Report, Queensland State Archives 2015-16, "The Future" at 18.

<sup>34</sup> The sequence of events which follows is recorded in the Report of the State Archivist, 24 October 2017.



122. On 15 June 2017, after this review had been completed, the DPC provided the CCC with its confidential report.
123. On 19 July 2017, the CCC publicly announced that:
- (a) the CCC considered that a number of these emails were public records.
  - (b) in reviewing the emails, the CCC did not identify any evidence to support allegations that the Minister had used the Email Account to engage in negotiations with the Electrical Trades Union that would amount to corrupt conduct.
  - (c) the CCC considered there was sufficient evidence to raise a reasonable suspicion of corrupt conduct relating to the potential destruction of public records by the Minister which may be an offence under the *Public Records Act 2002*.
  - (d) the CCC had referred this question to the State Archivist for investigation.
124. On 5 September 2017, the State Archivist provided a confidential report on that investigation to the CCC.
125. On 22 September 2017, the CCC publicly announced that it had determined not to commence a criminal prosecution against the Minister.
126. Shortly afterwards, the State Archivist also determined that he would also take no further action against the Minister, given that it was unlikely that a criminal breach of the *Public Records Act 2002* could be established and that all public records had been recovered.
127. On 24 October 2017, the State Archivist provided an internal report about this issue to the Director-General of DSITI.
128. This report is of some significance. A full copy, with some redactions where legal advice is mentioned, is now publicly available<sup>35</sup>. In summary, the report:
- (a) described, in detail, the course of the investigation into the Email Account and the process by which it was decided that no legal action would be taken.
  - (b) expressed concern at the “potential” for widespread creation of public records in the private email accounts of Ministers and their staff.
  - (c) suggested a number of practical measures which could be taken to promote compliance with the existing legislation.
  - (d) suggested that significant changes to the statutory framework of the *Public Records Act 2002* were also required.

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<sup>35</sup> <https://documents.parliament.qld.gov.au/tp/2022/5722T35-AAD3.pdf>

129. In essence, the proposed statutory changes involved<sup>36</sup>:

- (a) new minimum standards for record-keeping for all public authorities, including requirements for the timely transfer of public records from private email accounts to official systems, which would be mandatory in nature.
- (b) penalties for non-compliance with these mandatory requirements.
- (c) greater independence for the State Archivist when carrying out his or her statutory functions, including the enforcement of these requirements.

*Annual Report 2016-27*

130. On 30 September 2017 – about a month before the report of 24 October 2017 - the State Archivist formally submitted his annual report for 2016-17<sup>37</sup>.

131. In this report, the State Archivist expressed his concerns about the current standards of record-keeping and the need for legislative reform – but not in the level of detail contained in the internal report of 24 October 2017.

132. In the *Message from the State Archivist*, it was explained that:

“For me the fundamental importance of public records has been reinforced while grappling with some of the year’s challenges and issues, one of which was a high profile investigation into allegations of unauthorised disposal of public records by a Minister. This and other issues have highlighted opportunities for improvement in not only our own processes but public authority record keeping practices and in the *Public Records Act 2002* itself.

A key focus for us is to increase the understanding of the importance of public records. We have chosen this as a theme for this year’s Annual Report and have used inspirational quotes from our staff as an integral part of the design.

There have been a number of Annual Reports from previous Queensland State Archivists which have highlighted concerns of the standard of government record keeping practice in public authorities. A startling fact is that our most recent survey highlighted that only 15 per cent of public authorities in Queensland meet what we deem to be a minimum standard of recordkeeping practice.

A key role for us is to provide guidance around good government recordkeeping practices, however a significant problem we face is that our guidance is not mandatory. The mission of Queensland State Archives is to ensure the public records of Queensland are made, managed, kept and preserved for the benefit of present and future generations. So that this mission is not threatened, government record keeping practices need to improve significantly. Over the next 12 months we will continue the transformation of the guidance and services we

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<sup>36</sup> *Report of State Archivist*, 24 October 2017, at 4-5.

<sup>37</sup> *Annual Report of Queensland State Archives 2016-17*, 30 September 2017.

provide public authorities. The review of the *Public Records Act 2002* will be part of that transformation focus....

As the business of government becomes increasingly digital, good recordkeeping practices for digital records have become more important. Providing leadership on digital information management issues to Queensland Government agencies, including Ministerial Offices, will be a highlight of the year ahead. The budget allocation for a Digital Archive means we are able to move closer to a long-term digital preservation solution for Queensland public records. This will allow us to appropriately manage the State's important digital records while also helping to promote the accountability of government." (emphasis added)

133. These concerns were then explained in more detail in a chapter of the report entitled *The Future*:

### **"3. Transforming Government Recordkeeping services**

While managing and providing access to the permanent records of the Queensland Government is a core task of QSA, QSA also has a major role in ensuring that public records are effectively managed. QSA's Government Recordkeeping (GRK) team provides advice and guidance to all State Government public authorities plus around 500 public authorities throughout Queensland.

In Queensland, 85 per cent of public authorities do not currently meet a minimum acceptable standard of recordkeeping. Four of the key challenges impacting their recordkeeping are:

1. transitioning from paper-based recordkeeping to digital recordkeeping
2. managing the significant volume of digital records across different business systems
3. ensuring the long-term useability and accessibility of digital records (e.g. less than 47 per cent were confident their digital information will remain accessible for its entire retention period)
4. managing their existing stockpile of paper records.

We need to overcome these challenges and improve digital recordkeeping practices across the Queensland Government. While responsibility for recordkeeping in a public authority rests with the Executive Officer, QSA is initiating a five-year strategic program to enable public authorities to transform their business information management which includes:

- releasing new minimum standards in recordkeeping practice for public authorities and monitoring performance against them
- publicly reporting levels of recordkeeping practice across the public sector

- releasing a strategy to help public authorities plan and transition their paper based recordkeeping practices to digital
- implementing more effective and efficient methods for the authorisation and disposal of public records and particularly digital records
- reviewing the *Public Records Act 2002* to support effective recordkeeping for the public sector in the digital age, starting with the launch of a discussion paper for external consultation
- reimagining recordkeeping by critically challenging everything we know about recordkeeping to be able to create a new vision of how business information is used in government
- exploring innovative solutions and tools to promote practical and efficient recordkeeping practices
- identifying the value of records created across the public sector and ways of ensuring their long term preservation." (emphasis added)"

**134.** In short, this report foreshadowed that:

- (a) practical steps would be taken to improve government record-keeping practices; and
- (b) a review of the *Public Records Act 2002* would be commenced, beginning with a discussion paper for external consultation.

#### *Next Steps*

**135.** In December 2017, following the State election, there was an administrative reorganisation affecting the Queensland State Archives. As noted above, it became a part of the Department of Housing and Public Works and was now under the supervision of a new Minister and a new Director-General.

**136.** During this period, the next steps taken by the State Archivist – and by government generally - were practical measures designed to promote compliance with the existing legislation.

**137.** Amongst other steps:

- (a) in November 2017, a Recordkeeping Transformation Program was formally launched by the Queensland State Archives.
- (b) in December 2017, a Ministerial Records Policy was issued by the State Archivist and distributed to all Ministers.

- (c) in March 2018, the Premier issued new ministerial guidelines banning the use of private email accounts for ministerial business. These guidelines were incorporated into a new edition of the *Queensland Ministerial Handbook*.
- (d) in March 2018, the Public Service Commission issued a private email use policy which was applicable to all public service employees.
- 138.** During this period, the State Archivist also submitted to the Department a draft discussion paper to initiate a review of the *Public Records Act 2002*.
- 139.** In these circumstances, on 29 January 2018, the legal services section of the newly involved Department sought clarification from Crown Law as to the respective roles of the State Archivist, the Director-General and the Minister in the administration of the *Public Records Act 2002*<sup>38</sup>. The focus of the advice sought was upon the “degree of independence” conferred upon the State Archivist by statute, and in particular the extent to which the State Archivist is “subject to Queensland Government policies applicable to the department, departmental policies and/or the specific directions of the Minister, Director-General or delegate”<sup>39</sup>.
- 140.** Whilst the questions raised were potentially broad enough to invite discussion by Crown Law of the annual reporting obligations of the State Archivist, this was not a specific topic upon which advice was sought – and was not an issue specifically considered by Crown Law.
- 141.** On 22 February 2018, formal written advice was issued by Crown Law<sup>40</sup>. In summary, this advice analysed the legal issues in a similar way to that set out above and concluded that:
- “In brief, the State Archivist is for most purposes in the same position as any other Executive Director in the department. Specifically, he is subject to direction by the Director-General in most respects, and by the Minister in relation to his control of the Queensland State Archives”.
- 142.** In my view, this advice was correct.
- 143.** On Thursday, 1 March 2018, a regular meeting of the PRRC was held, which was attended by the State Archivist<sup>41</sup>.
- 144.** At this meeting, the State Archivist briefed the PRRC about: (a) his report of 24 October 2017; (b) the practical steps which were being taken to promote compliance with the PRA; and (c) the steps he had taken to initiate a review of the PRA. In the course of his presentation, the State Archivist advised the PRRC of his concern that

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<sup>38</sup> Recorded in Letter of Advice, Crown Law to Department, 22 February 2018.

<sup>39</sup> Letter of Advice, Crown Law to Department, 22 February 2018.

<sup>40</sup> Letter of Advice, Crown Law to Department, 22 February 2018.

<sup>41</sup> Minutes, PRRC, 1 March 2018.

“the Minister does not see the Review of the Act as a priority as he has such a large portfolio”.

145. As a result of this briefing, the PRRC decided to provide advice to the Minister which would support undertaking such a review. This advice was given the following Monday and is set out in detail below.
146. In the meantime, however, on Friday, 2 March 2018, a meeting was held between the State Archivist and senior departmental officers at which the advice obtained from Crown Law was discussed with him<sup>42</sup>.
147. The meeting concluded with the Director-General confirming that, regardless of the formal legal position, it was proposed that operational arrangements would continue as before<sup>43</sup>.
148. On Monday, 5 March 2018, the State Archivist wrote to the Department<sup>44</sup> advising that:
- (a) he did not have any real interest in challenging the validity of the Crown Law advice.
  - (b) he was, however, concerned about the practical implications of the advice, including the implications of having to consult with the Department or seek approval before issuing non-mandatory guidance.
  - (c) he would be providing a formal response and was considering referring the issue to the PRRC.
149. On the same day, the PRRC wrote to the Minister<sup>45</sup> providing their advice from the meeting of 1 March 2018:

“The Public Record Review Committee (“the Committee”) met on 1 March 2018 and were provided a copy of the State Archivist’s report to Jamie Merrick, Director General, Department of Science Information Technology and Innovation (‘DSITI’) titled, “Statutory Investigation into Allegations of Unauthorised disposal of Public Records by Honourable Mark Bailey MP, Minister for Main Roads, Road Safety and Ports and Minister for Energy, Bio-fuels and Water Supply – 24 October 2017 a. [sic] The Committee was also provided with a letter from the Queensland Integrity Commissioner Dr Nikola Stephanov dated 23 October 2017 (“the documents”).

The Committee considered the documents and resolved that they raised matters which affected the administration and enforcement of the *Public Records Act 2002* (“the Act”).

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<sup>42</sup> Information supplied by State Archivist.

<sup>43</sup> Information supplied by State Archivist.

<sup>44</sup> Email, State Archivist to Department, 5 March 2018 at 12:36pm.

<sup>45</sup> Letter, Chair of PRRC to Minister, 5 March 2018.

The Committee is obliged, pursuant to s 29(2)(a) of the Act, 'to advise the Minister about issues affecting the administration or enforcement of this Act'. In exercising that function, the Committee wishes to draw the following matters to the attention of the Minister:

- (a) The Committee considers that the review of the Act has become critical and recommends that the Minister pursue it as a matter of priority.
- (b) Within the scope of that review, the Committee urges the Minister to:
  - (i) reaffirm the independence of the State Archivist and clarify the powers, duties and responsibilities of that office; and
  - (ii) reaffirm the independence of the Committee and clarify the powers, duties and responsibilities of the Committee.
- (c) Although various sections of the Act create obligations regarding the management of public records, the majority of these provisions fails to provide a mechanism to ensure that these obligations are met and fails to establish any appropriate sanctions in the event that these provisions are breached.
- (d) The review ought to consider the mechanisms to improve compliance with the requirements of the Act, particularly with respect to the management of public records and specifically, to ensure that public records created in private media can be preserved in the public record.”

**150.** On 21 March 2018, the State Archivist provided the Department with his formal response to the Crown Law advice<sup>46</sup>. As foreshadowed, this response did not seek to challenge the correctness of the Crown Law advice, but:

- (a) expressed concern at the consequences of the advice because of its potential effect on his independence and sought the “reaffirmation” of his independence;
- (b) sought support to prioritise a review of the *Public Records Act*.

**151.** On 2 July 2018, the Minister formally responded to the PRRC’s advice by letter<sup>47</sup>.

**152.** In summary, this letter:

- (a) expressed appreciation to the PRRC for its advice.
- (b) confirmed the government’s commitment to improving the standard of recordkeeping across all government departments and statutory authorities.

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<sup>46</sup> Director-General Briefing Note, submitted by State Archivist on 21 March 2018.

<sup>47</sup> Letter, Minister to PRRC, 2 July 2018.

- (c) expressed support for the various practical initiatives taken by the Queensland State Archives to deal with the challenges involved.
  - (d) did not express any support for a review of the *Public Records Act 2002*.
- 153.** This letter was based on the view of the Department that the appropriate policy response was through better education, training and practices in government, and not through a change in the legislative framework<sup>48</sup>.
- 154.** On 17 July 2018, the next regular meeting of the PRRC was held.
- 155.** At this meeting, the PRRC was provided with a copy of the Crown Law Advice, the formal response to that advice by the State Archivist and the letter from the Minister<sup>49</sup>.
- 156.** In summary, the PRRC:
- (a) “noted that whilst the response [from the Minister] did not address the issues raised in correspondence, ie matters that ought to be considered in a review of the *Public Records Act*, in light of the advice from Government that the Act was not currently being reviewed, no further action will be taken at this stage.” (emphasis added).
  - (b) expressed general agreement with the advice provided by Crown Law.
  - (c) noted the State Archivist’s response to this advice and “advised the State Archivist to continue to brief and advise the Minister as he sees fit and as required by the Act, noting the potential of his independence being compromised has not happened yet”.
  - (d) noted that, in these circumstances, the Queensland State Archive’s review of the Act “has been put on hold for now.”
- 157.** The PRRC did not subsequently make any further recommendations for the review of the PRA.

### III COURSE OF EVENTS

- 158.** In the light of that context, the relevant course of events may now be outlined.
- 159.** For privacy reasons, I have referred to the principal Departmental officers by use of neutral descriptions (DO1, DO2 etc). They are identified by name in the confidential glossary which is attached to this report. Broadly speaking, the numbers used in these descriptions are intended to represent the level of seniority of the officers involved in these events (ranking from DO1 down to DO5). It should be noted, however, that

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<sup>48</sup> Information supplied by Departmental Officer DO3; Ministerial Correspondence Briefing Note from DO3, 13 June 2018.

<sup>49</sup> Minutes of PRRC Meeting, 17 July 2018.



descriptions refer to different officers who served in the same formal position at different times.

160. The work undertaken by these Departmental officers was undertaken before any of the relevant reports was submitted to the Minister (or his staff) for consideration<sup>50</sup>.

***Original Text of Annual Report 2017-18***

161. The original text of the annual report for 2017-18 was completed by the Queensland State Archives by at least 18 September 2018<sup>51</sup>.
162. On 18 September 2018, a copy of this draft was provided by the Queensland State Archives to the communications section of the Department<sup>52</sup>.
163. It was provided in the course of a lengthy email exchange, which had been going on for some time between the communications staff in each office, about compliance with the State government's graphic design requirements for the visual presentation of the report.
164. As in the previous year's annual report, the report was structured as follows:
- (a) the report begins with some brief introductory statements ("*Who we are*").
  - (b) these are followed by a "*Message from the State Archivist*".
  - (c) there is then a detailed summary of the work undertaken by the Queensland State Archives during the year ("*A year in stats*", "*Our year in review*").
  - (d) the report then concluded with a summary of future work ("*the Future*").
165. For present purposes, the main focus of controversy is the *Message from the State Archivist*.
166. The *Message* began by referring to the Strategic Plan for 2016-20.
167. It then discussed the "primary focus" of the work being undertaken, which concerned public accessibility to the collection.
168. The *Message* then moved to a second key focus of work and stated:
- "Our second key focus has been improving the standard of recordkeeping practice across the public sector in Queensland. Our most recent survey revealed that only 15 per cent of public authorities in Queensland meet what we deem an acceptable minimum standard of recordkeeping practice. Later this year we will conduct another survey to define a new baseline benchmark. This

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<sup>50</sup> Information supplied by DO3.

<sup>51</sup> Information supplied by State Archivist.

<sup>52</sup> Email, QSA to Department, 18 September 2018 at 9:43 am.

survey is an early stage of a major multi-year program of work to transform the standard of recordkeeping practice across the Queensland public sector. While we are at an early stage of the program, some of the initiatives being considered and developed are 'world firsts' with the potential to transform recordkeeping not only in Queensland but elsewhere in Australia and even further afield."

169. The *Message* then stated:

"While it has been a year of many highlights, the investigation into allegations of unauthorised disposal of public records by a Minister resulted in a significant reallocation of our resources, with many key staff being redirected to the investigation. This resulted in delays in progressing the recordkeeping transformation program in particular. However, what we have learned from undertaking the investigation will greatly enhance our approach and effectiveness going forward.

There is no doubt that we need to rethink our approach to government recordkeeping advice and practice."

170. The *Message* then concluded by noting that it had been an exciting year and extending thanks to all involved.

171. In the detailed text of the report, the sections which had some relationship to the quoted part of the *Message* were as follows.

172. In the chapter headed "Our Year in Review", there were three relevant sections:

**"Ministerial Records Policy**

Records are the cornerstone of an accountable and democratic society and allow scrutiny from the public of the decisions made by those who are elected to act on their behalf.

The *Ministerial Records Policy* was issued by the State Archivist in December 2017 and establishes the requirements for the management of ministerial records and the records of Assistant Ministers in accordance with the *Public Records Act 2002*. The policy was introduced to assist Ministers, Assistant Ministers and ministerial staff to make and keep full and accurate records of activities related to their portfolio responsibilities or Assistant Minister duties."

**"Recordkeeping Transformation Project**

There is great potential for the better use and reuse of records to support evidence-based decision making and opportunities to obtain hindsight, insight and foresight from the records created by government, every day. To address the opportunity and need for Government to improve, the Recordkeeping Transformation Program was formally launched by QSA on 16 November 2017.

The purpose of the program is to improve the standard of records and information management across government and to instil greater confidence in government's ability to manage and value its records and information."

### **“Records Governance Policy**

For 2017-2018, work has focused on ‘*Building Digital Capability*’, with the *Records Governance Policy* being the most significant deliverable. The *Records Governance Policy* is a fit-for-purpose records and information governance policy that recognises the diversity of Queensland Government agencies with a flexible and simplified approach to records management. The policy replaces Information Standard (IS) 40: Recordkeeping and Information Standard (IS) 31: Retention and disposal of public records.

Development of the policy was supported through formal and informal whole-of-government consultation using the Queensland Government Chief Information Office (QGCIO) and released through the Queensland Government Enterprise Architecture (QGEA).

The Records Governance Policy will be supported by the Building Digital Capability – Records Governance Policy Baseline Survey in September 2018.

The survey will allow agencies to self-assess their ability to meet the policy requirements, with questions designed to help agencies to understand and identify their own specific challenges and solutions for effective recordkeeping.

The survey replaces the previous biennial recordkeeping survey, and following the baseline survey in September 2018, agencies will be surveyed annually to measure their growth of recordkeeping maturity.

Further key deliverables under ‘Building Digital Capability’ occurring before the end of 2018 include:

- Recordkeeping and You training - a web-based introduction to recordkeeping suitable for new government employees or established staff who might benefit from a skills refresh. The training will be freely available to all public service employees and outlines obligations and responsibilities under the *Public Records Act 2002*.
- Recordkeeping Challenge – a step up from Recordkeeping and You, this learning tool uses gamification techniques and allows public service employees to consolidate their recordkeeping knowledge and skills in a simulated work situation.”

173. In the chapter headed *The Future*, there were no sections which related to this part of the *Message*.

### ***Analysis of the Original Text***

174. On first impression, it is difficult to see that the quoted paragraphs of the introductory *Message* contained any information of significance. The “survey” mentioned had been conducted in the previous year and had been discussed in the previous annual report. The existence of an “investigation into allegations of unauthorised disposal of public

records by a Minister" was widely known. The statements were otherwise only broad statements of the general direction to be taken, which appeared to be focussed on improving practice (in accordance with government policy) rather legislative reform.

175. This impression is confirmed when the detailed parts of the annual report are considered. These outline the specific work which was undertaken by the Queensland State Archives during the year – and specific plans for the future - but do not suggest that there are other matters of importance or urgency which needed to be drawn to the attention of the Minister or Parliament.
176. In my view, however, there are a number of statements in the *Message* which might reasonably be queried because they are not sufficiently clear in meaning and objective in tone.
177. "*Our most recent survey revealed that only 15 per cent of public authorities in Queensland meet what we deem an acceptable minimum standard of recordkeeping practice.*" - This statement is problematic. In the present context, it seems to imply that there had been a survey undertaken during the year in review, when in fact the relevant survey had been undertaken and discussed in the annual report for the preceding year. This sentence, which contained no new information and was potentially misleading, was removed from the final version of the report.
178. "*Later this year we will conduct another survey to define a new baseline benchmark.*" - This was new information about a proposed survey. With some minor changes, this sentence was properly retained in the final version.
179. "*This survey is an early stage of a major multi-year program of work to transform the standard of recordkeeping practice across the Queensland public sector. While we are at an early stage of the program, some of the initiatives being considered and developed are 'world first' with the potential to transform recordkeeping not only in Queensland but elsewhere in Australia and even further afield.*" - This statement is also problematic. It is expressed at a very high level of generality and has a tone of self-promotion. There is no explanation of what concerns are being addressed, why they are important, what approach is being proposed, or why this approach is said to be a "world first" or transformative. Nothing else in the report gives any explanation of this statement. Nevertheless, it was retained in the final version.
180. "*While it has been a year of many highlights, the investigation into allegations of unauthorised disposal of public records by a Minister resulted in a significant reallocation of our resources, with many key staff being redirected to the investigation. This resulted in delays in progressing the recordkeeping transformation program in particular.*" – This statement is also problematic. As in the previous annual report, there was no discussion, in the body of the report, of the Bailey investigation. Accordingly, there was no disclosure in the report that this investigation had concluded without legal action being taken. In these circumstances, the reference made to this investigation in the *Message* suggested that it could be described as one of the year's "highlights" – for reasons which are unexplained - and that it remained unresolved. The statement also seems to imply that this investigation resulted in a significant reallocation of resources during the year in review. In fact, much of the work of the

investigation was done in the previous year, with the final internal report produced on 24 October 2017 and the Record Transformation Program being able to be formally launched on 16 November 2017. There was no concern expressed about this investigation causing a material diversion of resources in the previous year's annual report (when a significant amount of work appears to have been done) or in the detailed text of the present annual report. In the event, these sentences were deleted from the final version.

- 181.** *“However, what we have learned from undertaking the investigation will greatly enhance our approach and effectiveness going forward. There is no doubt that we need to rethink our approach to government recordkeeping advice and practice and the investigation highlighted some significant opportunities for improvement.”* - The first difficulty with this statement is that it again refers to the Bailey investigation without any disclosure of its result. More importantly, it is also expressed at an uninformative level of generality. The report does not explain, even in a general way, what was learnt from the investigation and how that will affect any future approach. After adding more detail to this discussion, a version of this statement was included in the final report.

### ***First Suggestions for Change***

- 182.** On 18 September 2018, after receiving the original draft of the report, the communications section of the Department noted internally that the proposed design of the report did not comply with the general requirements for government communications<sup>53</sup>.
- 183.** The communications section sought and obtained approval from a more senior officer of the Department (DO2) before replying to the Queensland State Archives with “some options to help them deliver a compliant report”<sup>54</sup>. In essence, this simply required a change to the cover page of the report and a change of font for the main headings.
- 184.** By Wednesday, 3 October 2018, the original version of the report had also been submitted by Queensland State Archives to the Department for approval<sup>55</sup>.
- 185.** In the period between 3 October and 9 October 2018, this version of the report was reviewed by the relevant officers of the Department – DO2, DO3 and DO4<sup>56</sup>.
- 186.** DO4 then contacted the Queensland State Archives.
- 187.** First, on Monday, 8 October 2018, DO4 had a telephone conversation with a staff member of the Queensland State Archives concerning the design issues. It was

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<sup>53</sup> Internal Departmental Email, 18 September 2018, at 10:18 am.

<sup>54</sup> Recorded in Internal Departmental Email, 8 October 2018, at 8:38 am.

<sup>55</sup> Internal Departmental Email, 3 October 2018, at 5:28 pm.

<sup>56</sup> Information supplied by DO3.

agreed that changes would be made to the front cover and the fonts of the main headings<sup>57</sup>.

188. Then later on Monday, 8 October 2018 (10:36 am), DO4 sent an email to the same staff member of the Queensland State Archives which confirmed their discussion but also attached suggested changes to the text of the annual report<sup>58</sup>:

“Thanks for chatting with me.

As discussed, as per DPC’s minimum requirements regarding QLD government Corporate ID, can you please arrange to amend the cover to the mandatory cover and convert the heading fonts to meta. I believe it is ok to continue to use the typewriter font in the pull out quotes and infographics (where it is used for a stylised/graphic affect).

I have also attached a marked-up copy of the annual report fyc/action please.

Would you be able to let me know the ETA for these changes please?

If you have any questions, please don’t hesitate to contact me.

Thanks.” (emphasis added)

189. I construe the expression “fyc/action please” as meaning “for your consideration and potential action please”.
190. The attachment to this email had about 20 hand-written changes marked on it.
191. These changes mostly dealt with typographical, grammatical or factual corrections.
192. The only other suggestions were inconsequential:
- (a) enquiring “is this required?” of the following statement at the foot of the State Archivist’s covering letter: “An Annual Report from the State Archivist of Queensland is required under section 56 of the Public Records Act 2002”. This statement was not changed.
  - (b) changing, in the introductory “*Who we are*” section, a statement that the State Archives support the Department’s “vision of innovative responsible and integrated frontline services for Queenslanders”, so that it read “vision [of] delivering trusted & responsive services”. This minor change was to correctly state the Department’s vision, and was duly adopted in the next draft<sup>59</sup>.

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<sup>57</sup> Recorded in Internal Departmental Email, DO4 to DO3, 8 October 2018, at 9:50 am; Email, DO4 to QSA, 8 October 2018, at 10:36am.

<sup>58</sup> Email, DO4 to QSA, 8 October 2018, at 10:36 am.

<sup>59</sup> Information supplied by DO3.

- (c) deleting the following paragraph, in the “*Our year in review*” section, concerning the Digital Archiving Program: “The Department of Housing and Public Works’ ICT Strategic Projects Unit has been tasked to work with Queensland State Archives to establish this capability, allowing QSA to benefit from extensive expertise in complex whole-of-government ICT procurement.” This change was to remove reference to an internal administrative arrangement which was considered immaterial, and was duly adopted in the next draft<sup>60</sup>.

193. In my view, this is the likely and reasonable explanation for these requests.
194. None of these suggested changes generated any controversy.
195. On Tuesday, 9 October 2018, however, there was a telephone conversation between DO4 and the State Archivist in which other changes to the report were suggested.
196. The substance of this conversation was not recorded in notes or email exchanges at the time.
197. However, at least three things seem to be clear.
198. *First*, the suggestions concerned the paragraphs of the *Message* which are quoted above.
199. *Secondly*, they were framed as requests or suggestions and not directions<sup>61</sup>.
200. *Thirdly*, they were suggestions which – at least to some extent - the State Archivist was prepared to consider and act upon.
201. Given that DO4 was working on this matter with more senior officers (DO2 and DO3), it is likely that this conversation raised at least some of the same queries which had been troubling them.
202. In relation to DO2, these issues were noted in a later internal Departmental email<sup>62</sup>:

“The only thing that I still query is the reference to the investigation [of Minister Bailey’s emails] in Mike’s message. The Annual Report is intended to represent the financial year and the 2016-17 Annual Report already touched on the investigation, which is when it took place, unless I am wrong.

My recommendation is that these two paragraphs be amended to reflect the work undertaken by QSA from July 2017 onwards on improving recordkeeping practices through better guidelines, policies, training etc for Queensland Public Service employees, Ministerial officers and so on.”

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<sup>60</sup> Information supplied by DO3.

<sup>61</sup> Information supplied by State Archivist.

<sup>62</sup> Email, DO2 to DO3, 11 October 2019, at 4:40 pm.

203. Some further evidence of this conversation is to be found in an email, sent from DO4 to the State Archivist and one of his staff, shortly after this conversation (12:16 pm), which noted that “Mike will be sending you an update to his message”<sup>63</sup>. This suggests that at least some of the queries were immediately recognised as acceptable by the State Archivist.

204. Finally, there are two emails sent by the State Archivist to DO4 shortly after this email.

205. Within a very short time (12:41 pm), the State Archivist had sent an email to DO4 with his proposed changes to the text of the Message<sup>64</sup>.

206. The changes can be more easily seen by presenting them in a track-changes format:

“Our second key focus has been improving the standard of recordkeeping practice across the public sector in Queensland. ~~Our most recent survey revealed that only 15 per cent of public authorities in Queensland meet what we deem an acceptable minimum standard of recordkeeping practice.~~ Later this year we will conduct another survey to define a new baseline benchmark for this standard. This survey is an early stage of a major multi-year program of work to transform the standard of recordkeeping practice across the Queensland public sector. While we are at an early stage of the program, some of the initiatives being considered and developed are ‘world first’ with the potential to transform recordkeeping not only in Queensland but elsewhere in Australia and even further afield.

While it has been a year of many highlights, the investigation into allegations of unauthorised disposal of public records by a Minister was a major focus of the organisation in the early months of the year. The investigation was a major activity for government recordkeeping. ~~resulted in a significant reallocation of our resources, with many key staff being redirected to the investigation. This resulted in delays in progressing the recordkeeping transformation program in particular.~~ However, what we have learned from undertaking the investigation will greatly enhance our approach and effectiveness going forward. There is no doubt that we need to rethink our approach to government recordkeeping advice and practice and the investigation highlighted some significant opportunities for improvement.”

207. The nature of these changes suggests that the conversation discussed some of the issues with the *Message* which I have noted above. These were then properly recognised by the State Archivist through his proposed changes.

208. It is obvious, however, that the State Archivist’s remained concerned that advice from Crown Law would not lead to a change in practice which would impinge upon his independence.

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<sup>63</sup> Email, DO3 to State Archivist, 9 October 2018, at 12:16 pm.

<sup>64</sup> Email, State Archivist to DO3, 9 October 2018.



**209.** This email explained the State Archivist's position:

"The purpose of the Annual report is to provide the Minister my independent report on the administration of the Act during the year.

The Act states [s 56 is then quoted].

The changes that I have been asked to make explicitly relate to the only examples that the Act provides – it would be totally inappropriate for me to not comment on these matters. This is my report to the Minister on the administration of the Act – it is not a [Housing and Public Works] report to the Minister.

I made a huge effort to limit potential areas of conflict but complete omission of key areas of our work during the [year] would be a betrayal of my statutory responsibilities and grossly misleading. I really shouldn't be asked to do this.

Latest draft with changes I can live with. I reiterate I cannot ignore these areas as I would be misleading the Minister and Parliament." (emphasis added)

**210.** At 1:20 pm, the State Archivist sent a further email to DO4, which quoted an extract from a previous advice received from the Integrity Commissioner which emphasised his duties as a statutory office holder. The email introduced this quote by stating:

"Further to our conversation.

This is an extract from advice I received from the Integrity Commissioner at the time of the Bailey Investigation report. Whilst it is clearly focused on my report on that matter. I believe the central points as valid again when it comes to the Annual report. Bracketed sections are my changes to reflect that the advice referred to Minister Enoch at the time, but clearly would apply to Minister Debrenni [sic] as well.

In short I shouldn't being [sic] asked to omit key sections of my annual report. Minor wordsmithing I really have no problem with, but omitting key events and observations for the purpose of sanitisation of the report is totally inappropriate ... and probably not legal." (emphasis added)

**211.** The State Archivist took steps to have these emails saved in the Queensland State Archives document management system. His concern was about the future<sup>65</sup>:

"I think I will be directed to remove all mention of the bailey investigation and I am extremely uncomfortable with that".

**212.** In my view, these emails need to be read carefully to distinguish between: (a) the request which was *actually* made to the State Archivist; and (b) what the State Archivist was concerned *might* happen in future and which in his view should not occur.

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<sup>65</sup> Email, State Archivist to QSA, 17 October 2018, at 12:14 pm.

**213.** On the evidence, it is clear to me that:

- (a) the State Archivist was never *directed* to make any changes to his annual report.
- (b) to the extent that the State Archivist was asked to reconsider these passages, the request was not made for improper reasons. The paragraphs he was being asked to reconsider contained no information of any particular significance – and certainly nothing that would be embarrassing to anyone or information which (if omitted) would cause the report to be misleading or sanitised.
- (c) the paragraphs he was being asked to reconsider contained statements which reasonably required reconsideration, for the reasons discussed above.
- (d) the State Archivist, to his credit, was prepared to make changes to seek to overcome these problems.
- (e) however, the State Archivist was plainly concerned about where these discussions might lead. He was anxious to preserve the independence of his role – and avoid being directed to change his annual report. For this reason, in my view, he responded to the Department in an overly-strident way.

#### ***Second Version***

**214.** On Wednesday, 10 October 2018, DO4 forwarded the email with the State Archivist's proposed changes to DO3<sup>66</sup>.

**215.** On the same day, the staff of the Queensland State Archives forwarded to DO4 a second version of the annual report, which incorporated:

- (a) the design changes which had been requested;
- (b) the changes requested on 8 October 2018; and
- (c) the State Archivist's redrafted Message of 9 October 2018<sup>67</sup>.

**216.** Shortly afterwards, this email was forwarded by DO4 to DO3<sup>68</sup> – and then by DO3 to DO2<sup>69</sup>.

**217.** DO3 also contacted a legal officer of the Department for advice about the issue of independence which had been raised by the State Archivist in his recent emails.

**218.** The question which was asked of the legal officer was "whether the State Archivist has autonomy in relation to the content of the annual report required to be submitted to the

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<sup>66</sup> Email, DO4 to DO3, 10 October 2018, at 10:29 am.

<sup>67</sup> Email, QSA to DO3, 10 October 2018, at 10:37 am.

<sup>68</sup> Internal Departmental Email, 10 October 2018, at 10:37 am.

<sup>69</sup> Internal Departmental Email, 10 October 2018, at 2:36 pm.

Minister under section 56 of the *Public Records Act* (Act) or whether the Archivist is subject to the direction of the Minister and Director-General in the preparation of the report<sup>70</sup>.

219. On Thursday, 11 October 2018, DO2 replied to DO4 about the revised terms of the draft annual report, with the query which was quoted above (viz “The only thing that I still query...”)<sup>71</sup>.

220. On Friday, 12 October 2018, the relevant legal officer of the Department provided DO3 with the advice that had been requested<sup>72</sup>. In this advice, the conclusions in Crown Law advice were quoted, with the opinion being expressed that:

“As the preparation of the annual report on the administration of the Act does not involve the making of a decision about the disposal of public records, it would fall within the above principles that the State Archivist is subject to the direction of the Director-General in the preparation of the report.

If you would like me to seek Crown Law advice specifically in relation to the preparation of the annual report, please advise and I will arrange it.”

221. This further advice from Crown Law was not obtained at this time, as this issue seems to have become academic.

222. On Tuesday, 16 October 2018, DO2 followed the matter up internally with DO3<sup>73</sup>:

“Can we please finalise this as soon as possible? We need to allow time for the DG and the Minister’s office to review before the Minister can endorse.”

### ***Finalisation***

223. Shortly afterwards, DO3 replied to this email, thanking DO2 for the reminder and noting that “I am making small changes to the version you saw and will get it to you as soon as possible”<sup>74</sup>.

224. In the period which follows, there were a number of conversations or meetings between the State Archivist and DO3 about the draft report<sup>75</sup>.

225. In these conversations, DO3 explained the changes he was requesting and why they were being requested – indicating that the concerns he was seeking to satisfy came from his group (“they”) and included a concern that matters being mentioned in the

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<sup>70</sup> Email, DO3 to Legal Officer, 10 October 2018, at 11:22 am; Reply email, Legal Officer to DO3, 12 October 2018, at 5:26pm.

<sup>71</sup> Email, DO2 to DO3, 11 October 2018, at 4:40 pm

<sup>72</sup> Email, Legal Officer to DO3, 12 October 2018, at 5:26pm.

<sup>73</sup> Email, DO2 to DO3, 16 October 2018, at 10:50 am.

<sup>74</sup> Email, DO3 to DO2, 16 October 2018, at 11:56 am.

<sup>75</sup> Information supplied by State Archivist.

Message related to the previous year<sup>76</sup>. The State Archivist, for his part, expressed his concern about further changes being requested<sup>77</sup>. The State Archivist was also privately concerned about whether his employment contract would be renewed in the new year – but there is no suggestion that this was in any way alluded to in the discussions<sup>78</sup>.

- 226.** From DO3's perspective, he did not consider it was his role to direct changes to the report – and was careful never to do so<sup>79</sup>. However, he considered it was his responsibility to seek to maintain the standards ordinarily required for annual reports and was seeking to do so<sup>80</sup>. In dealing with this matter, he did not consider himself under any pressure from others<sup>81</sup>.
- 227.** This series of conversations appears to have begun on Wednesday, 17 October 2018. There is no contemporaneous note or email recording this initial conversation, but its content can reliably be inferred from:
- (a) the email from DO2, of 11 October 2018, which recorded the remaining issue with the report from the Departmental viewpoint.
  - (b) the subsequent course of correspondence between the State Archivist and DO3.
- 228.** In my view, it is likely that DO3 conveyed to the State Archivist a query of the kind mentioned in the email from DO2 of 11 October 2018, namely:
- “The only thing that I still query is the reference to the investigation [of Minister Bailey's emails] in Mike's message. The Annual Report is intended to represent the financial year and the 2016-17 Annual Report already touched on the investigation, which is when it took place, unless I am wrong.
- My recommendation is that these two paragraphs be amended to reflect the work undertaken by QSA from July 2017 onwards on improving recordkeeping practices through better guidelines, policies, training etc for Queensland Public Service employees, Ministerial officers and so on. “
- 229.** Shortly after this conversation, the State Archivist sent an email to DO3 which noted a range of concerns<sup>82</sup>. Again, in my view, it is again important to distinguish between concerns about the events to date and concerns about the future. In my view, it is clear that the State Archivist's concerns were to avoid the present discussions leading to instructions or directions being issued to him in future. In summary, his concerns were:

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<sup>76</sup> Information supplied by State Archivist.

<sup>77</sup> Information supplied by State Archivist.

<sup>78</sup> Information supplied by State Archivist.

<sup>79</sup> Information supplied by DO3.

<sup>80</sup> Information supplied by DO3.

<sup>81</sup> Information supplied by DO3.

<sup>82</sup> Email, State Archivist to DO3, 17 October 2018, at 12:40 pm.

- (a) "whether instructing me to change my annual report is potentially a breach of the Public Records Act or anything else."
- (b) "whether omitting reference to the investigation and indeed its recommendations are a breach of my statutory duty as Archivist given the sections referred to the Annual report. Key point to me is whether the examples [stated in s 56(2)] are directive on me in any way and whether their omission would be perceived as misleading of the work we undertook during the year in administration of the Act. My view is that the investigation and its recommendations were a material part of the work of QSA during the year and their omission has the potential to create a misleading impression."
- (c) "whether the Director-General has the ability to direct me to change my report and omit references to the investigation. If the DG has legal authority and directs as such [then] I will obviously do so and presumably the DG is thus taking responsibility for the content of the annual report..." (emphasis added)

**230.** However, the unreality of any suggestion that the Department was seeking to sanitise the report is apparent from this email itself, which noted that:

"The omission of any reference to the [Bailey] investigation given how public it already is, is to me a little ridiculous. Everybody knows it happened it is in the press every 2 weeks – rewriting it out of history is a bit late. Anyone with an interest would be likely to comment and criticise more as a result of its omission than the very weak inclusion of it as it stands. I think the current comment is actually fine and omitting [it] would [be] a mistake likely to create more negative comment."

**231.** In my view, this observation by the State Archivist persuasively demonstrates why the changes were not motivated by any concern to avoid mention of the Bailey investigation for fear of political embarrassment. This investigation had been covered by the media at length and had long been concluded. The concern about this passage in *Message* was the more basic one – that the text should focus upon providing a clear and concise account of the matters which needed to be reported.

**232.** This is apparent from all the other changes to the report which were suggested during the same period.

**233.** On Thursday, 18 October 2018, at 12:15 pm, DO3 forwarded to the State Archivist a copy of the draft report with a number of "proposed changes to the report for your consideration and revision please"<sup>83</sup>. These changes did not relate to the *Message from the State Archivist* and suggested the following seven changes:

- (a) under the heading "Ministerial Records Policy", deleting the opening paragraph "Records are the cornerstone of an accountable and democratic society and

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<sup>83</sup> Email, DO3 to State Archivist, 18 October 2018, at 12:15 pm.

allow scrutiny from the public of the decisions made by those who are elected to act on their behalf". This avoided repetition of a statement on page 4.

- (b) under the same heading, referring to the Ministerial Records Policy as "outlining the policy" for managing records, rather than one which "establishes the requirements" for managing records. This was more precisely expressed.
- (c) under the same heading, referring to the Ministerial Records Policy as one introduced to assist "in making and keeping records", rather than "to make and keep full and accurate records of activities relating to their portfolio responsibilities or Assistant Minister duties". This was more precisely expressed.
- (d) under the heading "Sunshine Rebooted Exhibition and Opening", in referring to the Cabinet minutes of 1987, changed the phrase "how the ensuing events have shaped a more inclusive and progressive state" to "how the ensuing events have shaped the state". This version was more neutrally expressed.
- (e) under the heading "Recordkeeping Transformation Project", changed the description of the purpose of the program from being "to instal greater confidence in government's ability" to manage and value its records and information, to being "to increase government's ability". This was more precisely expressed.
- (f) under the heading "Records Governance Policy", which referred to the proposed baseline survey, deleted reference to the date of the survey being "September 2018". The correction was because that date had already passed.
- (g) under the heading "Creative Workshops", which referred to the Sunshine Rebooted exhibition, deleted the phrase "exploring key Cabinet Minutes from 1987 that were released on 1 January this year". This avoided repetition.
- (h) under the heading "Digital Archiving Program", the funding approval was described as for the "first stage" rather than the "first two years" of the program. This was more precisely expressed.

**234.** For the reasons outlined above, these were all reasonable and appropriate requests and were uncontroversial.

**235.** Shortly afterwards, at 1:25 pm, the State Archivist replied to DO3 by email advising "No problem with any of those"<sup>84</sup>. By subsequent email<sup>85</sup>, he asked the relevant officer of the Queensland State Archives to make those changes to the draft, which "are largely cosmetic and I am fine with those". In relation to the Message, however:

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<sup>84</sup> Email, State Archivist to DO3, 18 October 2018, at 1:25 pm.

<sup>85</sup> Email, State Archivist to Staff Member, 18 October 2018, at 1:31 pm.

"lets leave my message as is for now...very hot issue as I am kicking back very hard on any further major changes".

236. Later that day, at 6:34 pm, DO3 sent an email to the State Archivist<sup>86</sup> advising:

"Mike, I have had a further look at your message and hope you will consider my suggestions. If you don't want to change then please make all other agreed changes I will then progress the revised version to DG." (emphasis added)

237. Two of the suggested changes were minor and uncontroversial:

- (a) at the end of the second paragraph, which referred to number of records being accessed, it was suggested that this be changed from "...accessed by Queenslanders" to "accessed." This was because "some of the people accessing the records would be interstate/overseas".
- (b) in paragraph 7, which referred to a new survey, it was suggested that this be changed from "Later this year we will conduct another survey..." to "We will be conducting another survey...". This was consistent with the changes to the body of the report referred to above.

238. The third change concerned the second paragraphs quoted at [206] above:

"Para 8 and 9, while I note your concerns, I am hoping to propose a form of words I believe achieves the same purpose which I think is more in keeping with the tone of the rest of the annual report. I have also included some more of the actions that have been taken by the team which I thought were worth including seeing it is leading work.

"While it has been a year of many highlights, Queensland State Archives have been called on this year to investigate and provide advice on matters which have highlighted the need to rethink our approach to government record keeping advice and practice. This includes reinforcing and providing clearer advice and examples on identifying public records and record classification, training for ministerial offices and public servants, considering the simplification of record keeping standards and retention and disposal arrangements and providing contemporary advice on managing public records within private email and other social media."

Happy to talk further about this." (emphasis added)

239. In my view, these three changes were all reasonable and appropriate requests to make. When the versions at [206] and [238] are compared, it is clear to me that the changes were requested for the reasons explicitly given by DO3 at the time.

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<sup>86</sup> Email, DO3 to State Archivist, 18 October 2018, at 6:34 pm.

240. That view seems to have been shared by the State Archivist at the time.
241. The next day, on Friday, 19 October 2018, at 7:33 am, the State Archivist replied to this email from DO3<sup>87</sup>, stating simply:

“I can live that change ie para 8/9”

242. That view is also corroborated by internal documents within the Department.
243. On Friday, 19 October 2018, at 8:13 am, DO3 reported to DO2 on developments<sup>88</sup>:

“The investigation was primarily conducted and completed within the financial year of this report. I have proposed a number of changes to the report and have been working with Mike to have a version that the State Archivist is OK with but which is more focused on actions taken and is in keeping with the tone of the rest of the document. See what you think when you get a copy which should be with you by [close of business] today.” (emphasis added)

244. There were no further issues with the report and it was finalised in these terms.
245. In November 2018, the report was also provided to the PRRC for noting.
246. The State Archivist made no complaint to the PRRC at the time that there was anything improper in the way it was prepared or anything misleading in the way it was expressed.

***Original Text of the Annual Report for 2018-19***

247. By June 2019, work upon the next annual report was commencing at the Queensland State Archives.
248. On Friday, 14 June 2019, the State Archivist sent the following email to DO3<sup>89</sup>:

“We are about to start work on the next annual report.

Given what happened last year and the departmental direction to omit certain information from my statement, can you confirm whether I will be allowed to what [sic] write what I consider appropriate feedback from the perspective of my role in administering the Public Records Act, without direction, or will I again be subject to direction on the final content of my statement in the report by the department.

I fully acknowledge that the direction to omit certain information did not come from yourself, but that is only a personal consideration.

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<sup>87</sup> Email, State Archivist to DO3, 19 October 2018, at 7:33 am.

<sup>88</sup> Email, DO3 to DO2, 18 October 2018, at 8:13 am.

<sup>89</sup> Email, State Archivist to DO3, 14 June 2019, at 8:14 am.



I would prefer to know the department's position before we start the process to avoid a repeat. I would make no statement rather than one that could be potentially misleading. I felt my own integrity was undermined in the statement that went out in my name last year and I won't do that again.

FYI in my statement I would intend to highlight the wonderful results in the access area and state that the administration of the Act during the year has highlighted the ongoing need for amendments and updating of the Public Records Act, a need which in my view has only increased."

- 249.** In my view, this email is not an accurate record of the events of the previous year – unless, of course, every request or suggestion made by the Department is to be characterised as a “direction”. Nor could the Department reasonably be expected to allow the State Archivist to “write what I consider appropriate feedback from the perspective of my role” without any opportunity to consider the proposed terms of the annual report and make any appropriate suggestions.
- 250.** The reference, at the end of this email, to an increasing need for amendment appears to refer again to the State Archivist's concern that he should have greater independence in the administration of the Act with broader enforcement powers.
- 251.** A particular issue which appears to have aggravated this concern arose from allegations made against the Queensland Building and Construction Commission (QBCC). The State Archivist was concerned that the QBCC had failed to keep records about particular matters in breach of the *Public Records Act 2002*. This question was then referred to legal advice within the Department. Having received that legal advice, however, the decision was made that no legal action would be taken. For the purposes of the current report, it is not necessary for me to refer to the contents of that advice or reconsider the conclusions which it reached.
- 252.** In any event, by 9 July 2019, the Queensland State Archives were working on the basis that a period of three weeks would be required for the Department to approve the annual report and complete any final edits<sup>90</sup>.
- 253.** By 29 August 2019, the Queensland State Archives had prepared the original version of the annual report for 2019-19<sup>91</sup>.
- 254.** On 29 August 2019, this version was provided by email to DO3 “to review”<sup>92</sup>.
- 255.** The only important change from the original version to the final version of the report was the complete deletion of the *Message from the State Archivist*. The circumstances which led to this deletion are considered in more detail below.
- 256.** All other changes that were suggested were reasonable and appropriate:

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<sup>90</sup> Email, QSA to Department, 9 July 2019, at 10:15 am.

<sup>91</sup> Information supplied by the State Archivist.

<sup>92</sup> Email, QSA to Department, 29 August 2019, at 8:32 am.

- (a) removal of an erroneous duplication of a paragraph on page 12 (“The exhibition demonstrates...”).
- (b) in relation to the Release of the 1988 Queensland Cabinet Minutes, the deletion of a description of Premier Mike Ahern as “leading a Government that was no longer trusted”. This was unnecessary comment.
- (c) in relation to the Joint Publication with the CCC of a guideline for Council records, the deletion of the phrase “to be published in July 2019”. This date had already passed.

**257.** The passage, within the original *Message*, which caused controversy was as follows:

“Our reason for existing is the administration of the Public Records Act 2002. Our Government Recordkeeping Innovation team has implemented some wonderful initiatives this year to promote better government recordkeeping to ensure that the permanent public records of Queensland survive and thrive. Unfortunately, there have been far too many incidents that have led to us investigating potential breaches of the Act by public authorities.

While that is in itself disappointing, the inability to take action under the Act’s powers for proven breaches is frankly far more concerning.

The Act is now over 17 years old and the advances in new communication technologies are creating more digital information than originally anticipated.

There is now an urgent need for the Act to be updated to reflect this new digital reality. As the State Archivist it is increasingly clear that the Act is unfit for purpose in ensuring that the key public records of Queensland are created, managed and preserved appropriately.

The risk of the Act being no longer meaningful is that key public records that should be made and preserved for the benefit of current and future generations may be lost, or worse, never created at all.”

**258.** To understand why this passage was queried by the Department, it is necessary to read the detailed text of the annual report.

**259.** In this text, there is only one relatively small passage dealing with “Investigations”<sup>93</sup>. In this passage, only three occasions are identified where investigations were conducted. There is nothing said about these investigations which suggests that any proven breach of the statute had occurred or that these investigations had revealed some serious or systemic problem which required statutory reform.

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<sup>93</sup> Annual Report of Queensland State Archives 2018-19, at 19.

260. In the full text of the report, there is more extensive discussion of the Records Transformation Program<sup>94</sup>. Again, however, this discussion does not suggest that any serious or systemic problem had arisen which required statutory reform.
261. Moreover, during the course of the year, there had been no revival of the proposed review of the PRA and no further advice about this topic had been given by the PRRC.

### ***Analysis of Original Text***

262. In these circumstances, there are obvious difficulties with this text.
263. There is no doubt that the State Archivist sincerely held each of the opinions which he expressed.
264. However, for any annual report to express a strong opinion about a serious deficiency in public administration requiring urgent statutory reform, it would ordinarily be necessary for that opinion to be supported in the text of the report by a sufficient factual foundation, or the results of a properly-conducted study, to provide objective justification for that opinion.
265. In the present case, for the reasons outlined below, it is difficult to see any objective justification for the key statements which were made.
266. *“Unfortunately, there have been far too many incidents that have led to us investigating potential breaches of the Act by public authorities”* - The report mentions only three incidents across the whole of the Queensland public sector – none of which were demonstrated to involve a breach of the statute, much less one which was serious or systematic.
267. *“While that is in itself disappointing, the inability to take action under the Act’s powers for proven breaches is frankly more concerning.”* - It is difficult to justify this statement. It may be that some requirements of the statute do not attract *criminal* sanctions for breach, but that is the case for the vast majority of statutory provisions in Queensland. Legal action is still available to enforce compliance with the provisions, where necessary.
268. *“There is now an urgent need for the Act to be updated to reflect this new digital reality. As the State Archivist it is increasingly clear that the Act is unfit for purpose in ensuring that the key public records of Queensland are created, managed and preserved appropriately.”* - These are provocative statements to make, without the support of any objective study having been conducted into the operation of the Act and without any apparent support for this proposition from the PRRC. There is simply no explanation in the report as to why the Act can be said to be “unfit for purpose” and how some form of “updating” of the Act would assist.

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<sup>94</sup> Annual Report of Queensland State Archives 2018-19, at 19.

### ***Exchanges About the Message***

269. On about 9 October 2019, there appears to have been a telephone discussion between DO3 and the State Archivist about this passage in the *Message*.
270. Again, there is no contemporaneous note of this conversation, but the effect of it was that State Archivist was asked to “have another look” at this part of the report<sup>95</sup>.
271. On 9 October 2019, the State Archivist responded to this request by email to DO3<sup>96</sup>. This email quoted PRA s 56 and stated, in reference to s 56(2):

“Clearly the term ‘may’ is not great – but I don’t believe that such a specific example is meant to be ignored.

However with that in mind draft 2 of the relevant section [is provided]. I think this is a weak statement given the purpose of the Annual report above, but it at least allows me to advocate for review of the PRA that at least meets my purpose.” (emphasis added)

272. The changes proposed in this second draft by the State Archivist may be more easily shown by tracking the changes against the original version:

“Our reason for existing is the administration of the Public Records Act 2002. Our Government Recordkeeping Innovation team has implemented some wonderful initiatives this year to promote better government recordkeeping to ensure that the permanent public records of Queensland survive and thrive. Unfortunately, there have been ~~far too many~~ an increasing number of incidents that have led to us investigating potential breaches of the Act by public authorities.

~~While that is in itself disappointing, the inability to take action under the Act’s powers for proven breaches is frankly more concerning.~~

The Act is now over 17 years old and the advances in new communication technologies are clearly creating more vast amounts of digital information than originally anticipated that could not have been anticipated in 2002.

It is becoming increasingly clear that there is ~~There is now~~ an urgent need for the Act to be updated to reflect this new digital reality. ~~As the State Archivist it is increasingly clear that the Act is unfit for purpose in ensuring that the key public records of Queensland are created, managed and preserved appropriately.~~

The risk of the Act being no longer meaningful is that key public records that should be made and preserved for the benefit of current and future generations may be lost, or worse, never created at all.”

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<sup>95</sup> Information supplied by DO3; Email, DO3 to State Archivist, 17 October 2019, at 11:56 am.

<sup>96</sup> Email, State Archivist to DO3, 9 October 2019, at 1:49 pm.

273. These changes addressed some of the difficulties noted above, but the statement continued to refer to an “increasing number of incidents” and “an urgent need for the Act to be updated” without the support of detailed analysis in the text of the report.
274. Upon review of these changes, DO3 consulted with the Director-General about whether there was a practice in annual reports of commenting on legislation<sup>97</sup>.
275. On 17 October 2019, at 11:56am, DO3 conveyed this advice to the State Archivist by email<sup>98</sup>:

“Thanks for having another look.

Having another look at Section 56, the example is not inviting commentary on the Act itself.

[The Director-General] has indicated to me that she administers over 20 acts but does not comment on the Acts themselves within the annual reports that she is responsible [for] and says it would be inappropriate to do so. Advocacy for changes can occur directly to the Minister, but as you know the Government decide Policy and whether to progress changes.

A suggested rewording:” (emphasis added)

276. Again, the suggested rewording is more easily depicted in a way which tracks the changes against the previous draft:

~~“Our reason for existing is the administration of the Public Records Act 2002. Our Government Recordkeeping Innovation team has implemented some wonderful initiatives this year to promote better government recordkeeping to ensure that the permanent public records of Queensland survive and thrive. Unfortunately, there have been an increasing number of incidents that have led to us investigating potential breaches of the Act by public authorities.~~

~~The Act is now over 17 years old and the Advances in new communication technologies are clearly creating vast amounts of digital information that could not have been anticipated in 2002 which is a challenge as we go forward.~~

~~It is becoming increasingly clear that there is an urgent need for the Act to be updated to reflect this new digital reality.~~

~~The risk of the Act being no longer meaningful is that key public records that should be made and preserved for the benefit of current and future generations may be lost, or worse, never created at all.”~~

277. The email concluded:

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<sup>97</sup> Noted in Email, DO3 to State Archivist, 17 October 2019, at 11:56 am.

<sup>98</sup> Email, DO3 to State Archivist, 17 October 2019, at 11:56 am.

"Happy to discuss.

Regardless, I am happy to work with you to look at other avenues to advocate for review of the Act." (emphasis added)

- 278.** In my view, this was a reasonable and appropriate suggestion to make to deal with the inherent difficulties in this part of the *Message*.
- 279.** Shortly afterwards, the State Archivist responded by an email proposing to remove his *Message* entirely – and indicating that he would be raising this issue with the PRRC<sup>99</sup>:

"I think the act does require / expect me to comment on ways to improve the administration of the act

[Section 56 is then quoted]

I have escalated this issue and directions in investigations to PRRC and I think they will raise with minister in their role to advise me and him

As you know I do think explicit independent advice on these issues is required ie independent of crown law and Clayton it's to move forward. I am really uncomfortable not on being directed but what I am being directed to do or more accurately not do

I am not comfortable to change my statement further but I am happy to remove it completely as a way forward

I believe that has been done before Mike"

- 280.** Again, it is not accurate to characterise this "suggested rewording" as a "direction".
- 281.** However, in my view, it was a reasonable and appropriate response by the State Archivist to delete the *Message* entirely and refer the matter to the PRRC, as nothing contained in the *Message* was required to satisfy his statutory reporting obligation.
- 282.** On Tuesday, 22 October 2019, DO3 replied by email<sup>100</sup>:

"Thanks Mike,

Could we progress a version along those lines so we can meet the timeframe".

- 283.** Shortly afterwards, the State Archivist replied by email: "Will do"<sup>101</sup>.
- 284.** As a result, the annual report was published with the changes noted above and the deletion of the *Message*.

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<sup>99</sup> Email, State Archivist to DO3, 17 October 2019, at 12:34 pm.

<sup>100</sup> Email, DO3 to State Archivist, 22 October 2019, at 10:00 am.

<sup>101</sup> Email, State Archivist to DO3, 22 October 2019, at 10:02 am.

- 285.** On 16 September 2019, prior to the finalisation of the annual report, the State Archivist raised with the PRRC his concerns about a range of issues, including his independence in conducting investigations, the QBBC matter, the need for amendment to the *Public Records Act 2002* and his independence in preparing annual reports. The PRRC invited him to raise his concerns more formally at the next meeting on 18 November 2019, with a statement of relevant facts and specific questions upon which he was seeking guidance<sup>102</sup>.
- 286.** In preparation for the 18 November 2019 meeting, the State Archivist prepared two detailed papers outlining his concerns. In summary, the concerns he expressed which are relevant for present purposes were that:
- (a) he had been “directed” in the last two years to remove content from the annual reports;
  - (b) that these directions were in breach of the *Public Records Act 2002* and were motivated by “political considerations” and so a breach of the QPS Code of Conduct.
- 287.** The specific advice which the State Archivist sought from the PRRC concerned how he should proceed in matters where, following a direction from the Department, he had ethical and professional concerns and was not able to obtain independent legal advice.
- 288.** After hearing from the State Archivist, the PRRC:
- (a) accepted that, in accordance with the advice of Crown Law, the State Archivist’s office was *not* an independent office, except as required by s 27 of the PRA.
  - (b) accepted that the State Archivist was nevertheless subject to the ethical obligations both as State Archivist and as a public servant.
  - (c) accepted that the State Archivist had “exhaustively and correctly” followed the processes available to him to resolve the “conundrums” he was dealing with.
  - (d) directed the State Archivist to obtain, and then provide to the PRRC, Crown Law advice:
    - (i) clarifying the degree of the State Archivist’s autonomy in the preparation of annual reports.
    - (ii) advising what action can be taken when a breach of ss 7, 8 or 14 of the *Public Records Act 2002* occurs.
  - (e) did not otherwise advise the Minister of any concerns arising from the matters raised with the PRRC by the State Archivist.

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<sup>102</sup> PRRC Minutes, 16 September 2019, at para 7.

**289.** On 22 May 2020, this legal advice was obtained from Crown Law for provision to the PRRC. It affirmed the previous Crown Law advice that the State Archivist is generally subject to the control and direction of the Director-General and the Minister, except for decisions made pursuant to s 27 of the PRA. However, it went on to discuss the preparation of annual reports in the following terms:

- “18. Given our previous advice about the limited independence of the State Archivist, we are of the opinion that Director-General or Minister may give directions to the State Archivist about the matters to be included in the Annual Report. This could include reporting about non-compliance by a particular public authority or information about a particular investigation undertaken by authorised officers. The State Archivist might be asked to make particular recommendations about future measures to be taken or seek his views on any issues generally related to the administration of the *PR Act*.
19. The State Archivist does not have complete independence over the matters to be reported, it is simply his responsibility to provide the Annual Report to the Minister. The Minister or Director-General can ask for specific issues to be addressed in the Annual Report and the State Archivist must comply with such a requirement.
20. However, we do not consider that the Minister or Director-General can or should direct that any particular matters related to the administration of the PR should be excluded from the Annual Report. If the Minister or Director-General were to provide a direction not to report on particular compliance issues during the year that might give rise to a perception of protecting some public authorities over others.
21. If particular compliance issues are directed to be reported on by the Minister or the Director-General, the State Archivist should not be advised to exclude particular breaches.
22. In our view, great care should be taken in directing a public servant to exclude matters in a report required to be provided under any legislation and tabled in Parliament. The Minister or Director-General can ensure that the matters reported on are relevant topics or issues for the Annual Report, but should not direct particular instances of noncompliance or recommendations regarding action to be taken to be excluded from the report.”

**290.** I agree with this analysis, which appears to have assisted in the preparation of the next annual report.



### **Original Text of the Annual Report for 2019-20**

- 291.** The State Archivist has now advised that he has no concerns about interference in relation to the preparation of this report<sup>103</sup>.
- 292.** However, as these events fall within the Terms of Reference and have the potential to throw further light on the earlier course of events in this matter, they will be considered in the same way.
- 293.** By 15 September 2020, the Queensland State Archives had prepared the original version of the annual report for 2019-20<sup>104</sup>.
- 294.** This version was unchanged in the final report, except for statements in the *Message* which were very similar to those which had given rise to issues in the previous year.
- 295.** Within the original text of this Message, the following paragraphs appeared:

“This year has been another of [sic] year of highlights, however it is important to remember that our core reason for existing is the administration of the Public Records Act 2002 (the Act) and that safeguarding the integrity of the Queensland Public Record remains the foundation principle of everything we do. Our Government Recordkeeping Innovation team has implemented some wonderful initiatives this year to promote better government recordkeeping to ensure that the permanent public records of Queensland survive and thrive. Unfortunately, there have been once again far too many incidents that have led to us investigating potential breaches of the Act by public authorities. The Act is now over 18 years old and the advance in new communication technologies are increasingly highlighting the deficiencies in the legislation. Many of which would never have been anticipated when the Act was passed in 2002.

Sadly, the last few years have seen an increasing incidence of failures in recordkeeping, some with tragic consequences. There is now an urgent need for the *Public Records Act 2002* to be updated to reflect the new digital reality and to acknowledge the Act’s shortcomings. The risk of the Act being no longer meaningful is that key public records that should be made and preserved for the benefit of current and future generations may be lost, or worse, never created at all. The review of the Public Records Act needs to be a priority over the next few years if the integrity of the Queensland public is to be maintained.”

- 296.** In this year, again, there were difficulties in justifying the key statements in this passage from the broader text of the report:

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<sup>103</sup> Information supplied by State Archivist.

<sup>104</sup> Information supplied by State Archivist; Email, State Archivist to QSA Staff, 15 September 2020, 8:32 am.

- (a) under the heading “Investigations”, it was noted that the State Archivist assisted the CCC in a review of private messaging accounts by Logan City councillors and employees. Whilst it was considered likely that there had been a failure to manage public records appropriately, the relevant public records were able to be recovered. Apart from this investigation, there were only four complaints from members of the public, none of which was said to have revealed serious or systematic breaches of the Act.
- (b) under the heading “Recordkeeping Across Government”, it was noted from the reports prepared by other authorities, that there were “several cases of poor recordkeeping practices within government departments and public authorities”. Whilst the number of public authorities said to be affected was quite large (over 200), it was not explained whether this related to minor or more significant matters – or how a change in legislation would assist in improving recordkeeping practices.
- (c) it was not suggested that any new objective study had been conducted – or advice given by the PRRC – which would support legislative change.

### ***Exchanges about the Message***

- 297. On 22 September 2020, DO3 received an internal email from DO5 which annotated the text of the report with a large number of minor comments<sup>105</sup>. The passage in the *Message* which is quoted above was highlighted with the comment: “are you ok with these passages?”
- 298. On 25 September 2020, at 4:39 pm, DO3 sought legal advice from within the Department about the ability to request or require this passage to be amended or deleted<sup>106</sup>.
- 299. Later that day, this legal advice was provided<sup>107</sup>.
- 300. That advice noted the lack of apparent justification for these passages, making similar points to those noted above.
- 301. The advice also noted the avenues open to the State Archivist to raise any issues of this kind with the PRRC or with the Director-General.
- 302. After referring to the advice of Crown Law, and in particular the advice that Departmental officers “should not specifically direct that particular matters are to be excluded from the Annual Report”, it was noted that:

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<sup>105</sup> Email, DO5 to DO3, 22 September 2020, at 3:09 pm.

<sup>106</sup> Email, DO3 to Legal Department, 2 October 2020, at 4:39 pm; Email, Legal Department to DO3, 2 October 2020, at 6:02 pm.

<sup>107</sup> Email, Legal Department to DO3, 2 October 2020, at 6:02 pm.

“This advice was provided in the context of questions about the possible omission of details about matters of compliance, prosecution or other enforcement actions for offences under the Act, which are of course matters of regulatory administration that rest with the [State Archivist]. In this case the [State Archivist] is making a strong recommendation to undertake legislative review and amendment, which are matters for the Director-General and the Minister.

While section 56(2) of the Act leaves open the opportunity for the [State Archivist] to include recommendations for measures to improve compliance with the Act, in this case the [State Archivist] has made a recommendation of legislative review without clearly articulating how that review would prevent or reduce noncompliance with the Act.

I consider it consistent with the exercise of their overriding power of control and direction for the Director-General or Minister to query the inclusion of these paragraphs in the Annual Report, and instead invite the [State Archivist] to submit for their consideration a briefing paper that more clearly sets out the [State Archivist's] concerns with the adequacy of the Act, any misalignment with current digital technologies and how compliance with recordkeeping across the public sector may be improved or increased by such amendments. Additionally, it is not inappropriate for the Director-General or Minister to ask the [State Archivist] for details about the incidence trends to which he refers and to more clearly explain the connection of the trends with the recommendation of a review.”

- 303.** I agree with this advice.
- 304.** Early in the week of 26 October 2020, DO1 arranged to visit the Queensland State Archives at Runcorn and meet with the State Archivist.
- 305.** In preparation for this meeting, DO3 prepared for DO1 a written analysis of the relevant passages from this Message which included “assessments” and “suggestions”<sup>108</sup>.
- 306.** There is no contemporaneous note of the meeting with the State Archivist, but it seems likely that DO1 acted upon the advice which had been received. This involved:
- (a) suggesting that any proposals for legislative change be revived by providing a formal briefing note to the Director-General, containing the relevant factual information; and
  - (b) explaining the importance of ensuring that statements in an annual report are justified by the facts set out in the text of the report;
  - (c) suggesting particular changes to the *Message* in the annual report which were justifiable by reference to the facts set out in the report.

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<sup>108</sup> Information supplied by DO3; Briefing Note, DO3 to DO1, undated.

307. The result of this meeting was that all but one of the Department's suggested changes to the *Message* were adopted by the State Archivist.

308. The suggested changes are more easily shown by tracking these changes against the original version:

"This year has been another year of highlights, however it is important to remember that our core reason for existing is the administration of the Public Records Act 2002 (the Act) and that safeguarding the integrity of the Queensland Public Record remains the foundation principle of everything we do. Our Government Recordkeeping Innovation team has implemented some wonderful initiatives this year to promote better government recordkeeping to ensure that the permanent public record of Queensland survive and thrive. Unfortunately, there have been once again far too many incidents that have led to us investigating potential breaches of the Act by public authorities.

~~The Act is now over 18 years old and the advances in new communication technologies are increasingly highlighting the deficiencies in the legislation. Many of which would never have been anticipated when the Act was passed in 2002. Sadly, the last few years have seen an increasing incidence of failures in recordkeeping, some with tragic consequences. There is now an urgent need for the Public Records Act 2002 to be updated to reflect the new digital reality and to acknowledge the Act's shortcomings. The risk of the Act being no longer meaningful is that key public records that should be made and preserved for the benefit of current and future generations may be lost, or worse, never created at all. The review of the Public Records Act needs to be a priority over the next few years if the integrity of the Queensland public is to be maintained. A feature of many investigations undertaken by integrity agencies such as the Crime and Corruption Commission, the Office of the Queensland Ombudsman and the Queensland Government Audit Office have highlighted failures in recordkeeping as significant factors in their investigations.~~

Advances in new communication technologies are creating new challenges for public authorities and creating digital records in different formats on different platforms. As a result, there is an increasing risk that key public records that should be made and preserved for the benefit of current and future generations may be lost, or worse, never created at all."

309. Only the last paragraph was changed in the final version of the report to read:

"Advances in new communication technologies are creating new challenges for public authorities, the volume of public records in particular being created is a significant challenge. There is a risk that the Act is inadequate to meet these challenges. There is an increasing risk that key public records that should be made and preserved for the benefit of current and future generations may be lost, or worse, never created at all."

310. In my view, it was reasonable for changes of this kind to be requested and implemented, as they result in a *Message* which is appropriately justified by the text of the report.

311. The report was finalised in these terms.

#### IV ANALYSIS

312. The issues to be addressed are:

- (a) whether there are any matters that involve, or may involve, corrupt conduct that require referral to the Crime and Corrupt Commission under section 38 of the *Crime and Corruption Act 2001*;
- (b) whether there are any matters that involve, or may involve, misconduct under the *Public Service Act 2008*; and
- (c) whether there are any matters that may otherwise warrant disciplinary action under the *Public Service Act 2008*.

#### ***Legal Framework***

313. For the reasons explained below, the lowest threshold which could be applied, to determine whether any form of misconduct occurred, would be to consider whether there was any reasonable suspicion that a breach of the *Code of Conduct for the Queensland Public Service Code* had occurred.

314. Unless this test is satisfied, there can be no question of any other form of corrupt conduct or misconduct.

315. This is apparent from an analysis of governing provisions.

316. Section 38 of the *Crime and Corruption Act 2001* creates a duty to notify the CCC of corrupt conduct, as follows:

**“38     Duty to notify commission of corrupt conduct**

- (1) This section applies if a public official reasonably suspects that a complaint, or information or matter (also a complaint), involves, or may involve, corrupt conduct.
- (2) The public official must notify the commission of the complaint, subject to section 40.”

317. In summary, the concept of “corrupt conduct” is relevantly defined in s 15 to be conduct that:

- “(a) adversely affects, or could adversely affect, directly or indirectly, the performance of functions or the exercise of powers of—

- (i) a unit of public administration; or
  - (ii) a person holding an appointment; and
- (b) results, or could result, directly or indirectly, in the performance of functions or the exercise of powers mentioned in paragraph (a) in a way that—
- (i) is not honest or is not impartial; or
  - (ii) involves a breach of the trust placed in a person holding an appointment, either knowingly or recklessly; or
  - (iii) involves a misuse of information or material acquired in or in connection with the performance of functions or the exercise of powers of a person holding an appointment; and
- (c) would, if proved, be—
- (i) a criminal offence; or
  - (ii) a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or were the holder of an appointment." (emphasis added)

**318.** The expression "reasonably suspects" is defined to mean "suspects on grounds that are reasonable in the circumstances" (s 12; Sch 2).

**319.** As explained in *R v Bossley* [2015] 2 Qd R 102:

"There is also well-established common law authority in relation to both the concept of suspicion and the concept of reasonable suspicion. The meaning of suspicion in this context is discussed by the High Court in *George v Rockett* (1990) 170 CLR 104, 115-116. A suspicion and a belief are different states of mind. A suspicion is a state of conjecture or surmise. It is more than idle wondering. It is positive feeling of apprehension or mistrust, but it is a slight opinion without sufficient evidence. Facts which reasonably ground a suspicion may be quite insufficient to reasonably ground a belief. Nonetheless, to have a reasonable suspicion some factual basis for the suspicion must exist. There must be sufficient factual grounds reasonably to induce the suspicion. The facts must be sufficient to induce the suspicion in the mind of a reasonable person. The suspicion must be reasonable, as opposed to arbitrary, irrational or prejudiced." (citations omitted).

**320.** The grounds for discipline of public service employees are set out in s 187 of the *Public Service Act 2008*.

**321.** They relevantly include being:

- (a) guilty of "misconduct"; or

- (b) contravening, without reasonable excuse, a relevant standard of conduct in a way that is sufficiently serious to warrant disciplinary action.

**322.** The term “misconduct” is defined in s 187(4) to mean:

- “(a) inappropriate or improper conduct in an official capacity; or
- (b) inappropriate or improper conduct in a private capacity that reflects seriously and adversely on the public service.”

**323.** The expression “inappropriate or improper conduct” is not defined in this statute. However, it has a settled meaning in this statutory context of a “deliberate departure from accepted standards, serious negligence to the point of indifference or an abuse of the private and confidence enjoyed by a public service employee”<sup>109</sup>.

**324.** The relevant standards of conduct are created under the *Public Sector Ethics Act 1994*.

**325.** These include the *Code of Conduct for the Queensland Public Service (Code)*.

**326.** The Code is based upon acceptance that the “elected government has the right to determine policy and priorities” (3.1).

**327.** It requires compliance with ethical standards (Code 1.1, 1.5), including:

- (a) ensuring that any advice that is provided is objective, independent, apolitical and impartial
- (b) ensuring that any decision making is ethical;
- (c) engaging with the community in a manner that is consultative, respectful and fair, and
- (d) meeting obligations to report suspected wrongdoing, including conduct not consistent with this Code.
- (e) treating co-workers, clients and members of the public with courtesy and respect.

**328.** It also requires diligence in public administration (Code 4.1), including:

- (a) applying due care in work, and providing accurate and impartial advice to all clients whether members of the public, public service agencies, or any level of government.
- (b) treating all people equitably and consistently, and demonstrating the principles of procedural fairness and natural justice when making decisions.

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<sup>109</sup> eg *Weaver v State of Queensland* [2021] QIRC 413 at [21] ff.

- (c) exercising lawful powers and authority with care and for the purpose for which these were granted.
- (d) complying with all reasonable and lawful instructions.

### ***Analysis of the Facts***

- 329.** On my analysis of facts, the answer to the key questions is clear.
- 330.** There is no reasonable basis to suspect that any member of the public service breached any of their duties in the course of finalising the annual reports of the Queensland State Archives.
- 331.** The reasons for this view may be summarised as follows.
- 332.** From the very outset, Crown Law advice had been obtained about the respective roles of the State Archivist, the Director-General and the Minister in the administration of the *Public Records Act 2002*.
- 333.** This advice was provided to both the Department and the Queensland State Archives, and concluded that “the State Archivist is for most purposes in the same position as any other Executive Director in the department. Specifically, he is subject to direction by the Director-General in most respects...”
- 334.** The legal effect of this was that, at the very least, the Director-General and the relevant staff of the Department were responsible for reviewing the work of the Queensland State Archives, including the annual reports which had been prepared.
- 335.** As part of any such review, the relevant staff of the Department were legally entitled to suggest appropriate changes to these reports.
- 336.** When the course of events is examined, it is clear that this was the only function which the staff of the Department performed. In each of the three years under review, they suggested changes to the reports. Nothing occurred which could fairly be described as a “direction” to the State Archivist to make changes.
- 337.** In making these suggestions, the evidence suggests that these interactions were always respectful, without improper pressure or other improper or unethical conduct.
- 338.** When suggestions were made, the State Archivist reconsidered his position and decided what changes would be made to the final report.
- 339.** There is no reasonable basis in the contemporaneous documents to suspect that any of these changes were suggested for improper reasons.
- 340.** On the contrary, the contemporaneous documents – including internal Departmental documents - suggest that the changes were suggested as part of the ordinary process which was followed in the preparation of annual reports to ensure that statements they



contained were precise, accurate and justified by the information provided in the report. This process resulted in a great many statements being queried, to correct a range of errors and other infelicities.

341. To objectively test the reasonableness of the queries which were raised, each of the original statements in the annual reports has been identified and examined.
342. Upon examination, it is not difficult to see why they were queried.
343. In the first of the annual reports (2017-18), the queried paragraphs of the *Message* were expressed in terms which were too vague to convey any real information about the work undertaken during the year or the future directions proposed. In some respects, the queried paragraphs also had the potential to leave a misleading impression.
344. In each of the next two annual reports (2019-19, 2019-20), the State Archivist sought to include in his *Message* a strongly-expressed opinion that the *Public Records Act 2002* should be substantially amended, in the light of increasing incidents of apparent non-compliance. The difficulty with these statements is that they were not based upon any sufficient information or analysis, in the detailed body of the report, which could fairly justify a call for urgent statutory amendment.
345. Whilst the State Archivist had a genuine belief that statutory changes were required, no disciplined analysis had been undertaken of: (a) the extent of any non-compliance with the *Public Records Act 2002*; (b) the various options available to promote compliance, including statutory reform; and (c) how and why statutory reform would be the preferable option.
346. Nor did this statement have the support of the Public Records Review Committee.
347. In the ordinary course, some form of disciplined analysis and consultation would be required to justify legislative intervention in a statute which had been in operation for almost 20 years.
348. In these circumstances, it was reasonable and appropriate for the Departmental officers to make their suggestions for changes – and it was equally reasonable and appropriate for the State Archivist to respond by publishing the annual reports in the form which was finally adopted.
349. Accordingly, in my view, there is no basis in the evidence to suspect that any of these queries or suggestions were made for improper reasons.
350. Further, in my view, the changes did not result in the reports being misleading or in failing to disclose matters that should properly have been disclosed. When a public official such as the State Archivist has concerns that there is a need for legislative reform, the conventional course is to proceed in a disciplined way, arranging appropriate studies and consultation. It is then conventionally a matter for government to determine the response (if any) which should be adopted. If the State Archivist

disagrees with the policy adopted government, then he or she is at liberty to record their personal, dissenting view (ideally in a reasoned way) in the annual report. In the ordinary course, however, policy issues are a matter for government and there is no obligation upon the State Archivist to report their personal views on such matters in an annual report.

**351.** In summary, in my view, there is no reasonable suspicion that any of the persons involved in the preparation of these annual reports acted other than lawfully and appropriately.

With compliments,



**John McKenna QC**

Chambers, 4.iii.2022.

## **Annexure 1 – Terms of Reference**

## REVIEW OF THE ALLEGATIONS ATTRIBUTED TO THE FORMER STATE ARCHIVIST ABOUT THE QUEENSLAND STATE ARCHIVES' ANNUAL REPORTS FOR 2017-18, 2018-19 AND 2019-20

### TERMS OF REFERENCE

#### 1. BACKGROUND

A number of statements attributed to the former State Archivist Mr Mike Summerell in relation to his annual reports have recently appeared in the media. These statements include allegations that:

- (a) he was pressured to remove any content from his draft of the Queensland State Archives' annual reports for 2017-18 and 2018-19 that could be perceived negatively;
- (b) for two years he was directed to create misleading annual reports to Parliament by then Department of Housing and Public Works' senior officials to avoid anything embarrassing or damaging to the Government; and
- (c) his attempts to raise concerns through the annual report were interfered with in both 2017-18 and 2019-20 (collectively the Allegations).

On 1 February 2022, the Premier announced that the Director-General of the Department of the Premier and Cabinet would look into the Allegations.

#### 2. SCOPE OF WORK

The Director-General will oversee a review that will gather all relevant documentary evidence in relation to the Allegations with a view to assessing whether the Allegations are substantiated.

The Allegations will be considered in the context of relevant legislation and policies including the *Code of Conduct For the Queensland Public Service*.

#### 3. METHODOLOGY

The review will:

- (a) gather and examine relevant documentation held by Government departments relating to the drafting and finalisation of the Queensland State Archives' annual reports for 2017-18, 2018-19 and 2019-20;
- (b) consider whether there are any matters that involve, or may involve, corrupt conduct that require referral to the Crime and Corruption Commission under section 38 of the *Crime and Corruption Act 2001*;
- (c) consider whether there are any matters that involve, or may involve, misconduct under the *Public Service Act 2008*; and
- (d) consider whether there are any matters that may otherwise warrant disciplinary action under the *Public Service Act 2008*.

These Terms of Reference have been reviewed and settled by an external Queen's Counsel. Likewise, the process will be considered, and the findings arising from the review will be settled, by the Queen's Counsel. Subject to any confidentiality obligations, the findings will be published.

#### 4. TIMING

The review will be finalised by no later than 4 March 2022, contingent on the volume and nature of material under consideration.