HONG KONG BAR ASSOCIATION

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4 March 2019

Dr. Hon Priscilla LEUNG, SBS, JP
Chairman
Panel on Administration of Justice and Legal Services
Legislative Council Complex
1 Legislative Council Road, Central
Hong Kong.

Dear Priscilla

Panel on Administration of Justice and Legal Services

Please find a copy of the Combined Views of the Hong Kong Bar Association dated 1 March 2019 on the Law Reform Commission of Hong Kong "Archives Law Sub-Committee" and "Access to Information Sub Committee" Consultation Papers, for the consideration of the AJLS Panel.

Thank you.

Yours sincerely,

Philip Dykes SC
Chairman

The Law Reform Commission of Hong Kong
Archives Law Sub-Committee
Access to Information Sub-Committee
Consultation Papers

Synopsis of the Views of the
Hong Kong Bar Association

1. The following is a summary of the most important submissions made by HKBA.

2. The current placement of **GRS** within the Government should be replaced by a fully externalized statutory public authority headed by a Chief Archivist and advised and supervised by a Public Information and Archives Commission (**PIAC**) whose functions include advising the Government on archives matters; supervising the Chief Archivist and the GRS and hearing appeals.

3. Legislation should be enacted to impose a positive legal duty upon the Government and specified public authorities to create and keep records, backed by criminal sanction. The legislation should empower the PIAC to investigate allegations of breach of the duty, to recommend civil service disciplinary proceedings and/or criminal prosecution.

4. Under the externalized model, the GRS shall continue to operate the Public Records Office to receive public records transferred after the general retention period of 15 years, and then make available the same for public inspection. Individual departments may apply to the Chief Archivist to extend the transfer of particular records on specified statutory grounds which extension should be no more than 2 years at any one time and not more than 5 years on aggregate.

5. The HKBA considers that the access to information regime should at least cover the list of organizations to which the Ombudsman Ordinance (Cap.397) applies. Further, there is a clear need to expand coverage to other public authorities such as the Hong Kong Council for Accreditation of Academic and Vocational Qualifications, the Hong Kong Examinations and Assessment Authority, the Hong Kong Tourism Board etc..

6. In relation to exemption of information from the new access to information regime the methodology of "absolute and qualified exemptions" is not endorsed since the question of exemption has to be a function of a function of variants such as time, nature, purpose and circumstances so that it should be left to an omnibus and flexible approach to be adopted by the PIAC as regulator. The legislation should provide a test of refusal to disclose according to the needs in a democratic society and proportionate to the specified protective aims.

COMBINED VIEWS OF THE HONG KONG BAR ASSOCIATION

7. The Hong Kong Bar Association (**HKBA**) submits its views on the Consultation Papers issued by the Archives Law Sub-Committee (**the AL Paper**) and the Access to Information Sub-Committee (**the Access Paper**) of the Law Reform Commission of Hong Kong in December 2018. The HKBA's views on these Consultation Papers are presented in this combined manner in light of the acknowledged inter-relation between these two topics and the in tandem working relationship of the two Sub-Committees.

8. The HKBA will first state its views on the AL Paper concerning the management and preservation of and access to government or public records and then on the Access Paper concerning the access by the public to information held by the government or public authorities. The HKBA notes that some of its views on the Access Paper will apply to archival records both at their pre and post-archive stage.

9. The HKBA notes with serious concern that the AL Paper sets out consultation question(s) only whereas the Access Paper sets out recommendations, with the implication that the AL Sub-Committee has *not* reached provisional views on some of the issues it has carriage under its terms of reference. If this is the case, there is a serious possibility that the two Sub-Committees may not thereafter be able to proceed in tandem or that the AL Sub-Committee's longer deliberations (which could lead to another round of consultation) might delay the preparation of the reports of both Sub-Committees and their finalization for adoption by the Law Reform Commission as recommendations to the Government. Given that the Sub-Committees have been in operation since 2013, further delay will become undesirable since obviously it is in the public interest for the new laws to be introduced, enacted and implemented as soon as practicable.

The AL Paper

10. The HKBA is surprised to note that while the AL Paper acknowledges and refers to the reports of the Audit Commission (2011) and the Ombudsman (2014) of the current administrative public records management system, with the latter informing the public that most Government Bureaux/Departments had failed to comply with the milestone dates for compliance with General Circular No.2/1999 (**GC 2/2009**) on "mandatory records management requirements" and summarizes in para 1.21 the "main comments" of the above reports and other reports, the AL Paper fails to inform the public any improvement or measures to improve accomplished by the Bureax/Departments to comply with the overdue requirements of GC 2/2009. It is noted that in para 5.33 relating to the issue of a new Guideline cum Checklist concerning records retention and disposal in 2015 and in para 8.37 relating to efforts of the Government Records Service (**GRS**) to conduct "records management reviews" pursuant to General Circular No.5/2012 (**GC 5/2012**) the public is informed that up to now the GRS has only reviewed such work of 10 Bureax/Departments and is conducting review on 3 others. The HKBA expresses concern that either the AL Paper has been drafted in a way failing to include sufficient information on follow-up of the concerns and comments of the above two reports or that the AL Sub-Committee has not been provided with such information to enable it to assess the current situation.

11. **Consultation Questions 1**: The HKBA is of the view that the current placement of GRS within the Government should not continue. The system should be changed so that a public authority should be established *external* of Government and headed by a Chief Archivist and advised and supervised by a Public Information and Archives Commission (**PIAC**). The PIAC's functions shall include advising the Government, on request or on its own initiative, on recordkeeping and archives matters; recruiting and recommending the appointment by the Chief Executive of the Chief Archivist; supervising the Chief Archivist and the GRS (including the disposal of public records held by the GRS in relation to its own functions; the appropriate criteria for the independent audit of the recordkeeping practices of the Chief Archivist; and the review the GRS's risk management strategy); and reviewing customer and other stakeholder

relations. The PIAC shall consist of non-governmental members appointed by the Chief Executive following consultation of stakeholder organizations in the related professions and fields and must include a specified minimum of members who have experience and established ability in records management or archival research. The HKBA has considered the opinions referred to in Chapter 4 of the AL Paper suggesting that an archives service should be placed *within* the government hierarchy and at an influential level and other matters including transitional staff and management costs and the financial maintenance of the GRS to a public authority external of Government. The HKBA nevertheless considers that a fully externalized model driven by the PIAC in the areas of both archives services and the safeguarding of public access to information is in the public interest and more desirable.

12. The HKBA considers that the GRS may need to be renamed under the externalized model. A possible new name is the Hong Kong Archives. For convenience of reference only, the abbreviation GRS will continue to be used in the present Combined Views though in our view it will not be part of the government.

13. **Consultation Questions** 2: The HKBA notes that the documents and information currently published on the GRS's website appear to collate with the list of major rules and guidelines on public record management in Hong Kong in pp 3-5 of the AL Paper. The HKBA, on the other hand, observes that not all of these rules and guidelines are available in both Chinese and English. Rather, some are available only in English and some are available only in Chinese. This situation should be regularised.

14. The HKBA considers that the GRS and the Government should be required by statute to publish its standards and guidelines issued. Further, the GRS and the PIAC should be required by statute to publish annual reports on its work.

15. **Consultation Questions** 3: The HKBA considers that the current obligation for the creation of public records is not adequate in ensuring the proper creation of records. Legislation should be enacted to impose a positive legal duty upon the Government and specified public authorities to create records and this positive legal duty should be backed by

criminal sanction to deter any willful (or serious negligent) breach of the duty. In the light of the externalized model proposed, legislation to be enacted should empower the PIAC to investigate breach of the legal duty (with ancillary power of access, disclosure and seizure), to recommend civil service disciplinary proceedings and/or criminal prosecution following the investigation; and to require the Secretary for the Civil Service, the Secretary for Justice and/or the Public Service Commission to respond to recommendations of the PIAC within a statutorily specified period of time.

16. **Consultation Questions 4**: The HKBA considers that the AL Paper has failed to provide sufficient information on the past and current compliance by Bureux/Departments of the GRS's current guidance, namely the Guideline cum Checklist (2015), to enable the public to have a meaningful appreciation and discussion of the effectiveness of the current system. The HKBA therefore submits that the current guidance is not sufficient and propose that under the externalized model proposed, the GRS shall conduct regular review of retention and disposal schedules of different Bureaux/Departments and to publish the results of the review, including detailed criteria established, so as to enhance full compliance by Bureaux/Departments of their legal obligations even before the intervention by the PIAC.

17. **Consultation Questions 5**: The HKBA considers that under the externalized model, the GRS shall continue to operate the Public Records Office to receive government records transferred to it for appraisal and then make available the same for public inspection. The current arrangements, based on the Director of Administration's letter dated 21 March 2014 and the disposal schedules based on a general retention period of 30 years formulated by Bureaux/Departments primarily on their own, are not appropriate. The HKBA considers that the general retention period should be 15 years, to be prescribed by statute. This shorter period of general retention promotes open, transparent and accountable government. All records held by a Bureau/Department shall be transferred to the Public Records Office for appraisal at the expiry of this general retention period. Individual Bureau/Department may apply to the Chief Archivist for permission to defer transfer of particular records on specified statutory grounds, including for instance due to security and

external relationship of the HKSAR, maintenance of law and right to a fair trial, or endangering the safety of any person and excluding purported grounds such as "operational need", "for reference" and "policies being reviewed". Permissions to extend shall not be more than 2 years at any one time and shall not be more than 5 years on aggregate. Permissions given should be noted in a register. A refusal on the part of the Chief Archivist to permit deferral of transfer is subject to appeal by the Bureaux/Departments to the PIAC.

18. The HKBA considers that while the Bureaux/Departments will continue to be the decision-makers to review and determine the access status of archival records at first in accordance with guideline published by the GRS, the Chief Archivist shall be empowered by legislation to review the "closed" access status determined by the transferring Bureaux/Departments and approve or disapprove such an access status. A disapproval on the part of the Chief Archivist of such an access status is again subject to appeal by the Bureaux/Departments to the PIAC. If a Bureau/Department does not determine the access status of an archival record on transfer, this archival record shall be made available for public inspection.

19. The HKBA's views above should be read together with its views on the current list of exemptions under the Code of Access of Information (**CAI**) and the recommendations on exemptions in Chapter 10 of the Access Paper, which are set out below.

20. **Professional and staff support for GRS**: The HKBA notes with concern that the AL Sub-Committee makes no recommendation in relation to the critical matter of professional and staff support for GRS in para. 5.95 of the AL Paper. The Consultancy Report appears to be premised uponthe GRS shall stay under the umbrella of the Government. The AL Sub-Committee seems to have adopted this premise relying on excuses such as resources and manpower supply or allocations are outside its terms of reference and failsat least to make a remark concerning the importance of ensuring that the GRS shall be properly resourced and appropriately and professionally staffed. Further, the Consultancy Report is unduly limited in its terms of reference to consider existing requirements and does not consider the long term needs of professional archivists in Hong Kong The

HKBA notes that the educational avenues previously available to obtain the necessary professional qualifications of archivists in Hong Kong have become closed (see news report in 'Sunday workshop', *Ming Pao*, 13 January 2019). The externalized model proposed in the present submission is likely to impact on the resources and staffing of the GRS and the PIAC which should be supported by the government.

21. **Consultation Question 6**: The HKBA underlines that a document created out of the input or generation of electronic or digital information should be included in the definition of a "record" or an "information" in legislations related to official or public recordkeeping and access to public records and information. While the HKBA, like the Sub-Committee, is keen to ensure a steady and expeditious implementation of electronic record keeping system across the Bureax/Departments of Government, there should at the same be retention of expertise and know-how on existing means of non-digital recordkeeping, such as microfilm and microfiche.

22. **Consultation Questions 7**: The HKBA considers that the current Personal Data (Privacy) Ordinance (Cap.486) ss 26, 62, 63D and data protection principle 3 appear to strike a reasonable balance between the preservation of archives and protection of personal data. The principle of data minimization recently highlighted in the European Union's General Data Protection Regulation appears to be substantively safeguarded under the Personal Data (Privacy) Ordinance's data protection principle 1 (purpose and manner of collection of personal data).

23. **Consultation Questions 8**: The HKBA agrees with the Sub-Committee's provisional view to follow the approach of other jurisdictions where census information is preserved. The HKBA considers that if the adopted period of confidentiality of census information is 100 years from the relevant census, there is no need to make the subject individual's consent a precondition for preserving his/her census schedule.

24. **Consultation Questions 9**: As stated above in relation to Consultation Questions 5, the HKBA proposes the current time frame be changed to a statutory time frame of 15 years for the reasons above stated.

25. **Consultation Questions 10**: The HKBA considers that the existing measures are not sufficient to ensure compliance by the Bureaux/Departments with their record management obligations. As stated above in relation to Consultation Questions 3 and 4, the HKBA proposes that the Bureuax/Departments be subject to a statutory positive legal obligations of record management that are backed up by the powers of the GRC to review their recordkeeping, retention and disposal programmes regularly and the authority of the PIAC's powers of investigation and recommendation of sanction. The HKBA adds that there should be a separate criminal offence for the destruction of a record with intent to prevent disclosure after a request for information has been made. The HKBA considers that the GRS and the PIAC shall discharge their functions of providing training, guidance and advice to Bureaux/Departments on records and archives management to enable full compliance and foster a strong culture to do so in the public interest.

26. **Consultation Question 11**: The HKBA considers that the above considerations all point to the introduction of legislation to establish the externalized model for regulating public archives in Hong Kong.

27. **Consultation Questions 12**: The HKBA considers that the proposed externalized model legislation should at least cover the existing entities of Bureaux/Departments and the ICAC and the HK Monetary Authority. As to the extent of oversight by the PIAC, is is set out above.

<u>The Access Paper</u>

28. The Access Paper adopts a different approach of stating a list of recommendations for consultation. The HKBA has set out above its proposal in respect of the externalized model of advice, supervision and regulation anchored on the PIAC. The HKBA will examine the recommendations made in the Access Paper.

29. **Recommendations 1 and 2**: The HKBA is in favour of introducing legislation to implement an access to information regime. The HKBA addresses below the key features of this legislation based on the externalized model proposed above.

30. The HKBA considers that the PIAC should be an independent statutory authority external to the government to administer the statutory access to information regime. The PIAC's functions in relation to the administration of this regime shall include production and promulgation of codes of practice, promotion and recommendation of good practice, dissemination of information, giving of advice, assessment/audit/process review and training to ensure that the Government and public authorities subject to the new legislation commit to the values of accountability, transparency and openness through access to information. The PIAC shall also have an international role to exchange views and experience with relevant bodies outside of Hong Kong.

31. **Recommendation 3**: The HKBA is in favour of having a general, non-exhaustive and technological neutral definition of "information" in the access to information regime. This definition should include items (a) to (e) listed in this recommendation. The HKBA adds that the access to information regime should not only apply to recorded information but also to non-recorded information held by a principal officials and heads of departments/authorities/commissions/boards in their official capacities, with the rider that applications by a member of the public for access to non-recorded information should be made to the PIAC, which shall decide whether the information holder should provide a written statement in relation to the application.

32. **Recommendation 4**: The HKBA is in favour of an access to information regime that includes proactive disclosure provisions. The HKBA considers that the PIAC should be empowered to administer the proactive disclosure provisions through prescribing a model publication scheme that can be further reviewed and augmented in light of the structure, policies, services and operations of the relevant Bureau/Department/Authority/Commission/Board.

33. **Recommendation 5**: The HKBA considers that the list of organizations to which The Ombudsman Ordinance (Cap.397) applies (in Sch 1 of that Ordinance) should be the minimum baseline for the coverage of the access to information regime. On the other hand, the HKBA finds that there is a clear need to expand coverage from that list. The list under Cap

397, for instance, covers only the Kowloon-Canton Railway Corporation but not the MTR Corporation Limited that currently owns and runs it. And public authorities like the Hong Kong Council for Accreditation of Academic and Vocational Qualifications, the Hong Kong Examinations and Assessment Authority, the Hong Kong Quality Assurance Agency, the Hong Kong Tourism Board and the Hong Kong Trade Development Council are not in the said list. Further, that list has not been updated in relation to the Legislative Council Secretariat, which has now become the Legislative Council Commission, a statutory body.

34. **Recommendation 6**: The HKBA is in favour of an access to information regime that provides that any person (individual or corporate) irrespective of whether he/she is a Hong Kong resident is eligible to make an access to information request.

35. The Access Paper has not made recommendations on certain key features of an access to information regime. The HKBA is in favour of an access to information regime that underlines a presumption of disclosure, specifies a timeframe for response, and requires refusals to be supported by sufficient reasons.

36. **Recommendation 7**: The HKBA is in favour of an access to information regime that charges a basic application fee, subject to provisions allowing the Bureau/Department/Authority/Commission/Board concerned to charge an additional fee on the ground that it estimates that completing the access to information request will exceed a specified number of man-hours (say 10 man-hours) and allowing the Bureau/Department/Authority/Commission/Board concerned to decline to process or complete an access to information request after it has expended a prescribed upper limit of man-hours (say 20 man-hours). These decisions of the Bureau/Department/Authority/Commission/Board concerned are subject to appeal to the PIAC.

37. **Recommendation 8**: The HKBA is in favour of an access to information regime that does not charge a fee for applications for archival records and only a recovery of costs fee for reproduction of archival records and provision of other services.

38. **Recommendation 9**: The HKBA accepts that an access to information regime should include provisions that handle vexatious and repeated applications. The HKBA considers that while repeated applications can be objectively identified, it is less so in the case of vexatious applications, particularly where relevant criteria, like those stated in the recommendation, involve a judgment in terms of degree and extent. The HKBA considers that an access to information regime should include provisions for the Bureau/Department/Authority/Commission/Board concerned to decline to process or complete an access to information request if it is of the opinion that the application is vexatious, and such a decision is subject to appeal by the applicant to the PIAC.

39. **Recommendations 10 to 12**: These recommendations concern the critical topic of exemption of categories of information from an access to information regime. Currently, the CAI allows a Bureau/Department to refuse to confirm or deny the existence of information thought to be falling within the types of information disclosure of which may be withheld. There are 36 grounds for withholding information sought under an access to information request in Part 2 which provides that information coming within most of these types of information may be withheld after applying a "harm or prejudice" test. The Constitutional and Mainland Affairs Bureau's guidelines also states in para 2.1.1: "If there is a clear public interest in disclosure, departments may, *after obtaining any necessary authority*, disclose information which could be withheld. ... Departments should **not** interpret the provisions in Part 2 of the Code as directives to withhold information requested. *If in doubt in any particular case, departments may wish to seek advice from the appropriate policy bureau and/or seek legal advice, if necessary*" (italics supplied). These guidelines suggest (in para 2.2.2) that "harm or prejudice" can be applied "*if there is a risk or reasonable expectation of harm in the circumstances. When balancing the risk against the public interest in disclosure, the weight to be attached to the risk will depend on the nature of harm which might result*" (italics supplied). On the other hand, para 2.2.4 states that Part 2 provisions containing reference to "harm or prejudice" may, "where there is no statutory restriction or legal obligation which prevents, disclosure, be set aside *in circumstances where there is a clear public interest in disclosure of the information sought and this public interest*

outweighs the harm or prejudice that may result to the Government or to any other person" (italics supplied). Para 2.2.6 explains that "public interest" is "*a difficult concept to define*" (italics supplied) and after citing an example relating to public interest overriding copyright points to the many other cases considering the words "public interest" and the "many varying interpretations ... offered", before drawing attention to a dictionary meaning of "public interest" and to changing perception of what is in the "public interest". These guidelines are hardly helpful.

40. The Access Sub-Committee recommends the adoption of the methodology of "absolute and qualified exemptions", which is said to be used in a number of common law jurisdictions surveyed. A closer look suggests a variety of methodologies, such as "unconditional exemptions and conditional exemptions" (Australia), "mandatory exemptions that must be invoked and discretionary exemptions that may be invoked" (Canada), "subject matter based exemptions to which different tests are applicable" (Ireland), "exemption established by a conclusive reason and exemption established by other reason and passing a public interest test" (New Zealand), and "an omnibus test of structured elements of legal precision, necessity in a democratic society and being proportionate to one or more of specified protective aims" (Council of Europe's Convention on Access to Official Documents 2008). Having considered this variety of methodologies, the HKBA considers that the Access Sub-Committee recommends in substance the methodology used in the United Kingdom under Part II of the Freedom of Information Act 2000.

41. The HKBA is unable to endorse the division between absolute exemptions and qualified exemptions advocated by the Access Sub-Committee in para 10.27 of the Access Report. The Sub-Committee made the *pre-emptive* assumption in respect of the types of information it seeks to assign under absolute exemptions that the public interest for and against disclosure has already been weighed. This assumption does not, with respect, hold good since the weighing of the public interest for and against disclosure is plainly a function of variants such as time, nature, purpose and circumstances. Furthermore, the two examples referred to in para 10.27 are only applicable (if at all) to the particular type of information in question, namely a type of information in respect of which

there is already legislation or common law principles governing disclosure. These examples can hardly be representative of all types of information the Sub-Committee seeks to include as "absolute exemptions". Further, some of the types of information sought to be assigned under absolute exemption are classified on grounds of administrative convenience or regime diversion only, such as "information accessible to applicant by other means", "court records", "Legislative Council privilege", and even "legal professional privilege".

42. The HKBA's proposed externalized model is based on the premise that the PIAC is the standard-setter, adviser, auditor and regulator which will enable an omnibus and flexible approach to be adopted. The HKBA considers that legislation providing for the access to information regime should provide for a test of refusal to disclose requiring satisfaction of necessity in a democratic society and being proportionate to one or more of specified protective aims, ie the Council of Europe approach, with some and not necessarily all the headings of absolute exemptions and qualified exemptions set out in paras 10.28 and 10.30 incorporated. The PIAC should be concomitantly empowered to produce and promulgate a code of practice for making of decisions by the responsible officer of the Bureau/Department/Authority/Commission/Board concerned, which shall include guidance on the performance of the necessary weighing, balancing and ultimately, justificatory exercise where it is established that a particular protective aim or interest is engaged; and may include guidance on the approach of decision-making by type of information as well. As it is envisaged below that the PIAC is to be the authority determining appeals from refusal decisions, it is expected that the PIAC will produce and accumulate further and better decision/experience/lesson based guidance and revise the code of practice in operation.

43. The HKBA needs to caution against one alleged ground for refusal of disclosure, which is "prohibition by or under any enactment or law, or would constitute or be punishable as a contempt of court, or constitutes a breach of any obligation arising under common law or under any international agreement which applies to Hong Kong" (para 10.28(5)). The HKBA views the exercise of the enactment of the legislation

establishing the access to information regime to be the opportunity for examining and settling potential conflicts or incongruences between the presumption of disclosure of information and the various prohibitions of disclosure provided in the current laws. A serious exercise in establishing a statutory access to information regime does not evade this responsibility by subsuming the regime under the existing prohibitions without question and debate.

44. The HKBA expresses serious concern that the Access Sub-Committee appeared to be labouring under the perception that the HKSAR Government is in no position to decide whether or not the release of certain information regarding national and the HKSAR's security and the defence of the HKSAR would harm or prejudice the HKSAR's defence and security (para 10.28(6)) and that the HKSAR Government is in no position to decide whether or not the release of certain information regarding foreign or external relations would harm or prejudice the HKSAR's external relations (para 10.28(7)). The HKBA regards these perceptions to be wrong. The Official Secrets Ordinance (Cap.521) provides with a degree of objectivity in Part III definitions of security and intelligence information, information relating to defence and information relating to international relations for the purpose of prohibiting unlawful disclosure of these types of information and the proper interpretation of these provisions is a matter of the HKSAR courts. It is a matter of serious concern that the Access Sub-Committee of the Law Reform Commission of the HKSAR Government makes these claims denying the autonomy of the HKSAR jurisdiction to make determinations on these matters on an objective basis.

45. **Recommendation 13**: The HKBA does not accept this recommendation. As stated above, the HKBA considers the question of disclosure to be a function of time, nature, purpose and circumstances. And the HKBA has advised against the methodology of assigning types of information under "exemptions". Accordingly, the HKBA is not in favour of setting non-disclosure duration for specified types of information in the statutory access to information regime. The HKBA notes that in relation to Consultation Question 5 above, the HKBA expresses the view that there be a general retention period of 15 years under an archival legislation. The HKBA would underline that where an access to information is made

for information held by a Bureau/Department within the general retention period of 15 years, the Bureau/Department is obliged to consider the application applying the tests of necessity and proportionality provided under the statutory access to information regime.

46. **Recommendation 14**: This recommendation raises the controversial topic of "conclusive certificates", made famous by the litigation in the UK over the request for disclosure of letters between HRH Prince Charles and a number of UK government departments; see *R (Evans) v Attorney General* [2015] AC 1787 (UKSC). See also Access Paper, paras 12.8-12.26. It appears that a certificate mechanism is not a necessary element in an effective statutory access to information regime, as Australia has demonstrated since 2009, when provisions on certificates were removed from its freedom of information legislation (para 12.30). Also, the Access Report's description of the Canadian legislation accepts that the relevant legislation does not make provisions for issuing of certificates and the alleged use of certificates is based on unspecified "reports" (para 12.31 and footnotes). However, the Access Sub-Committee considers that a form of certificate mechanism should be a feature in a statutory access to information regime.

47. The HKBA expresses the view that a statutory access to information regime can operate effectively in the absence of any certificate mechanism. The statutory access to information regime under the externalized model centred upon the PIAC can ensure the proper consideration of executive or governmental interests by providing for an avenue of intervention by the Secretary for Justice in an appeal before it from a Bureau/Department's refusal to disclosure in light of an access to information application.

48. **Recommendation 15**: This recommendation applies to "closed records" held in GRS. Under the externalized model proposed, an application of access to a "closed record" will be made to the Chief Archivist, who will make his decision after receiving the views of the related Bureau/Department. If the Chief Archivist refuses disclosure, his decision is subject to appeal to the PIAC and as stated above, the Secretary for Justice may intervene in the appeal.

49. **Recommendations 16, 17, 19**: These recommendations are concerned with the multiple review and appeal stages of the statutory access to information regime. The HKBA has made submissions on the avenues of appeal to the PIAC. The HKBA now sums up its submissions on the multiple review and appeal stages under the externalized model: ***First stage***: Internal review of the decision by another officer or officer of a higher rank of the Bureau/Department/Authority/Commission/Board concerned (and in the case of archived information, by the Chief Archivist personally, whether the first decision was made by a subordinate under delegated authority or by him/her); ***Second stage***: Appeal to the PIAC, which is empowered to hear and determine appeals either by a committee of three chaired by one of its legally qualified members or by the PIAC *en banc* (which is the mandatory option in an appeal where the Secretary for Justice intervenes); ***Third stage***: Appeal to the Court of Appeal by the applicant or the Secretary for Justice.

50. Where the PIAC, on appeal, determines that the Bureau/Department/Authority/Commission/Board concerned (and in the case of archived information, the Chief Archivist) has failed to communicate information, the PIAC has the power to issue a decision notice which specifies the steps which the public body must take and the time within which the steps must be taken.

51. Where the Bureau/Department/Authority/Commission/Board concerned (and in the case of archived information, the Chief Archivist) has decided an application for access to information in favour of disclosure but has not done so within the time specified in the decision letter or the alternative maximum timeframe specified in legislation, or has otherwise failed to comply with a requirement under the statutory access to information regime, the applicant concerned is entitled to apply to the PIAC for an enforcement notice. Where the PIAC is satisfied that the public body in question has failed to comply with any of the requirements under the regime, the PIAC is empowered to serve on the public body with an enforcement notice requiring it to take such steps within a specified time in order to comply with those requirements.

52. All decision notices and enforcement notices are entered into a register open for inspection by members of the public at no fee and also published.

53. Consideration should also be given to further empower the PIAC to apply *inter partes* to the Court of First Instance in a case of non-compliance with an enforcement notice for relief converting an enforcement notice into a corresponding court order, including a quashing order, a take action order or an injunction.

54. **Recommendation 18**: The HKBA agrees that where a request for information has been made to a Bureau/Department/Authority/Commission/Board/the Chief Archivist, it shall be a criminal offence to alter, erase, destroy or conceal records with intent to prevent disclosure of records or information. The HKBA also agrees that any failure on the part of the public body to comply with a duty should not confer any right of action in civil proceedings.

55. **Cost**: The HKBA accepts that a statutory access to information regime generates expectation from the public and is likely to raise the number of applications for access to information, with implications on the public revenue. The HKBA also accepts that the externalized model involves the establishment of a public authority and the reprovision of a government department, with implications on the public revenue. On the other hand, staff of the Office of The Ombudsman who have been responsible for handling access to information complaints can be recruited to help with the establishment and commencement of operation of the PIAC and man-hour cost will in due course be lowered with the implementation of the statutory access to information regime through dissemination of information, training and gathering of experience.

56. **Recommendation 20**: This recommendation concerns the position of a third party whose rights and interests may be impinged by disclosure of information to which an access to information application relates, such as trade secret or business information provided in confidence to the Government. The HKBA is in principle in favour of including third party notification provisions in the statutory access to information regime. These provisions include an obligation to notify the third party (who supplied the confidential information) where it is minded to grant access to the applicant, so that the third party is able to make submissions before a decision is made. Where a third party who has made submissions against disclosure fails to prevent disclosure, he/she has standing to

appeal to the PIAC against the disclosure decision. In the case of a third party who cannot be notified, the responsible officer may apply to the PIAC for a direction, which can include dispensing with the notification requirements. Regarding archived records, the HKBA is not disposed to include notification provisions.

57. Lastly, in the case that the Access Sub-Committee is able to proceed more expeditiously in finalizing its recommendations to the Law Reform Commission, the HKBA urges the Access Sub-Committee to do so without having to work in tandem with the AL Sub-Committee.

Dated: 1st March 2019.

HONG KONG BAR ASSOCIATION