

DRAFT BILLS POST INTERNAL REVIEW: FOR CIRCULATION TO STAKEHOLDERS
IN ADVANCE OF THE STAKEHOLDER CONFERENCE IN FEBRUARY 2024
REPUBLIC OF SOUTH AFRICA

DRAFT
**NATIONAL ARCHIVES AND RECORDS
SERVICE OF SOUTH AFRICA
AMENDMENT BILL**

*(Internal draft, as prepared for Roger Layton and Associates, proposed in terms of section 76(1) of the
Constitution (National Council of Provinces))*

(The English text is the official text of the Bill)

(MINISTER OF SPORT, ARTS AND CULTURE)

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the National Archives and Records Service of South Africa, 1996, so as to define and update certain words and expressions taking into account technological and digital developments; to provide for the proper preservation of all records in all languages bearing in mind that archives constitute the collective memory of nations and of societies, shape their identity, and are a cornerstone of an inclusive information society; to provide for public access to official information and peoples' history, bearing in mind the need to redress colonial and apartheid-era discriminatory archival practices; to provide for the recognition that archives are fundamental to democracy, accountability and good governance; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 43 of 1996

1. Section 1 of the National Archives and Records Services Act, 1996 (hereinafter referred to as “the principal Act”), is hereby amended—

(a) by the insertion before the definition of “appraisal” of the following definition:

“**‘accessibility’** means ensuring that everyone including people with disabilities can live independently and participate fully in all aspects of life, including the taking of appropriate measures to ensure access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas”;

(b) by the insertion after the definition of ‘accessibility’ of the following definition:

“**‘archival value’** means values, administrative, fiscal, legal, evidential, historical and/or informational, which justify the indefinite or permanent retention of records”;

(c) by the insertion after the definition of ‘accessibility’ of the following definition:

“**‘audiovisual works’** are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment,

- together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied”;
- (d) by the insertion before the definition of “disposal authority” by the insertion of the following definition:
 “ **‘department’** means the department responsible for arts, culture, archives, library and information services, and cultural heritage”;
- (e) by the insertion before the definition of “document” by the insertion of the following definition:
 “ **‘Director-General’** means the Director-General or any officer acting on the authority of the Director-General of the department as defined by this Act”;
- (f) by the insertion after the definition of “Director-General”, of the following definition:
 “ **‘document’** means any work which is intended to store or convey information in textual, graphic, visual, auditory or other intelligible and accessible format through any medium, including born-digital works, online and offline works, static and dynamic electronic documents, and any version or edition of a document which is significantly different from that document in respect of its information content, intelligibility, accessibility, or physical presentation is considered to be a separate document”;
- (g) by the substitution of the definition of “governmental body”, of the following definition:
 “ **‘governmental body’** means a legislative, executive, judicial or administrative organ of state (including a statutory body) in such province at the national, provincial or local level of government, or any other entity listed in section 3 of the Public Finance Management Act 1 of 1999 subject to future provincial archival legislation”;
- (h) by the insertion after the definition of “head of a governmental body”, of the following definition:
 “ **‘information and communications technology (ICT)’** means any technology used for the processing, communication and manipulation of information”;
- (i) by the insertion after the definition of “information and communications technology”, of the following definition:
 “ **‘inclusive information society’** means a society in which access to and the creation, distribution, use, integration and manipulation of information is a significant economic, political, and cultural activity, is people-centred, and ensures that everyone can create, access, utilise and share information and knowledge, enabling individuals, communities and peoples to achieve their full potential in promoting their sustainable development and improving their quality of life”;
- (j) by the substitution of the definition of “Minister”, by the insertion of the following definition:
 “ **‘Minister’** means the minister with the portfolio responsible for arts, culture, archives, library and information services, and cultural heritage”;
- (k) by the insertion before the definition of “National Archives”, of the following definition:
 “ **‘national documentary heritage’** means existing and future documents in any format which contain analogue or digital information, such as books, manuscripts, archives and audiovisual works that are made available, printed or produced by any other means in the Republic of South Africa, or commissioned to be produced outside of the Republic of South Africa by a person normally resident in the Republic of South Africa or a juristic person whose principal place of business is the Republic of South Africa or that otherwise concerns the Republic of South Africa in any way including by having enduring national significance;”
- (l) by the insertion after the definition of “non public record”, of the following definition:
 “ **‘obsolescence’** means the transition from available technology to

- unavailable technology with the risk of loss of content”;
- (m) by the insertion after the definition of “prescribe”, of the following definition:
 “**‘preservation’** means the act or process of applying measures necessary including conservation measures to sustain the form, integrity and materials of an object or information, whatever its format, to prevent harm to it and ensure its continued use and accessibility for current and future generations”;
- (n) by the insertion after the definition of “preservation”, of the following definition:
 “**‘processing’** means any operation or activity or any set of operations, whether or not by automatic means, including the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use; dissemination by means of transmission, distribution or making available in any other form; or merging, linking, as well as restriction, degradation, erasure or destruction of information”;
- (o) by the substitution of the definition of “public record”, of the following definition:
 “**‘public record’** means a record created or received by a governmental body in pursuance of its activities regardless of its form or medium”;
- (p) by the substitution of the definition of “record”, of the following definition:
 “**‘record’** means recorded information regardless of form or medium including evidence of a transaction, preserved for the evidential information it contains”;
- (q) by the insertion after the definition of “public record”, of the following definition:
 “**‘reasonable accommodation’** means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to all persons at the intersection of one or more prohibited grounds, as defined in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”;
- (r) by the insertion after the definition of “reasonable accommodation”, of the following definition:
 “**‘sound recordings’** are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied”;
- (s) by the insertion after the definition of “records classification system”, of the following definition:
 “**‘records management’** means the planning, controlling, directing, organising, training, promoting, and other managerial activities involved with respect to records creation, records preservation, maintenance, access, and use, and records disposition including secure destruction, deletion, transfer for archival review or to a third party in order to achieve adequate and proper documentation of the policies and transactions of the state and effective management of agency operations”;
- (t) by the insertion after the definition of “records management”, of the following definition:
 “**‘records manager’** means any person specifically appointed to develop and manage an organisation-wide records management programme designed to ensure that record keeping and records management practices effectively meet the organisation’s objectives; and to ensure that the records management practices of this office comply with the requirements of the Act and its provincial equivalents, and transactions of the State and effective management of agency operations”;
- (u) by the insertion after the definition of “regulation”, of the following definition:
 “**‘technological protection measure’** means any process, treatment, mechanism, technology, device, product, system or component that in the

normal course of its operation prevents or restricts infringement of copyright in a work and does not include a process, treatment, mechanism, technology, device, product, system or component, to the extent that in the normal course of its operation, it controls any access to a work for non-infringing purposes”;

- (v) by the insertion after the definition of “this Act”, of the following definition:
 “ ‘**universal design**’ means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialised design, without prejudice to the obligation to provide reasonable accommodation”;

Amendment of section 3 in Act 43 of 1996

2. Section 3 of the principal Act is hereby amended by the substitution of section 3 of the following sections—

3. The objects and functions of the National Archives shall be to—

- (a) preserve public and non-public records with enduring historical and evidentiary value for use for current and future generations by the public and the State as determined by the National Archivist after consultation with the National Archives Advisory Council, and serve as a centre for promoting public awareness of, and access to, public and non-public records;
- (b) make such records accessible to everyone without discrimination on the basis of prohibited grounds of discrimination as defined in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 including taking steps towards reasonable accommodation, and promote their use by the public;
- (c) ensure [the] proper management and care of all [public] records, whether public or non-public, with the aim of making records available and accessible along with essential contextual information;
- (d) collect non-public records with enduring historical and evidentiary value of national significance which cannot be more appropriately preserved by another institution, with due regard to the need to document aspects of the nation's experience neglected by archives repositories in the past, as determined by the National Archivist after consultation with the National Archives Advisory Council ;
- (e) maintain a national automated archival information retrieval system, in which all provincial archives services shall participate;
- (f) maintain national registers of non-public records with enduring historical and evidential value including that of national significance, and [promote] facilitate cooperation and coordination between institutions having custody of such records in order to ensure their preservation, conservation, management, use, and access;
- (g) assist, support, set minimum essential standards for and provide professional guidelines to provincial archives services;
- (h) [promote an awareness of] ensure and facilitate the education, training and professional accreditation of practitioners in archives and records management, and encourage archival and records management activities across the sector;
- (i) [generally] promote the preservation and use of a national archival heritage;
- (j) build and maintain the physical and digital infrastructure required to preserve, conserve, access, use and store records of different media in appropriate repositories whose technical and climatic conditions ensure the preservation of records and their access for current and future generations and prevent damage and destruction thereof;
- (k) coordinate with other relevant departments responsible for the administration of this Act and its effective implementation;
- (l) use and promote the use of archival practices to record indigenous histories and knowledge for current and future generations in accordance with the National Heritage Resources Act 25 of 1999.

Amendment of section 4 in Act 43 of 1996

3. Section 4(1) of the principal Act is hereby amended by the substitution of Section 4(1) of the following section—

4(1)—

- (a) The Minister shall, after consultation with the Minister for the Public Service and Administration, appoint an experienced and qualified person as National Archivist in terms of the Public Service Act, 1994 (Proclamation 103 of 1994), on such grade as the Minister may determine, without regard to political affiliations and solely on the basis of the professional qualifications and experience required to perform the duties and responsibilities of the National Archivist, taking into account the following competencies and qualifications and addressing the disadvantage experienced by people at the intersection of one or more prohibited grounds of discrimination as defined in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000—
- i. accredited archival and records management qualifications or equivalent qualifications relevant to the archives sector;
 - ii. expertise in the sector;
 - iii. leadership experience in management of archives and record management services or equivalent experience relevant to the sector;
 - iv. special insight into the needs of users of archives;
 - v. special expertise in one or more relevant areas including ICT, information systems management, copyright, digitisation, records management, documentary cultural heritage, emerging technologies, history, political science.
- (b) The National Archivist shall manage the National Archives under the direction of the Director-General [Arts, Culture, Science and Technology].

Amendment of section 4(2) in Act 43 of 1996

4. Section 4(2) of the principal Act is hereby amended by the substitution of Section 4(2) of the following section—

4(2) The National Archivist shall in the performance of [his or her] their functions, including in the performance of sections 10, 11, 12, 13, and 14 of this Act, be assisted by officers and employees appointed in terms of the Public Service Act, 1994 (Proclamation No. 103 of 1994).

Amendment of section 5 in Act 43 of 1996

5. Section 5 of the principal Act is hereby amended by the substitution of Section 5 of the following section—

5 The National Archivist shall—

- (a) take such measures as are necessary to [arrange, describe and retrieve] acquire, appraise, arrange, describe, preservation and access records, including providing guidance and assistance to governmental bodies with respect to ensuring economical and effective records management, adequate and proper documentation of the policies and transactions of the state, and proper records disposition;
- (b) provide universal access, information, consultation, research and other services related to records in fulfilment of their obligations under the Constitution and in the manner set out in the Promotion of Access to Information Act 2 of 2000 and process personal data where necessary in accordance with the Protection of Personal Information Act 4 of 2013;
- (c) collect and disseminate information on training programmes, technological developments, and other activities relating to records management towards building an inclusive information society;
- (d) [with] place special emphasis on conducting activities designed to reach out to less privileged sectors of society, make known information concerning records including disseminating catalogues and inventories and manuals regarding the use of and access to the National Archives, by means such as publications and exhibitions [and the lending] of records;

- (e) require of a person who has made use of records in the custody of the National Archives while researching a publication or dissertation to furnish a copy of the publication or dissertation to the National Archives;
- (f) conduct research with respect to the improvement of records management practices and programmes including periodically revising these practices to align with international standards and best practices;
- (g) facilitate training in archival techniques and the management of records;
- (h) liaise with organisations interested in archival matters or the management of records;
- (i) provide professional and technical support in aid of archival activities and the archival community including in relation to emerging technologies and the use of ICTs;
- (j) publish the appraisal policy and lists of records that may be destroyed;
- (k) generally, take such other steps and perform such other acts as may be necessary for or conducive to the achievement of the objects of the National Archives.

Amendment of section 6 in Act 43 of 1996

6. Section 6 of the principal Act is hereby amended by the substitution of Section 6 of the following section—

6 (1) The Minister shall by notice in the *Gazette* establish a council to be known as the National Archives Advisory Council.

(2) The Council shall consist of—

- (a) not more than six members appointed by the Minister from among persons who are knowledgeable of or have an interest in archival matters appointed through a public nomination process set out in subsection (3) and taking into account the competencies and considerations set out in subsections (4) and (5); and
- (b) every chairperson of the various provincial councils advising on archives or, in the absence of such a provincial council, a representative for the province in question elected through a public and transparent process which shall be determined and overseen by the responsible member of the Executive Council of that province.

(3) Before persons contemplated in subsection 2(a) are appointed the Minister must—

- (a) invite nominations from interested persons by notice in the Gazette and in at least two nationally circulated newspapers, over the radio, on a public website in an accessible format for people with disabilities, and circulated by any relevant professional body via its channels of communication, specifying a reasonable period within which nominations must be submitted;
- (b) set out in such notice the procedure pertaining to the nominations including competencies and considerations set out in subsections (4) and (5); and
- (c) appoint a panel after the composition is approved by the relevant Parliamentary Portfolio Committee consisting of senior archivists and records managers with experience and expertise in the sector to compile a shortlist of candidates from the persons nominated in subsection (a) and appoint Council members referred to in subsection 2(a) from this shortlist.

(4) The members of the Council other than the provincial representatives must all be persons who have—

- (a) accredited archival and records management qualifications or equivalent qualifications relevant to the archives sector;
- (b) expertise in the sector;
- (c) leadership experience in management of archives and records management services or equivalent experience relevant to the sector;
- (d) special insight into the needs of users of archives including having consulted archival records for research purposes;
- (e) special expertise in one or more relevant areas including ICT, information systems management, copyright, digitisation, records management, documentary cultural heritage, emerging technologies, history, political science.

(5) The Council must be broadly representative of all sectors in archives and records management fields and be constituted in a manner that will—

- (a) address the disadvantage experienced by people at the intersection of one or more

prohibited grounds of discrimination as defined in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; and

- (b) ensure a range of expertise and experience regarding—
- i. national, provincial and local interests;
 - ii. the role of the sector in building an inclusive information society;
 - iii. the role of emerging technologies and digital transformation; and
 - iv. research development and education in archival and records management studies.

(6) The functions of the Council shall be to—

- (a) advise the Minister and the Director-General [Arts, Culture, Science and Technology] on any matter related to the operation of this Act;
- (b) advise the National Archivist on furthering the objects and functions of the National Archives;
- (c) advise and consult with the South African Heritage Resources Agency on the protection of records forming part of the National Estate as prescribed by the National Heritage Resources Act 25 of 1999;
- (d) facilitate the enforcement of section 16 of this Act; and
- (e) annually submit a business plan to the Minister for approval.

(7) The Council may appoint committees from amongst its members and may assign to any committee so appointed such of its functions as it may deem fit: Provided that the Council shall not be divested of any function which it has so assigned and may amend or revoke a decision of such a committee.

(8) The procedure at meetings of the Council and of a committee shall be as prescribed.

(9) The Council or any committee may, subject to the approval of the Minister, coopt any person to serve on the Council or on a committee, as the case may be, but such a coopted member shall not have any voting rights: Provided that such person meets the conditions set out in subsections (4) and (5).

(10) [Subject to paragraph (b)] A member of the Council who is not in the full time service of the state will be eligible to receive remuneration for their services as a member of the Council [may receive in respect of his or her functions as a member of the Council such allowances as] as determined by the Council after consultation with the Minister [may determine with the concurrence of] and the Minister of Finance.

Amendment of section 10(4) in Act 43 of 1996

7. Section 10(4) of the principal Act is hereby amended by the substitution of Section 10(4) of the following section—

10 (4) Within five months after the reports have been tabled, a delegation consisting of the National Archivist and at least two members of the Council must brief the relevant Portfolio Committee [on Arts, Culture, Science and Technology] responsible for arts, culture, archives, library and information services, and cultural heritage on the reports.

Amendment of section 11 in Act 43 of 1996

8. Section 11 of the principal Act is hereby amended by the substitution of Section 11 of the following section—

11 (1) The Minister [may] shall from time to time establish archives repositories under the control of the National Archivist for the custody of records.

(2) Public records identified in a disposal authority as having enduring historical and evidential value shall be transferred to an archives repository when they have been in existence for 20 years: Provided that—

(a) no other Act of Parliament requires such records to be kept in the custody of a particular governmental body or person;

(b) the National Archivist may, after consultation with the head of a governmental body, identify such records which-

(i) should remain in the custody of a governmental body, subject to that governmental body fulfilling standards of storage, preservation and conservation of these records as prescribed by the Minister; or

- (ii) should be transferred to an archives repository before they have been in existence for 20 years;
 - (c) the National Archivist may only defer the transfer of any public records on a reasonable basis not impeding the fulfillment of their functions under this Act; and
 - (d) the National Archivist may grant permission for any public records to be transferred to an archives repository before they have been in existence for 20 years.
- (3) The Minister [may] shall prescribe terms and conditions governing the transfer of records under subsection (2).
- (4) The National Archivist shall take such measures as are necessary to preserve, conserve and restore records for the use and access of current and future generations.

Amendment of section 12(3) in Act 43 of 1996

9. Section 12(3) of the principal Act is hereby amended by the substitution of Section 12(3) of the following section—
- 12 (3) Notwithstanding subsections (1) and (2), the National Archivist may only refuse access to a record on grounds that it is in a damaged or fragile condition in addition to the grounds set out in Part 2 Chapter 4 of the Promotion of Access to Information Act 2 of 2000: Provided that any person who has been refused access has the right to appeal the refusal decision as set out in Part 4 Chapters 1 and 2 of the Promotion of Access to Information Act 2 of 2000.

Amendment of section 12 (4) and insertion of section 12(5) in Act 43 of 1996

10. Section 12(4) of the principal Act is hereby amended by the substitution of Section 12(4) of the following section and the insertion of section 12(5) after section 12(4) in the principal Act—
- 12(4) In fulfillment of its obligations under this Act, the National Archives shall—
- (a) for the purposes of carrying out their duties, possess, copy, store in electronic form (whether offline or online), and use any copy of a record;
 - (b) be permitted to reproduce and/or adapt records if the copy / adaptation is made in any of the circumstances set out in this subsection and circumstances analogous to these circumstances—
 - i. to preserve or replace the record by placing the copy or adaptation in the permanent collection in addition to or in place of the relevant material;
 - ii. to replace the record in the permanent collection of a provincial archive if that record has been lost, destroyed, or damaged;
 - iii. to adapt the record to a different medium or format from the format in which the record was collected if the National Archivist considers the change is necessary or expedient for conservation or preservation purposes, for instance, due to technological changes.
 - (c) facilitate public access to a physical record on the premises of the National Archives if the National Archivist is convinced in the adequate preservation of the record and that the use of the record will not damage it;
 - (d) facilitate public access to an electronic record through a secure database whether on the premises of the National Archives or remotely;
 - (e) make and supply for use on its premises or through a secure database, whether on the premises of the National Archives or remotely, accessible formats of records for people with disabilities, as a form of reasonable accommodation, if the format in which the record has been deposited or preserved is inaccessible;

- (f) upon request from a member of the public, make and supply for use on its premises or through a secure database, whether on the premises of the National Archives or remotely, one (1) copy of a record where the National Archivist is satisfied that the copy is required exclusively for non-commercial purposes such as education, private study, research, reporting current events, criticism or review, parliamentary or judicial proceedings;
- (g) upon request from a provincial archive, transfer or lend a copy or adaptation of the record.

12(5) The Minister may make regulations as to the admission of the public to archives repositories, the making available of records for public access, and the use of equipment for the making of copies of or extracts from records in the custody of the National Archives, provided that these regulations give effect to the rights in the Bill of Rights and do not constrain the scope of section 12(4) or any other provision in this Act.

Insertion of section 12A in Act 43 of 1996

11. The principal Act is hereby amended by the insertion of section 12A after section 12 in the principal Act—

12A In circumstances where a record contains personal data—

- (a) the National Archives may process personal data in documents containing personal data for the fulfillment of the objectives of this Act and this processing will not be an infringement of the Protection of Personal Information Act 4 of 2013: Provided that the data subject is permitted to make a request justifying the withholding of access to the document from the public to the extent that the place of legal deposit is satisfied on reasonable grounds that the processing of personal data would, or would be likely to, unreasonably prejudice the interests of the person making the request;
- (b) Notwithstanding a request pursuant to subsection (a), National Archives may nonetheless grant access upon a specific request from a person seeking access to the document for the purposes of scientific research or study;
- (c) In any event, any person who has been refused access to a public or non-public record on any grounds has the right to appeal the refusal decision as set out in Part 4 Chapters 1 and 2 of the Promotion of Access to Information Act 2 of 2000.

Amendment of section 13(3) in Act 43 of 1996

12. Section 13(3) of the principal Act is hereby amended by the substitution of Section 13(3) of the following section—

13 (3) The Minister [may] shall make regulations as to the management, preservation, conservation and care of public records in the custody of governmental bodies to give effect to this Act.

Amendment of section 13(4) in Act 43 of 1996

13. Section 13(4) of the principal Act is hereby amended by the substitution of Section 13(4) of the following section—

13 (4) The National Archivist [may from time to time] shall issue directives and practical instructions, which shall not be inconsistent with the regulations, as to the management, preservation, conservation and care of public records in the custody of governmental bodies to give effect to this Act.

Amendment of section 14 in Act 43 of 1996

14. Section 14 of the principal Act is hereby amended by the substitution of

Section 14 of the following section—

14 (1) The National Archivist may on behalf of the State acquire by purchase or donation or on loan for a temporary period or in perpetuity, either unconditionally or subject to such conditions as may be agreed upon, non-public records which[, in his or her opinion,] have enduring historical and evidential value of national significance and which cannot be more appropriately preserved by another institution.

(2) Subject to any conditions as may be applicable, non-public records acquired under subsection (1) shall be deposited in the archives repository determined by the National Archivist.

(3) The producer [or distributor] of a recording which is a non-public record in terms of this Act shall, within six months after a request in writing is made by the National Archivist, provide the National Archivist with a copy of the recording in such form as may be specified in the request: Provided that this does not duplicate a request made under the National Heritage Resources Act 25 of 1999.

(4) Subsection (3) shall not apply in respect of a recording that is required to be deposited in a legal deposit library, [defined in section 1 of the Legal Deposit of Publications Act, 1982 (Act No. 17 of 1982)] under the Legal Deposit Act 54 of 1997, or that has not been broadcast or made public in South Africa.

(5) The National Archivist shall maintain national registers of non-public records in South Africa which [, in his or her opinion,] have enduring historical and evidential value, in consultation with the institutions having custody of such records, such as the National Automated Archival Information Retrieval System.

Amendment of section 16 in Act 43 of 1996

15. Section 16 of the principal Act is hereby amended by the substitution of Section 16 of the following section—

16(1) A person who with intent to deny access, preservation, conservation or management of records in terms of this Act—

(a) destroys, damages or alters a record;

(b) conceals a record;

(c) falsifies a record or makes a false record; or

(d) otherwise than in accordance with this Act or any other law, removes, destroys, erases, falsifies, conceals, alters, damages or knowingly acts in a manner that foreseeably causes such record be removed, destroyed, erased, falsified, concealed, altered or damaged,

commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or both such fine and imprisonment.

(2) Any person who fails to comply with a request mentioned in section 14 (3); shall be guilty of a criminal offence and liable on conviction to a fine not exceeding R 20000;

(3) The National Archivist may refuse to allow any person convicted of an offence in terms of subsection (1) access to an archives repository for such period as they may deem fit, subject to the procedures laid out in the Promotion of Access to Information Act 2 of 2000.

(4) If, upon an inspection at a governmental body, the National Archivist in consultation with the Council, finds that an offence in the nature of subsection (1) is being committed by the members of that governmental body, the National Archivist shall:

(a) immediately take appropriate disciplinary steps against such person who does not comply with a provision of this Act or a regulation made thereunder;

(b) immediately report to the Minister the particulars of such non-compliance; and

(c) as soon as possible report to the Minister the particulars of the disciplinary steps taken.

(5) The Minister must immediately report to the Cabinet any non-compliance by a governmental body with a provision of this Act or regulation made thereunder along with the particulars of the disciplinary steps taken.

(6) Should the National Archivist, in consultation with the Council, decide on the basis of non-completion of the disciplinary process within reasonable time, that the matter be referred to the Public Protector for investigation, they may do so

under section 7 of the Public Protector Act 23 of 1994.

Amendment of certain expressions in Act 43 of 1996

16. The principal Act, is hereby amended by the substitution for the expressions “his or her” where it appears in the Act, of the relevant expression of “their”.

Short title and commencement

17. (1) This Act is called the National Archives and Record Services Amendment Act, 2024, and comes into operation X months from the date of publication in the *Gazette*, or an earlier date fixed by the President by proclamation in the *Gazette*.

DRAFT

MEMORANDUM ON THE OBJECTS OF THE NATIONAL ARCHIVES AND RECORDS SERVICES OF SOUTH AFRICA AMENDMENT BILL

1. BACKGROUND

At the time of introducing the Bill in Parliament, the relevant Department must set out the background to the Bill: why and how this Bill came about.

2. OVERVIEW OF BILL

- 2.1. The purpose of the proposed amendments to the Act is to update the National Archives and Records Services of South Africa, 1996, to take into account technological developments since its promulgation, and address contemporary and historical challenges to the effective preservation of records in accordance with government policy.
- 2.2. The objectives of the Bill are—
- 2.3. To define and update certain words and expressions taking into account technological and digital developments;
- 2.4. to provide for the proper preservation of all records in all languages bearing in mind that archives constitute the collective memory of nations and of societies, shape their identity, and are a cornerstone of an inclusive information society;
- 2.5. to provide for public access to official information and peoples' history, bearing in mind the need to redress colonial and apartheid-era discriminatory archival practices;
- 2.6. to provide for the recognition that archives are fundamental to democracy, accountability and good governance;
- 2.7. to provide for matters connected therewith.

3. ANALYSIS OF BILL

- 3.1. Clause 1 of the Bill proposes the insertion of new definitions necessitated by certain amendments embodied in the Bill.
- 3.2. Clause 2 of the Bill proposes the amendment of Section 3 to clarify the objects and functions of the National Archives.
- 3.3. Clause 3 of the Bill proposes the amendment of Section 4(1) to provide guidance to the Minister in appointing a National Archivist.
- 3.4. Clause 4 of the Bill proposes the amendment of Section 4(2) to provide for adequate staff.
- 3.5. Clause 5 of the Bill proposes the amendment of Section 5 to provide for the obligations of the National Archivist.
- 3.6. Clause 6 of the Bill proposes the amendment of Section 6 to clarify the appointment of members to the National Archives Advisory Council and their function and remuneration.
- 3.7. Clause 7 of the Bill proposes updating the reference to the responsible portfolio committee to be briefed.
- 3.8. Clause 8 of the Bill proposes the amendment of Section 11 to insert terms that clarify the role of the National Archivist and the Minister in managing public records.
- 3.9. Clause 9 of the Bill proposes the amendment of Section 12(3) to explain the

specific circumstances where the refusal of access may take place and insert references to other relevant legislation.

- 3.10. Clause 10 of the Bill proposes the amendment of Section 12(4) and the insertion of Section 12(5) to set out public access conditions and the Minister's regulation making role.
- 3.11. Clause 11 of the Bill proposes the insertion of Section 12A to align with relevant legislation on personal data processing.
- 3.12. Clause 12 of the Bill proposes the amendment of Section 13(3) to include preservation and conservation within the ambit of the Minister's regulation making power.
- 3.13. Clause 13 of the Bill proposes the amendment of Section 13(4) to include preservation and conservation within the ambit of the National Archivist's standard setting role.
- 3.14. Clause 14 of the Bill proposes the amendment of Section 14 to include references to relevant heritage legislation when dealing with non public records clarifying the scope of such records.
- 3.15. Clause 15 of the Bill proposes the amendment of Section 16 to clarify the nature and scope of penalties and disciplinary procedures.
- 3.16. Clause 16 of the Bill proposes the amendment of certain expressions.
- 3.17. Clause 17 of the Bill provides for the short title and commencement.

4. DEPARTMENTS/BODIES/PERSONS CONSULTED

- 4.1. At the time of introducing the Bill in Parliament, the relevant Department must set out the various stakeholders consulted in different sectors in discharge of its constitutional obligations set out in ss 72 and 118 of the Constitution.¹

5. FINANCIAL IMPLICATIONS FOR STATE

- 5.1. At the time of introducing the Bill in Parliament, the relevant Department must address and itemise any financial implications of the Bill for the annual budget.

6. PARLIAMENTARY PROCEDURE

Tagging

- 6.1. At the time of introducing the Bill in Parliament, the relevant Department must identify the appropriate tagging provision that the Bill must be brought under. The Bill must be considered against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4 and Schedule 5 to the Constitution. It is our considered view that the Bill is a s 76 Bill that affects the provinces since it sets minimum essential standards and national standards for matters of provincial competence in Schedule 5, per section 44(2) of the Constitution.

¹ See also, *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).