

THE LAW REFORM COMMISSION OF HONG KONG

ARCHIVES LAW SUB-COMMITTEE

CONSULTATION PAPER

ARCHIVES LAW

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This Consultation Paper has been prepared by the Archives Law Sub-committee of the Law Reform Commission. It does not represent the final views of either the Sub-committee or the Law Reform Commission, and is circulated for comment and discussion only.

The Sub-committee would be grateful for comments on this Consultation Paper by 5 March 2019. All correspondence should be addressed to:

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It may be helpful for the Commission and the Sub-committee, either in discussion with others or in any subsequent report, to be able to refer to and attribute comments submitted in response to this Consultation Paper. Any request to treat all or part of a response in confidence will, of course, be respected, but if no such request is made, the Commission will assume that the response is not intended to be confidential.

It is the Commission's usual practice to acknowledge by name in the final report anyone who responds to a consultation paper. If you do not wish such an acknowledgment, please say so in your response.

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List of abbreviations

Archival bodies

ACNRA		Advisory Council on National Records and Archives (England)
Advisory Council (Ire)		National Archives Advisory Council (Ireland)
Archives (NZ)	Council	Advisory council established under Public Records Act 2005 (New Zealand)
ANZ		Archives New Zealand
GRS		Government Records Service (Hong Kong)
NAA		National Archives of Australia
NAAAC		National Archives of Australia Advisory Council
NAI		National Archives of Ireland
NAS		National Archives of Singapore
NLB		National Library Board (Singapore)
PRO		Public Record Office (England)
TNA		The National Archives (England)

Legislation

1958 Act	Public Records Act 1958 (England)
1983 Act	Archives Act 1983 (Australia)
1986 Act	National Archives Act 1986 (Ireland)
2005 Act	Public Records Act 2005 (New Zealand)
NLBA	National Library Board Act (Cap 197)(Singapore)
FOIA 2000	Freedom of Information Act 2000 (England)

Reports

2007 Civic Exchange Report	Christine Loh, Marcos Van Rafelghem and Jaimie C Graham, " <i>Managing Public Records for Good Governance and Preservation of Collective Memory: The Case for Archival Legislation</i> ", Civic Exchange, March 2007
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2011 Civic Exchange Report	Christine Loh and Nick Frisch, <i>"The Memory Hole: Why Hong Kong Needs an Archives Law"</i> , Civic Exchange, November 2011
Audit Commission's Report	Chapter 10, <i>Report No. 57 of the Director of Audit on records management work of the Government Records Service</i> , 25 October 2011
Ombudsman's Report	Direct Investigation Report - Public Records Management in Hong Kong issued by the Office of The Ombudsman in March 2014
Parer's Report	Dagmar Parer, <i>"Archival Legislation for Commonwealth Countries"</i> (Association of Commonwealth Archivists and Records Managers, 2001)
RAMP Study	Eric Ketelaar, <i>"Archival and Records Management Legislation and Regulations: A RAMP Study with Guidelines"</i> (United Nations Educational, Scientific and Cultural Organisation (UNESCO), 1985)

Miscellaneous

ATI Sub-committee	Sub-committee on Access to Information of the Law Reform Commission of Hong Kong
B/D	Government bureau or department
CAI	Code on Access to Information (Hong Kong)
DRM	Departmental Records Manager
ERKS	Electronic Recordkeeping System
GARDS	General Administrative Records Disposal Schedules
LegCo	Legislative Council of Hong Kong Special Administrative Region
Lord Chancellor's Code	Lord Chancellor's Code of Practice on the management of records issued under section 46 of the Freedom of Information Act 2000 (England)
OGCIO	Office of the Government Chief Information Officer
PAC Information Note	Information Note to Public Accounts Committee on Chapter 10 of the Director of Audit's Report No 57 entitled "Records Management Work of the Government Records Service" contained in the letter dated 19 December 2011 to the Clerk of PAC

**List of major rules and guidelines on
public records management in Hong Kong**

	Abbreviation	Publication	Date of Issue/ Last Update
1	DOR	Disposal of Original Records (for records that have been digitised and stored in a digital form) (English version only)	April 2017
2	ECPLGP	General Circular No 1/2001: "Establishment of the Central Preservation Library for Government Publications"	30 January 2001
3	EDRMP	Administration Wing Circular Memorandum No 5/2012: "Establishment of Departmental Records Management Policies" (English version only)	11 July 2012
4	EIMSF	Office of the Government Chief Information Officer Circular No 1/2011: "Electronic Information Management Strategy and Framework" (English version only)	3 May 2011
5	FRERKS	Functional Requirements of an Electronic Recordkeeping System (version 1.2) (English version only)	September 2016
6	GBR	Guidelines on Bulk Relocation of Government Records (English version only)	July 2015
7	GC06	General Circular No 5/2006: "Management of Government Records"	28 December 2006
8	GC09	General Circular No 2/2009: "Mandatory Records Management Requirements"	22 April 2009
9	GC12	General Circular No 5/2012: "Records Management Reviews"	5 October 2012
10	GCCR	Administration Wing Circular Memorandum No 4/2012: "Guidelines on Creation and Collection of Records" (English version only)	6 July 2012
11	GFP	Guidelines on Filing Practices (Chinese version only)	October 2015
12	GISCSAR	Guidelines on the Implementation of the Standard Classification Scheme for Administrative Records (English version only)	May 2009

	Abbreviation	Publication	Date of Issue/ Last Update
13	GMEM	Guideline on the Management of Electronic Messages	December 2017
14	GMRHE	Guidelines for Managing Records in a Hybrid Environment (English version only)	March 2016
15	GR	General Regulations of The Government of The Hong Kong Special Administrative Region (Regulations of The Government of The Hong Kong Special Administrative Region, Volume 1)	November 2016
16	GRMP	Good Records Management Practices	October 2011
17	GTRPA	Guidelines for Transferring Records to Public Records Office of GRS for Appraisal (English version only)	February 2015
18	Guideline cum Checklist	Guideline cum Checklist for Review of Records Retention and Disposal Schedules (English version only)	April 2017
19	Handbook 2015	A Handbook on Records Management Practices and Guidelines for an Electronic Recordkeeping System (English version only)	January 2015
20	HPER	A Handbook on Preservation of Electronic Records (English version only)	31 July 2013
21	PRAR	Public Records (Access) Rules 1996	1996
22	RKMS	Recordkeeping Metadata Standard for the Government of the Hong Kong Special Administrative Region (version 1.1) (English version only)	September 2016
23	RMM	Records Management Manual	August 2001
24	RMP1	Records Management Publication No 1 – A Practical Guide to Records Scheduling and Disposal (English version only)	May 2015
25	RMP2	Records Management Publication No 2 – Managing Active Records: File Management (English version only)	March 2018
26	RMP3	Records Management Publication No 3 – Subject Filing (English version only)	March 2018
27	RMP4	Records Management Publication No 4 – General Administrative Records Disposal Schedules (GARDS) (English version only)	October 2013

	Abbreviation	Publication	Date of Issue/ Last Update
28	RMP5	Records Management Publication No 5 – The Microfilming User Manual (English version only)	March 2018
29	RMP6	Records Management Publication No 6 – Manual on Vital Records Protection (English version only)	August 2017
30	RMP7	Records Management Publication No 7 – Topical Guide cum Checklists for Proper Records Management Practices (English version only)	March 2018

Preface

Introduction

1. Archives record decisions, actions and memories. They are a unique and irreplaceable heritage passed from one generation to another.¹ Archives and records are also tools by which governments can make themselves accountable. Well-managed archives and records enable people to understand the "*who, when, where, how and why of government actions*". Archives are therefore central to good governance.² In Hong Kong, the management and archiving of government records are regulated under an administrative regime. The Government Records Service ("**GRS**"), under the purview of the Administration Wing of the Chief Secretary for Administration's Office, is tasked with overseeing the overall management of government records, and ensuring that they are properly managed whilst those with archival value are selected for preservation and public access. Government bureaux and departments ("**B/Ds**") are required to establish their records management programmes in accordance with the administrative guidelines and requirements issued by the Government in relation to the management of their records.

2. In recent years, there have been calls from concern groups, the media and legislators, for the government to strengthen its protection of government records, with some urging for the introduction of an archives law in Hong Kong. Besides, the rapid development of electronic technologies for the management of information and the increasing use of information systems have also brought about new challenges to the conventional recordkeeping mechanism.

Terms of Reference of the Archives Law Sub-committee

3. The Chief Justice and the Secretary for Justice referred the topic of archives law to the Law Reform Commission of Hong Kong for consideration. The Archives Law Sub-committee was established in May 2013 to conduct a comprehensive study on this topic. The Terms of Reference of the Sub-committee are:

"To review the current regime relating to management and preservation of, and access to government or public records for

¹ *The Universal Declaration on Archives* adopted by the 36th session of the General Conference of UNESCO in 2011, available at:
<https://www.ica.org/sites/default/files/UDA_June%202012_web_EN.pdf>.

² See "*Why archiving?*" on the webpage of the International Council on Archives:
<<https://www.ica.org/en/why-archiving>>.

the purposes of considering whether reform is needed and if so, to make such recommendations for reform as appropriate."

4. Readers may note that the Access to Information Sub-committee ("**ATI Sub-committee**"), also set up in 2013 by the Law Reform Commission of Hong Kong, is tasked with the responsibility to "*review the current regime relating to **access** by the public to information held by the government or public authorities*" (*emphasis added*). For the avoidance of doubt, it is pointed out here that the ATI Sub-committee is concerned with the *right* to access, whereas the Archives Law Sub-committee is concerned with the *management* of physical access. The former looks into matters such as the recognition of a right to access and exemptions appertaining thereto; the latter addresses administrative and operational matters in relation to the preservation of records as archives. The two Sub-committees therefore work under a clear division of labour, separately but alongside each other, with the goal that in the end, a single, universal, and consistent set of rules should apply.

Membership of the Archives Law Sub-committee

5. The Sub-committee is chaired by Mr Andrew Liao, GBS, SC, JP, with members comprising representatives of relevant bureaux, stakeholders, and lawyers. The members of the Sub-committee are as follows:

Mr Andrew Liao, GBS, SC, JP (Chairman) ³	Senior Counsel
Mr Michael Chan	Consultant, Wilkinson & Grist
Ms Kitty Choi, JP	Director of Administration, Chief Secretary for Administration's Office
Mr Richard Khaw, SC	Senior Counsel
Miss Rosanna Law, JP (from 10 September 2016) ⁴	Deputy Secretary for Constitutional and Mainland Affairs 1, Constitutional and Mainland Affairs Bureau
Mrs Stacy Belcher Lee ⁵	Director, University Archives, The University of Hong Kong

³ Mr Liao is also the Chairman of the Council of the Hong Kong University of Science and Technology.

⁴ Mr Gordon Leung, JP (then Deputy Secretary for Constitutional and Mainland Affairs 1, Constitutional and Mainland Affairs Bureau) was a member of the Sub-committee from its establishment until 9 September 2016.

⁵ Mrs Lee is also a member of the Archives Action Group.

6. Mr Byron Leung in the Law Reform Commission Secretariat is the secretary to the Sub-committee.⁶

Methodology adopted for the Sub-committee's study

7. The Sub-committee commenced its work in June 2013 and held 43 meetings as at the publication of this Paper.

8. This Paper endeavours to provide an overview of the existing scheme of management of government records in Hong Kong, the main concerns over this scheme by various concerned parties and the Government's response thereto, followed by a list of relevant issues that calls for the public's consideration. It is noteworthy that records and archives management is a specialised subject in its own rights. Its detailed workings and the intricacies involved are probably too technical for the general public. In this Paper, we have attempted to be as reader-friendly as we possibly can so that the public can make informed decisions in considering the relevant issues. We therefore believe it more constructive to, apart from setting out our observations and provisional views⁷ where appropriate, pose various consultation questions (especially open-ended ones) in this Paper for the sake of galvanising consideration of, and responses to, the issues raised. It should further be noted that this Paper will not go into the theoretical underpinnings which we appreciate are abundant in the literature of archival science. The study of various archival theories constitutes an academic discipline in itself and exceeds the scope of our Terms of Reference.

9. This Paper has looked into the law and practice of a number of jurisdictions. More specifically, we have focused on five overseas jurisdictions (namely, Australia, England, Ireland, New Zealand, and Singapore), although references are also made to other jurisdictions where appropriate. These five jurisdictions are common law jurisdictions which bear closer resemblance to Hong Kong's legal system. Their laws and rules governing public records management could serve as useful references in our study.

10. In this consultation exercise, the Sub-committee is seeking to consult the public as to whether reform of the current public records management regime is needed; and if so, what kind of reform is to be preferred. With no doubt, we believe government records form an integral part of the community's shared heritage that belongs to all, and we therefore seek to engage as much of the public as possible in this consultation exercise

⁶ Mr TY Lee and Ms Helen Kung were the secretary to the Sub-committee during the periods from 6 November 2014 to 26 July 2015 and from 27 July 2015 to 19 November 2017 respectively.

⁷ For readers' easy reference, these provisional views are set out again in Chapter 11 below, apart from the chapters (ie Chapters 6, 8, 9 and 10) in which they first appear.

by asking various consultation questions and are keen to hear the different voices from all quarters of the community. We hope this Paper would be useful in prompting and facilitating public discussion on the issues raised, and welcome any views, comments and suggestions on the issues presented in this Paper. These will greatly assist the Sub-committee to fulfil the objectives set out in its Terms of Reference which would best serve the interest of the community.

Chapter 1

Overview of the current framework of public records management in Hong Kong

Introduction

1.1 This chapter briefly outlines (1) the existing administrative scheme on government records management in Hong Kong, (2) the scope of its application, and (3) the roles and functions of the responsible government authority, namely, the GRS. An outline of the different heads of comments on the system, which will be examined more closely in subsequent chapters, is also included at the end.

Administrative scheme

1.2 At present, there is no specific legislation on the general management of government records and archives in Hong Kong. Whilst there are ordinances that oblige different public offices and registries to keep and provide access to specific records and documents,¹ the scope of these ordinances is confined to their own ambit and they do not provide for an overall framework for the management of government records. Government records and archives management are currently regulated under an administrative regime under which the GRS is the central records management and service agency.

1.3 The administrative regime comprises a number of administrative rules, guidelines and best practices promulgated and updated by the Director of Administration and the GRS. The records management manuals, guidelines and publications are posted on the Government's intranet for B/Ds' reference. Some of these manuals and publications are also available in GRS' Central Preservation Library for Government Publications for public inspection. In April 2017, most of the above documents were uploaded to the official website of the GRS for public information.² A List of Major Rules and

¹ See, for example, Part 2 of the Companies Ordinance (Cap 622) regarding the powers and obligations of the Companies Registrar; s 2 of the Land Registration Ordinance (Cap 128); ss 10, 15 and 22 of the Births and Deaths Registration Ordinance (Cap 174); reg 4 of the Land Registration Regulations (Cap 128A); reg 8 of the Registration of Persons Regulations (Cap 177A) and ss 67 to 69 of the Trade Marks Ordinance (Cap 559).

² GRS' web page on records management guidelines is at:
<http://www.grs.gov.hk/en/hksar_government_administrative_guidelines_on_record_management.html>.

Guidelines on Public Records Management in Hong Kong (along with their abbreviations) is set out after the List of Abbreviations in this Paper.

1.4 Amongst these various rules and guidelines, the Records Management Manual (the "**RMM**") issued by the Director of Administration is the core one which prescribes the code of practices for establishing a comprehensive records management programme in B/Ds.³ The RMM applies to the management of all government records in the conduct of B/Ds' official business and activities.⁴ It is to be read together with a series of the Records Management Publications ("**RMPs**") issued by the GRS (see the List of Major Rules and Guidelines on Public Records Management in Hong Kong) as they give explanations and detailed procedures for achieving the outcomes of the RMM as well as provide options and flexibility to suit the circumstances and needs of individual B/Ds.⁵ Other guidelines and circulars have been published to assist B/Ds in managing their records in various aspects throughout the life cycle of the records, including but not limited to records creation/collection, records classification, custody and storage of records, records scheduling,⁶ records disposal (including destruction of records subject to prior consent of the GRS Director and transfer of records having archival value to the GRS), management of email records and protection of vital records.

1.5 Not all of the requirements in these rules and guidelines are mandatory. Those promulgated through *General Circular No 2/2009: "Mandatory Records Management Requirements"* ("**GC09**")⁷ are meant to impose a mandatory obligation on government servants. Any government servant who does not comply with the requirements therein may be subject to disciplinary action, including verbal or written warnings, reprimand, severe reprimand, reduction in rank, compulsory retirement and dismissal.⁸

³ Para 101 of the RMM.

⁴ Paras 106 and 107 of the RMM.

⁵ Para 112 of the RMM.

⁶ Records scheduling is the action for developing records retention and disposal schedules which stipulate the length of time that records should be retained and the ways they are to be disposed of. The terms "records retention and disposal schedule" and "records disposal schedule" (or simply "disposal schedule") are interchangeable. More details of records scheduling are discussed in chapter 2.

⁷ Such mandatory records management requirements include designation of Departmental Records Manager ("**DRM**"), accurate records inventory, proper management of email records, records classification, records disposal (including establishment of disposal schedules for all programme records, disposal of time-expired records at least once every two years, destruction of records or transfer of records to non-government bodies subject to prior consent of GRS Director, and transfer of records having archival value to the GRS), proper custody and storage of records, protection of vital records, and regular review of records management practices.

⁸ See Parts I and II of the Information Note for the Public Accounts Committee on Chapter 10 of the Director of Audit's Report No 57 entitled "*Records Management Work of the Government Records Service*" ("**PAC Information Note**"), available at: <http://www.grs.gov.hk/pdf/Information_note_E.pdf> (from p 173 to 175).

Scope of application

1.6 While B/Ds are subject to the administrative scheme of records management, public organisations generally are not.⁹ The physical management and preservation of records of public organisations, including statutory bodies, non-government organisations receiving recurrent funding from the government, charity and religious groups as well as private organisations, are outside the regulation of the Government's administrative scheme of records management. The Independent Commission Against Corruption ("**ICAC**") and the Hong Kong Monetary Authority ("**HKMA**") have, however, implemented the records management requirements promulgated by the Government in the management of their records.

Background of establishment of the GRS

1.7 Discussions within the government about devising a system of preservation and disposal of government records and creating a public records office started in the 1960s. In May 1970, the Finance Committee of the Legislative Council approved the creation of a supernumerary post of Archivist. The Public Records Office was established under the Councils Branch of the Colonial Secretariat in 1972 to help government offices maintain the standards of records management, to provide facilities for custody and maintenance of records for permanent preservation, and to make records available for official reference and for private research. In 1987, the Government Records Co-ordination Unit ("**GRCU**") was set up under the Office of the Deputy Chief Secretary to implement records management in the government. The Government Records Service Division was subsequently created in 1989 by restructuring the former GRCU and the Public Records Office. It comprised the Public Records Office, a new Records Management Office and a Special Duties Unit.

1.8 Organisationally, the Government Records Service Division was originally put under the then Constitutional Affairs Branch. Since 1 September 1989, it has been transferred to the Administration Wing of the Chief Secretary for Administration's Office upon the reorganisation of the Government Secretariat. On 20 October 2003, it was re-organised and renamed as GRS with a view to streamlining the organisational services in pursuit of electronic records management and other initiatives in records and archives management.

Roles and functions of the GRS and its offices

1.9 Currently, the GRS is overseen by, and placed under, the Administration Wing of the Chief Secretary for Administration's Office. The

⁹ With the exception of the Independent Commission Against Corruption and the Hong Kong Monetary Authority. See discussion later in this Paper.

GRS acts as the central records management and service agency of the Government, tasked to oversee the management of archival records and government records on a government-wide basis.

1.10 The GRS' main responsibilities are as follows:¹⁰

- (i) development and implementation of government-wide records management policies;
- (ii) development of records standards, guidelines and procedures;
- (iii) provision of records related advisory services and training;
- (iv) administration of records centres, records disposal and centralised microfilming services;
- (v) survey, inspection, study and evaluation of departmental records management programmes;
- (vi) selection, administration and preservation of government archives and valuable publications;
- (vii) provision of access and reference services to government archives and selected publications; and
- (viii) authority in advising and providing instructions on proper administration and management of government records, archives and publications that are of long-term (30 years or over) or permanent value.

1.11 The GRS consists of four offices, namely, the Public Records Office, Preservation Service Office, Record Systems Development Office and Records Management and Administration Office. The main functions of these offices are as follows:-

- (i) Public Records Office: archives acquisition, public access and reference services to archival and library holdings, promotion of archival heritage.
- (ii) Preservation Service Office: preservation and conservation of archival and library holdings, photo-imaging services to B/Ds through the Government Microfilm Centre.¹¹
- (iii) Record Systems Development Office: electronic records management, development of records classification scheme, new initiatives in managing recorded information.

¹⁰ Para 220 of the RMM.

¹¹ The Government Microfilm Centre was established in 1997 to provide microfilming and related services to B/Ds and to conduct reviews on microfilming needs in B/D.

- (iv) Records Management and Administration Office: Records Centre services, records management system development and implementation, departmental review services, training and consultancy services, internal administration of the GRS.

Staffing in GRS

1.12 The head of the GRS is the GRS Director, who oversees and directs the operation of the GRS. The GRS Director is responsible to the Director of Administration of the Chief Secretary for Administration's Office.¹² As at 31 December 2017, the GRS has a total of 104 staff members, consisting of 16 Archivist grade staff, four Curator grade staff, 19 Executive Officer grade staff, two Librarian grade staff and 63 staff members of other grades.

Staff qualifications

1.13 The entry requirements of the Archivist grade include a bachelor's degree in History, Political Science, Public Administration, Information Management and Library Studies, Archives and Records Management, or equivalent, and two-years' post-graduate research, study or training in the abovementioned subjects, as well as good language proficiency in Chinese and English. Currently, all the 16 Archivist grade officers (including two Archivists, six Senior Assistant Archivists and eight Assistant Archivists) have obtained master degrees in relevant subjects including history, archives and records management, library science or political science. The Archivists and Senior Assistant Archivists have also obtained a postgraduate diploma in archives and records management and undergone ongoing professional training in related subjects. Newly recruited Assistant Archivists are provided with in-house training and are required to pass a proficiency test involving written and practical exercises after one year's service. Upon passing the test, they are required to take a postgraduate programme on archives and records management.

1.14 Besides, officers from the Conservation Stream of the Curator grade and the Librarian grade, which are under the management of the Director of Leisure and Cultural Services, are also deployed to the GRS. The Curator grade officers participate in work relating to handling, identification, examination and conservation of archival and library collections and loan exhibits; environmental monitoring and control programmes in archival repositories and display venues as well as the rendering of preventive measures for the preservation of collection items.¹³ The entry requirements of the Curator grade include a bachelor's degree majoring in Conservation,

¹² An organisation chart of the GRS is available in *GRS Annual Report 2016*, at p 8, available at: <[http://www.grs.gov.hk/pdf/GRS_Annual_Report_2016_\(Eng\).pdf](http://www.grs.gov.hk/pdf/GRS_Annual_Report_2016_(Eng).pdf)>.

¹³ GRS Annual Report 2016 at p 16.

Applied Chemistry / Chemistry, Materials Science or Materials Engineering, as well as good language proficiency in both Chinese and English. Throughout their career, they receive on-the-job training and attend courses on relevant subjects like conservation of paper, audiovisual, photographic, archival and library materials. As regards the Librarian grade officers, they are mainly responsible for library services. The entry requirements of the Librarian grade include a bachelor's degree, good language proficiency in Chinese and English as well as a pass in the Aptitude Test in the Common Recruitment Examination. Officers at the rank of Librarian have obtained a diploma in librarianship or a full Membership of the Hong Kong Library Association or equivalent.

1.15 Executive Officers specialise in office administration, personnel, systems and resource management. Among their great variety of duties are records management and the supervision of the operation of filing registries in B/Ds. The entry requirements of Executive Officer grade include a bachelor's degree, and good language proficiency in Chinese and English as well as a pass in the Aptitude Test in the Common Recruitment Examination. After joining the service, Executive Officers receive training at various stages of their careers. The training programme of Executive Officer II includes a session on records management. On promotion to the Executive Officer I rank, they have to participate in a comprehensive records management module in the management development programme. For those taking up records management duties in GRS, they are required to enrol in the Association for Intelligent Information Management's Electronic Records Management Certificate Programmes.¹⁴

Staff training

1.16 GRS has developed a structured training and development programme to equip its staff to face the challenges of paradigm shift, particularly in view of the extensive use of electronic means to conduct business resulting in substantial growth in electronic records. The training programme is a combination of online courses/webinars on archives and records management as well as digital preservation provided by recognised professional bodies. Moreover, GRS has arranged its staff to attend duty visits and professional conferences overseas so as to widen their exposure to international best practices.¹⁵

¹⁴ The Association for Intelligent Information Management (AIIM) is the community that provides education, research, and best practices to help organisations find, control, and optimise their information. The AIIM was formerly known as the "Association for Information and Image Management". See further at: <<http://www.aiim.org>>.

¹⁵ Para 7(f) of LC Paper No. CB(2) 28/17-18(02) "The Chief Executive's 2017 Policy Address – Policy Initiative of Chief Secretary for Administration's Office in relation to Archives Law" for LegCo Panel on Constitutional Affairs meeting on 16 October 2017: <<https://www.legco.gov.hk/yr17-18/english/panels/ca/papers/ca20171016cb2-28-2-e.pdf>>.

Facilities in GRS

1.17 The GRS' purpose-built archival facility for preservation of archival and library holdings, namely, the Hong Kong Public Records Building, was opened in 1997.¹⁶ It provides a permanent and suitable environment as well as preservation support to archival and library holdings, including archival and library repositories, preservation laboratories, advanced digital imaging equipment, microfilmers and associated film processing facilities. The building also houses a search room for visitors to consult the archival records and other materials, an exhibition hall and also a lecture room. In addition, the Records Management and Administration Office operates two Records Centres¹⁷ which offer intermediate storage service for inactive records of B/Ds.

1.18 The GRS also operates the Central Preservation Library for Government Publications which preserves selected government publications and printed materials with permanent value as Hong Kong's documentary heritage. Its holdings include publications, reports and printed materials on Hong Kong in different formats, dating back to as early as 1840s. As at the end of December 2017, it preserved around 43,400 publications.¹⁸

Comments

1.19 The administrative public records management system discussed in this chapter has been subject to scrutiny in recent years, for example the reports issued by the Civic Exchange in 2007¹⁹ ("**2007 Civic Exchange Report**") and 2011²⁰ ("**2011 Civic Exchange Report**"), report by the Audit Commission in 2011²¹ ("**Audit Commission's Report**") and report by The Ombudsman in 2014²² ("**Ombudsman's Report**"). Comments are also found in news articles and other publications some of which call for an

¹⁶ The Hong Kong Public Records Building is located at Kwun Tong, Kowloon.

¹⁷ Presently located in Tuen Mun with two separate sites, namely, Tuen Mun Government Storage Centre and YKK Records Centre. The total floor area is 15,200 square metres. It has a storage capacity of 116,000 linear metres for inactive records.

¹⁸ Information provided by GRS on 13 March 2018.

¹⁹ Christine Loh, Marcos Van Rafelghem and Jaimie C Graham, *Managing Public Records for Good Governance and Preservation of Collective Memory: The Case for Archival Legislation*, Civic Exchange, March 2007.

²⁰ Christine Loh and Nick Frisch, *The Memory Hole: Why Hong Kong Needs an Archives Law*, Civic Exchange, November 2011.

²¹ Audit Commission, Report No 57, *Records management work of the Government Records Service*, October 2011, available at: <http://www.aud.gov.hk/pdf_e/e57ch10.pdf>.

²² Office of The Ombudsman, *Direct Investigation Report - Public Records Management in Hong Kong*, March 2014, available at: <http://ofomb.ombudsman.hk/abc/files/DI246_full_E-20_3_2014_with_Appendix_1.pdf>.

archives law.²³ Incidents involving destruction or unavailability of public records were also cited in some of these publications to illustrate the problems of the public records management system in Hong Kong.²⁴ Shortcomings in B/Ds' management of records have also been mentioned by the courts.²⁵

1.20 In a Legislative Council ("**LegCo**") debate on the motion of "Enacting an archives law" on 16 November 2011, members supporting the motion referred to alleged defects in the Government's administrative system and argued that Hong Kong lagged behind other jurisdictions which all have an archives law. The motion was eventually not passed,²⁶ but demands for an archives law have continued. In 2017, three LegCo members sought to introduce the Public Records Bill as a private member's bill.²⁷

1.21 Having reviewed the foregoing reports, judgments and publications, we set out below their main comments for the sake of completeness of this introductory chapter -

²³ See, for example, "*Records swept away on wave of indifference*", South China Morning Post, 30 March 2008; "政府總部遷址恐失檔案·前法官促立檔案法", Hong Kong Economic Journal, 7 March 2011; "*Fresh call for archive law to halt destruction of documents*", South China Morning Post, 28 March 2011; William Waung (Founding member of the Archives Action Group; Adjunct Professor, The University of Hong Kong; Former Judge of the Court of First Instance, HKSAR), "*Good governance and preserving history: why Hong Kong needs an archives law*", Hong Kong Lawyer, July 2011, at 16 to 29; "*Archivists ask for action, now*", China Daily, 4 August 2011; Nicholas Frisch, "*Hong Kong's Blind Spot, The territory lacks a law to ensure the government preserves its records*", The Wall Street Journal, 25 November 2011; Patrick Lo, *Preserving Local Documentary Heritage, Conversations with Special Library Managers and Archivists in Hong Kong* (City University of Hong Kong Press, 2015), Ch 1 and 2.

²⁴ The Commission of Inquiry's Report dated 10 April 2013 on the collision of vessels near Lamma Island on 1 October 2012 showed shortcomings of the Marine Department's recordkeeping, including the absence of contemporaneous documentation of the genesis of decision-making, policy and job requirements. The redacted version of this report is available at :
<<http://www.legco.gov.hk/yr12-13/english/panels/edev/papers/edev0527-rpt20130430-e.pdf>>.

Questions have been raised regarding Government's destruction of records. See, for example, the Chief Secretary for Administration's written reply to the question raised by Hon Emily Lau in the Legislative Council dated 19 October 2011 at:
<<http://www.info.gov.hk/gia/general/201110/19/P201110190200.htm>>.

²⁵ For instance, in *Chu Woan-chyi & Ors v The Director of Immigration* (HCAL 32/2003, at para 110; [2007] HKCFI 267; [2007] 3 HKC 168), Hartmann J (as he then was) expressed concern that there was a lack of substantive contemporary records in the archives of Government to show why four applicants, together with more than 70 others, were refused entry to Hong Kong. See also *Abid Saeed v Secretary for Justice* [2015] 1 HKLRD 1030 at paras 94-101.

²⁶ Hong Kong Hansard, Session 2011-12, 16 November 2011, at 2182, available at:
<<http://legco.gov.hk/yr11-12/english/counmtg/hansard/cm1116-translate-e.pdf>>.

²⁷ They were the Hon Tanya Chan, the Hon Dennis Kwok and the Hon Charles Mok. A copy of the draft Public Records Bill and other relevant materials are available at:
<<https://www.charlesmok.hk/legco/hon-charles-mok-hon-tanya-chan-and-hon-dennis-kwok-will-table-the-draft-public-records-bill-as-members-bill/>>.

- (i) administrative rules and guidelines being nullified by records-related legislation;
- (ii) limited coverage of the current administrative records management framework;
- (iii) lack of support of any advisory body in carrying out GRS' mission to ensure proper management of government records;
- (iv) ineffective compliance framework;
- (v) inadequacies in the administration and operations of GRS itself;
- (vi) inappropriateness of the "30-year rule" on transfer of records to GRS for appraisal and retention; and
- (vii) lack of legal backing of the existing regime.

1.22 In the following chapters, we will examine each of the above comments by conducting comparative studies and setting out Government's responses and positive measures taken to address them, and will then set out our provisional view(s) and/or draw up a list of consultation questions.

Chapter 2

Overview of records management cycle and its related rules, guidelines and publications

Introduction

2.1 As mentioned in the previous chapter, the different aspects of records management of B/Ds are currently governed by administrative rules and guidelines. The records management manuals, guidelines and publications are posted on the Government's intranet for B/Ds' reference. Some of these manuals and publications are also available in GRS' Central Preservation Library for Government Publications for public inspection. In April 2017, most of such documents were uploaded to the official website of the GRS for public information. Since these rules and guidelines do not feature heavily in the daily lives of the general population, their intricacies may not be familiar to the general public.

2.2 To enable readers to gain an informed view of the Government's records management regime, we set out in this chapter an overview of the key records management stages with reference to the main rules and guidelines according to which government records are currently managed in Hong Kong. Readers may also find it helpful to refer to the flowchart in Annex I of this Paper. Where a relevant requirement is made mandatory by GC09, it is underlined.

2.3 It should be noted that, although the records management processes are presented in this chapter and in the flowchart as if in a sequence, some of them may in fact take place simultaneously. For instance, records creation and classification are often carried out as an integrated series of actions.

Terminology

2.4 In order to fully understand the records management rules, it is necessary first to be familiar with the following key terms, which have been defined in the RMM.¹

¹ Records Management Glossary in Appendix B of the RMM.

"Record", "Government record", "Electronic records"

2.5 "Record" is defined to mean recorded information regardless of physical format or media created or received in the course of official business and maintained for reference and as evidence of such business. "Government record" is any recorded information or data in any physical format or media created or received by a B/D during its course of official business and kept as evidence of policies, decisions, procedures, functions, activities and transactions.² "Electronic records" are any information recorded in a form that only a computer or other electronic devices can retrieve and process, and that satisfies the definition of "record" given in the RMM.³

"Programme records" vs "administrative records"

2.6 "Programme records" are records created or received by a B/D whilst carrying out the primary functions, activities or missions for which it was established; whereas "administrative records" mean those records created or received during the course of day-to-day administrative activities that deal with finance, accommodation, procurement and supply, establishment, personnel and other general administrative activities.⁴

"Archives"

2.7 "Archives" are defined as (1) documents and materials created or received and accumulated by a person or organisation in the course of conducting affairs, and are preserved because of their continuing or permanent value, and (2) the agency or programme responsible for selecting, acquiring, preserving, and making them available for use.⁵ The term "archives" as defined in (1) is interchangeable with the term "archival records".

"Records management"

2.8 "Records management" is defined to include planning, directing, organising, controlling, reviewing, training, and other managerial activities involved with respect to the creation, classification and indexing, distribution, handling, use, tracking, storage, retrieval, protection and disposal of records to achieve adequate and proper documentation of government policies, decisions and transactions as well as efficient and effective operation of government agencies.⁶

² Para 115 of the RMM.

³ Records Management Glossary in Appendix B of the RMM.

⁴ Records Management Glossary in Appendix B of the RMM.

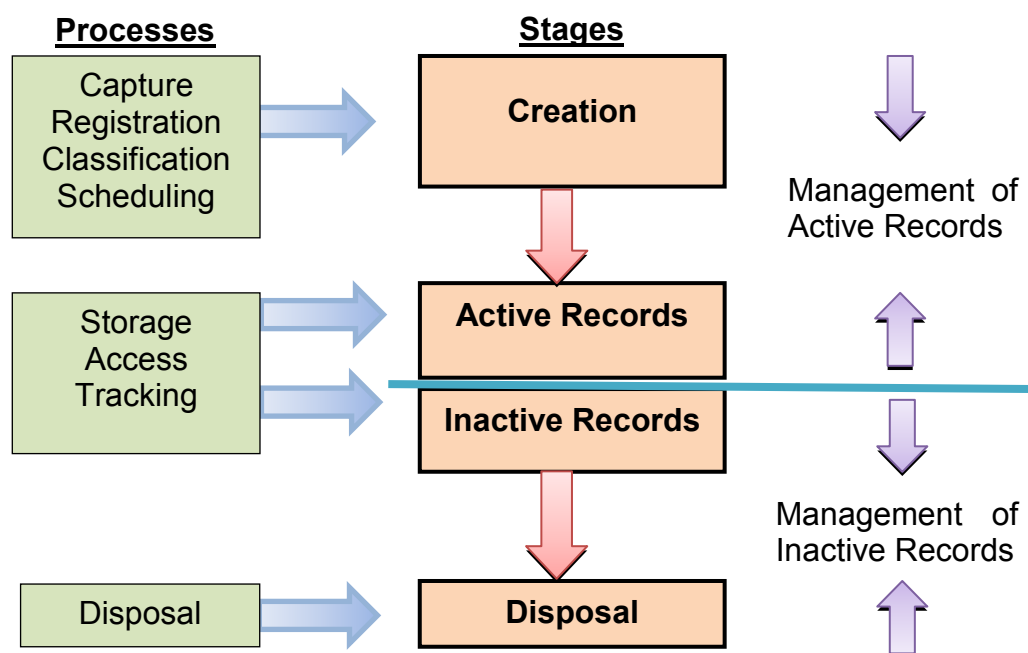
⁵ Records Management Glossary in Appendix B of the RMM.

⁶ Records Management Glossary in Appendix B of the RMM.

2.9 The GRS' website sets out an overview of the Government's records management in Hong Kong, and a summary of the policies and processes involved. In gist, its records management programme applies to the entire life cycle of a record from its creation or receipt, through its useful life to its final disposal. The records management processes in different stages of records life cycle include:

- (i) capture
- (ii) registration
- (iii) classification
- (iv) scheduling
- (v) storage
- (vi) access
- (vii) tracking
- (viii) disposal.

2.10 Thus, on a diagram, these various stages will look like:-



Summary of records management processes and the corresponding rules, guidelines and publications

(a) *Establishment of comprehensive records management programme*

2.11 According to the government's policy, each B/D should establish a comprehensive records management programme which should apply to the

entire life cycle of a record from its creation or receipt, through its useful life to its final disposal.⁷

(b) Designation of a directorate officer to oversee records management in B/Ds, appointment of a Departmental Records Manager ("DRM") and implementation of records management programme

2.12 B/Ds are required to work closely with the GRS in applying records management standards, procedures and techniques.⁸ While the head of B/D has the overall responsibility for its records management, a directorate officer should be designated to oversee the matter.⁹ A DRM¹⁰ should also be appointed to assist the head of B/D to establish and implement the departmental records management programme. The DRM is responsible for, *inter alia*, establishing and implementing practices and procedures according to the GRS' guidelines and instructions, and cooperating with the GRS in evaluating and improving the programme on a regular basis.¹¹

(c) Creation and collection of records by B/Ds

2.13 B/Ds are generally required to create and collect adequate but not excessive records to meet their operational, policy, legal and financial purpose having regard to their business functions.¹² To minimise the risk of inadequate creation or collection of records, B/Ds should promulgate relevant business rules and guidelines to all staff for compliance,¹³ and review them at least once every two years.¹⁴

⁷ Paras 200 and 208 of the RMM. A comprehensive records management programme includes (i) determining what records should be created, what form and structure records should be created and the level of accuracy and security required; and (ii) ensuring compliance with legal and regulatory requirement, applicable standards and organisational policy.

⁸ Para 221 of the RMM.

⁹ Administration Wing Circular Memorandum No 5/2012 - Establishment of Departmental Records Management Policies ("**EDRMP**") para 7 in Annex I.

¹⁰ The DRM is normally the Departmental Secretary or an officer holding equivalent position.

¹¹ Paras 210, 212 and Appendix C of the RMM.

¹² Paras 2, 3 and 8 of the "Guidelines on Creation and Collection of Records" promulgated in the *Administration Wing Circular Memorandum No 4/2012 - Guidelines on Creation and Collection of Records* ("**GCCR**"); para 303 of the RMM.

¹³ Paras 8 and 17 of the "Guidelines on Creation and Collection of Records" promulgated in the GCCR.

¹⁴ Para 18 of the "Guidelines on Creation and Collection of Records" promulgated in the GCCR.

2.14 The records captured should contain not only the content but also the structure and contextual information¹⁵ necessary to document an official activity or transaction.¹⁶

2.15 Records should be created in the most suitable medium and format that would facilitate access, use and preservation as required.¹⁷ For electronic mail records, B/Ds are required to print and file them in paper-based files¹⁸ pending the implementation of an electronic recordkeeping system ("ERKS") for keeping electronic records. Records created or collected should be kept in an identifiable recordkeeping system¹⁹ which should include at least a records classification scheme(s).

(d) Maintenance of accurate records inventory in B/Ds for tracking of records

2.16 B/Ds should prepare and maintain an accurate inventory of all records which should at least include file titles, file reference numbers, dates opened and dates closed, and locations.²⁰ B/Ds should maintain audit trail of transactions, document the physical movement of records, and implement the recordkeeping system to maintain control on records tracking.²¹

¹⁵ For example, the structure of a memorandum should cover its header and body; whereas its contextual information should include sender, addressees, issue date, reference and security classification, see item I in Appendix I(b) to PAC Information Note issued by the Administration Wing of the Chief Secretary for Administration's Office, available at: <http://www.grs.gov.hk/pdf/Information_note_E.pdf>.

¹⁶ Under para 9 of the "Guidelines on Creation and Collection of Records" promulgated in the GCCR, key considerations for determining what records should be created and collected include the need to explain, and if necessary justify, past actions in the event of an inquiry, audit or other investigations. According to para 302 of the RMM and para 10 of the "Guidelines on Creation and Collection of Records" promulgated in the GCCR, examples of records to be created and kept include (a) inward and outward communications with external persons and bodies directly relating to the functions and activities of the organisation; (b) minutes and other records of meetings, consultations and deliberations pertinent to the decision-making process, formulation of policies and procedures or transaction of business; (c) major oral decisions and commitments; (d) individual exercise of a discretionary judgement which has a major effect on the functions and activities of the organisations; (e) departmental/government forms, registers and information (in electronic/non-electronic forms) which document business transactions/procedures; and (f) draft documents (eg amendments to minutes of meetings) which form part of a complete documentation of the relevant issue, as appropriate.

¹⁷ Para 314 of the RMM and para 7 of the "Guidelines on Creation and Collection of Records" promulgated in the GCCR.

¹⁸ Para 7 of GC09.

¹⁹ Para 311 of the RMM.

²⁰ Para 6 of GC09.

²¹ Paras 480 to 482 of the RMM.

(e) Content classification

2.17 Each B/D should establish and maintain a records classification scheme that builds around its functions and organisation and covers all official records.²² B/Ds should organise records according to classification schemes²³ to facilitate access to and retrieval of records.

2.18 Administrative records and programme records²⁴ are of different nature, and should be subject to different retention and disposal requirements.²⁵ Given the generic nature of administrative records, the GRS has promulgated a standard classification scheme which provides standard primary subject terms on administrative activities to help B/Ds in organising common administrative records and in disposing of such records.²⁶ It also facilitates B/Ds by developing a set of General Administrative Records Disposal Schedules ("**GARDS**") on the disposal of time-expired administrative records. By adopting the GARDS, there is, generally speaking, no need for B/Ds to compile their own records retention and disposal schedules for administrative records.²⁷

2.19 The RMP1 sets out the procedures to implement retention and disposal requirements of the GARDS in two stages, namely (1) identify and determine the proper retention and disposal requirements for administrative records; and (2) dispose of time-expired administrative records.²⁸ A common set of disposal schedules, relevant guidance and instructions can be found in RMP4, which is reviewed and updated by the GRS from time to time.

2.20 Since programme records are unique to each B/D, classification scheme(s) should be developed by each B/D for its own records making reference to the procedures set out in RMP3.

2.21 Where administrative and programme records have been mingled together, B/Ds should adopt the principles set out in the RMP1 as appropriate to determine the proper retention periods and disposal actions of the concerned records.²⁹

²² Para 416 of the RMM and para 3.4.3 of RMP1.

²³ According to para 8 of GC09, a records classification scheme is a plan for logical arrangement of records according to one or more of the following: business functions, activities and contents of the records.

²⁴ See the definitions of "administrative record" and "programme record" earlier in this chapter.

²⁵ Paras 612 to 613 of the RMM.

²⁶ *Guidelines on the Implementation of the Standard Classification Scheme for Administrative Records ("GISCSAR")* provides guidelines on the implementation of the standard classification scheme for administrative records in B/Ds, including a seven-stage action plan.

²⁷ Paras 3.2.2, 3.5.1, 3.5.2 and 3.6.1 of RMP1.

²⁸ Para 3.4.8 of RMP1.

²⁹ Paras 3.4.4 to 3.4.7 of RMP1.

(f) Records scheduling and disposal³⁰

2.22 To facilitate easy retrieval of records and to minimise costs for maintenance and storing records, B/Ds are required to properly plan and implement records disposal.³¹ Records disposal refers to the variety of ways and actions taken on records no longer in active use, ie transfer of records to GRS for appraisal of their archival value, permanent retention as archival records, immediate destruction, or migrating the content of records to a different storage medium such as microform or electronic format for prolonged retention.³²

2.23 The GRS has the overall responsibility for authorising the disposal of government records through approving records disposal requests and records disposal schedules, and issuing disposal authority or agreement.³³ A records disposal schedule is a systematic listing or description of B/D's records which indicates the arrangements to be made for their custody, retention period and disposal action.³⁴ B/Ds should draw up their records disposal schedules in accordance with the GRS' guidelines.

2.24 B/Ds should dispose of time-expired records (ie inactive records which have been retained for the period specified in the GARDS for administrative records or the approved disposal schedules for programme records and are ready for disposal) at least once every two years.³⁵ In the interests of proper internal control, disposal of records should be considered and endorsed in writing by a senior officer not below the rank of Senior Executive Officer or equivalent in the B/D.³⁶

2.25 The procedures and requirements for disposing of administrative records are different from those for programme records. For administrative records, B/Ds should adopt the GARDS promulgated by the GRS, and obtain the GRS' approval for the disposal. GARDS sets out the retention periods and the disposal actions of records in different subject groups under six schedules (such as administration, accommodation and facilities as well as procurement and supplies).³⁷

2.26 For programme records, B/Ds should, in consultation with the GRS, develop their own records disposal schedules in accordance with the

³⁰ See generally paras 600 to 632 of the RMM, and paras 13 and 14 of GC09.

³¹ Para 6.3.1 of RMP1.

³² Para 625 of the RMM and para 2.3.2 of RMP1.

³³ Para 602 of the RMM.

³⁴ Para 1.3.1(h) of RMP1.

³⁵ Para 17 of GC09, paras 2.3.4 and 6.3.1 of RMP1.

³⁶ Para 2.3.4 of RMP1.

³⁷ Part II of RMP4.

GRS' guidelines.³⁸ The DRM of each B/D may appoint Assistant DRM(s) and other responsible staff to coordinate the drawing up of the Programme Records Disposal Schedule to ensure the systematic and consistent disposal of their programme records.³⁹ Draft disposal schedules should be endorsed by the B/Ds and then forwarded to the GRS for its Director's agreement.⁴⁰ The GRS will consider the draft schedule and discuss with B/Ds with a view to finalising it.

2.27 B/Ds must obtain the GRS Director's prior agreement before they destroy or dispose of any government records in accordance with the disposal schedules.⁴¹ Files having archival value to be transferred to GRS should also be checked for their completeness.⁴² B/Ds should document these checks for accountability. A list of the records destroyed should also be maintained.

2.28 All records retention and disposal schedules have to be reviewed by B/Ds at least once every five years to determine whether any amendment is required.⁴³

(g) Use, custody and storage of records in B/Ds

2.29 B/Ds should put in place appropriate arrangements to ensure the safe custody of records.⁴⁴ Records should be stored in appropriate environment and facilities to be protected from unauthorised access, use, disclosure, removal, alienation,⁴⁵ deterioration, loss, destruction, dirt, insects, rodents, smoke, chemical exhausts etc.⁴⁶

2.30 B/Ds should follow the classification which falls into four categories according to their level of sensitivity at a particular time, ie "Top Secret", "Secret", "Confidential" and "Restricted". Security classification restriction should be imposed for a stated period of time. DRMs in B/Ds

³⁸ Para 613 of the RMM. It is noteworthy that para 4.2.32 of RMP1 provides that it is not advisable to keep inactive programme records for more than seven years.

³⁹ Paras 4.1.1 to 4.2.2 of RMP1.

⁴⁰ Paras 615 and 616 of the RMM, paras 14 and 15 of GC09, and para 2.5.4 of RMP1.

⁴¹ Para 605 of the RMM, para 3(d) of *General Circular No 5/2006: "Management of Government Records" ("GC06")*, para 18 of GC09 and paras 1.1.1 and 2.3.3 of RMP1.

⁴² Appendix IV of GC09.

⁴³ Para 617 of the RMM and para 4.6.1 of RMP1.

⁴⁴ Para 21 of GC09.

⁴⁵ Para 502 of the RMM, para 3.8.1 of RMP1 and para 20 of GC09 provide that B/Ds have to seek the GRS' prior agreement before transferring records to non-government bodies due to such reasons as corporatisation, privatisation or outsourcing, and no government records should be transferred outside the Government unless with the prior agreement of the GRS Director.

⁴⁶ Paras 510 to 523 of the RMM, para 23 of GC09.

should review the classification of documents and records in his custody at least every five years.⁴⁷

2.31 In case of loss, unauthorised removal, defacing, alteration or destruction of records, B/Ds are required to report the matter to the respective DRMs and GRS Director immediately.⁴⁸ The DRM of the B/D concerned should investigate, reconstruct the records where necessary, take steps to prevent recurrence and consider taking disciplinary action or other administrative action against the staff concerned. The DRM should report his findings and actions taken to the GRS within three months. The GRS will consider the B/D's findings and actions and provide advice as appropriate.⁴⁹

(h) Vital records protection within B/Ds

2.32 Vital records are records containing information essential to the continued and effective operation of a B/D during and after an emergency or disaster.⁵⁰ B/Ds should identify and protect their vital records by way of duplication or off-site storage to ensure uninterrupted operation of major business functions.⁵¹ B/Ds should also establish a vital records protection programme in respect of such records in accordance with the guidelines provided.⁵² Only authorised personnel should be allowed to deal with access to and transmittal of vital records.⁵³

(i) Appraisal of records and transfer of records having archival value to the GRS

2.33 For programme records, the Public Records Office will appraise their archival value when reviewing the disposal schedules drawn up by B/Ds.⁵⁴ Those assessed to have potential archival value would be appraised again by the Public Records Office to determine their final disposition when they become time-expired.

2.34 Time-expired administrative records having potential archival value as mentioned in GARDS should be referred to the Public Records Office

⁴⁷ Paras 430 to 433 and 443 of the RMM.

⁴⁸ Para 606 of the RMM, para 22 of GC09.

⁴⁹ Para 22 of GC09.

⁵⁰ Para 700 of the RMM and definition of "vital records" in Appendix B of the RMM.

⁵¹ Para 24 of GC09.

⁵² Paras 701 and 702 of the RMM and para 24 of GC09. Detailed guidelines for establishing a vital records protection programme are given in RMP6.

⁵³ Para 727 of the RMM.

⁵⁴ Para 4.2.10 of RMP1.

for appraisal.⁵⁵ Above all, all government records reaching 30 years old should be appraised by the Public Records Office to determine whether or not they possess archival value for permanent preservation.⁵⁶

2.35 GRS has adopted a set of appraisal guidelines on selection of archival records. Records likely to be selected as archival records may include the following:-

- (i) records that document or reflect the organisation, functions and activities of the government;
- (ii) records that document the formation process, implementation and outcome of significant policies, decisions, legislation and actions of the government;
- (iii) records that document the impact of the decisions, policies and programmes of the government upon the physical environment, community, organisations and individuals;
- (iv) records that document the interaction between the public and the government as well as between the physical environment and the government;
- (v) records that document the legal rights and obligations of individuals, groups, organisations and the government; and
- (vi) records that contain significant or unique information or aged documents that can enrich the understanding about the history, physical environment, society, culture, economy and people of Hong Kong.⁵⁷

2.36 Records appraised as having archival value should be transferred to the Public Records Office for permanent retention according to the disposal schedules.⁵⁸ When transferring archival records to the Public Records Office, B/Ds should provide a transfer list, and advise the access status of classified records.⁵⁹

2.37 In a letter to B/Ds dated 21 March 2014, the Director of Administration stated that deferrals of transfer of time-expired records having archival or potential archival value to the GRS were highly undesirable and should be approved only when they were absolutely necessary. For deferrals

⁵⁵ Part II of GARDS, Guidelines for transferring records to the Public Records Office for physical appraisal are provided in the *Guidelines for Transferring Records to Public Records Office of GRS for Appraisal* ("GTRPA"), and RMP4, Part I para 20.

⁵⁶ Para 637 of the RMM.

⁵⁷ See para 6 of the PAC Information Note.

⁵⁸ Paras 3.7.2, 4.4.1 and Appendix D(ii) of RMP1. See also para 16 of GC09.

⁵⁹ See p 196 of the PAC Information Note.

for more than two years, written agreement of a directorate officer in the concerned B/D at the level of deputy secretary/deputy head of department and prior consultation with the GRS are required.⁶⁰ Upon request by the GRS, B/Ds should make ready files for appraisal within a reasonable period of time, say three months.⁶¹

2.38 For records appraised as having no archival value according to the disposal schedules, B/Ds should arrange physical destruction of the records and maintain a list of records destroyed after seeking approval from GRS Director.⁶²

(j) Protection and preservation of archives in GRS

2.39 Records appraised as having archival value should generally be kept in a secure and controlled environment and be permanently preserved by the Public Records Office.⁶³ In gist, preservation means the processes and operations involved in the stabilisation and protection of records.⁶⁴

2.40 It is the GRS' responsibility to select, administer and preserve government archives and valuable publications. The Public Records Office of the GRS is the central archives of the government, and also operates the Central Preservation Library for Government Publications which selects and centrally preserves government publications and printed materials of permanent value. B/Ds are requested to forward one copy of their new publication or printed material to this library for selection, and are required to consult it when they want to dispose of any of their library materials.

2.41 The Public Records Office may accept donations, including from government-owned/funded statutory bodies, if they are appraised to have archival value for preservation as part of Hong Kong's documentary heritage.⁶⁵

(k) Archives accessioning, description and arrangement

2.42 GRS will perform accessioning upon the transfer of archival records to GRS. Accessioning consists of a sequence of different activities, including preliminary sorting of the records, registering the essential information about the records and creator in the register, and providing suitable storage for the records. GRS will sort, list, stamp and box the

⁶⁰ Para 2.3.5 of RMP1, and para 17 of GC09.

⁶¹ Para (d) of the Letter of Director of Administration to B/Ds dated 21 March 2014.

⁶² See p 195 of the PAC Information Note.

⁶³ Para 626 of the RMM.

⁶⁴ RMM Appendix B, definition of "Preservation".

⁶⁵ *GRS Annual Report 2014*, at p2, available at:
<[http://www.grs.gov.hk/pdf/GRS_Annual_Report_2014_\(Eng\).pdf](http://www.grs.gov.hk/pdf/GRS_Annual_Report_2014_(Eng).pdf)>.

records, and input basic information pertaining to the records into the archives information system, namely, Integrated Information Access System. Subsequently, records will be described to facilitate users in identifying the required records from the voluminous archival holdings of GRS. Descriptive information will be documented in accordance with the General International Standard Archival Description (ISAD(G)).

(I) Public access to archival records kept by GRS

2.43 Access to archival records is managed through the Public Records (Access) Rules 1996 ("**PRAR**").⁶⁶ Users can search the descriptive information or selected images of archival records via the Integrated Information Access System. Charged copying services and self-service photography services are available if users wish to keep a copy of the archival records. GRS also organises visits, seminars, workshops, thematic film shows, exhibitions and other educational activities, and prepares different kinds of online resources to promote the appreciation of the documentary heritage of Hong Kong.

2.44 To provide better service to the public, GRS has institutionalised the appeal channel on access to records by enabling the public to appeal to the Director of Administration against GRS' decision, and to lodge a complaint with The Ombudsman if they are concerned about any maladministration in the handling of their requests. Besides, having reviewed the criteria for approving/refusing access to archival records, GRS has also removed the security grading of records as a factor to be considered when vetting applications for inspecting closed records as recommended in The Ombudsman's Report.

Management of electronic records

2.45 The GRS has since 2001 been working in conjunction with the Office of the Government Chief Information Officer ("**OGCIO**") and the Efficiency Office to formulate policy, strategies, and standard for the effective management of electronic records. The objective is to develop new records management practices and tools to assist B/Ds to manage both electronic and non-electronic records in an integrated, efficient and consistent manner. Guidelines on managing email records were promulgated in 2001 to help B/Ds to identify, create, file and manage email records.⁶⁷

2.46 In February 2009, an Electronic Information Management Steering Group ("**EIMSG**") was established to steer the government-wide

⁶⁶ See discussions in chapter 7 under the heading "The '30-year Rule' on Access" and in Annex II under the heading "Access to archival records kept by GRS".

⁶⁷ LC Paper No CB(2)1517/09-10(04), at para 4, available at:
<<http://www.legco.gov.hk/yr09-10/english/panels/ca/papers/ca0517cb2-1517-4-e.pdf>>.

strategy and implementation of electronic information management. Between February and October 2010, a consultancy study was conducted to make recommendations on further development and implementation of electronic information management, including an Electronic Recordkeeping System ("**ERKS**"), across the government. On 3 May 2011, on the basis of the study and as endorsed by the EIMSG, the Government Chief Information Officer issued a circular on "*Electronic Information Management Strategy and Framework*" ("**EIMSF**") to promulgate a strategy and a framework for implementing electronic information management in B/Ds. The GRS also issued a set of functional requirements for compliance by B/Ds in developing or adopting an ERKS ("**FRERKS**").⁶⁸ According to the EIMSF:

- (i) B/Ds should take forward electronic records management as an integral part of the electronic information management initiative and adopt an ERKS to drive electronic records management in the government;⁶⁹ and
- (ii) the FRERKS form part of the mandatory requirements that B/Ds should observe in implementing electronic information management.⁷⁰

2.47 On 29 May 2012, the GRS issued the *Recordkeeping Metadata Standard for the Government of the Hong Kong Special Administrative Region* ("**RKMS**"), which specifies a core set of recordkeeping metadata to be created, captured, used, managed and maintained in an ERKS to support efficient and effective management of records throughout their life cycle. The GRS subsequently issued a number of guidelines to assist and guide DRMs and IT staff of Information Technology Management Units of B/Ds in implementing and complying with the requirements of the said Recordkeeping Metadata Standard.⁷¹

⁶⁸ Audit Commission's Report, at paras 5.6-5.7 available at: http://www.aud.gov.hk/pdf_e/e57ch10.pdf.

⁶⁹ Para 5 of EIMSF.

⁷⁰ Para 9 of EIMSF. See also para 1.6 of FRERKS, which provides that B/Ds are required to adopt in full mandatory functional requirements of an ERKS and comply with other electronic records management and ERKS standards, including the *Recordkeeping Metadata Standard for the Government of the Hong Kong Special Administrative Region* ("**RKMS**"), to ensure that an ERKS possesses the essential records management functionality to properly manage and store records throughout the life cycle of records.

⁷¹ These include, for example, (1) *Recordkeeping Metadata Standard for the Government of the Hong Kong Special Administrative Region: Implementation Guidelines* issued in July 2012 and last updated in September 2016, (2) *Guidelines on Mapping out Implementation of an Electronic Recordkeeping System in the Context of Developing Organisational Electronic Information Management Strategies* issued on 31 December 2013 and last updated in April 2017, (3) *Guidelines on Implementation of an Electronic Recordkeeping System: Key Considerations and Preparation Work Required* issued in January 2015 and last updated in April 2017. These are now accessible at the GRS' website: http://www.grs.gov.hk/en/hksar_government_administrative_guidelines_on_record_management.html.

(a) Preservation of electronic records

2.48 A *Handbook on Preservation of Electronic Records* ("HPER") promulgated by the GRS on 31 July 2013 with contributions from the OGCI0 provides guidance for B/Ds to establish and implement a departmental preservation programme, and to adopt proper measures and practices to preserve their electronic records for meeting legal and regulatory requirements, business and operational needs and evidence purpose.⁷²

2.49 The HPER advises B/Ds to plan for and implement preservation of electronic records to meet challenges of rapid technological changes, media decay and physical damage to hardware and storage media.⁷³ It highlights the B/Ds' responsibility and the GRS and OGCI0s' assisting roles in this regard.⁷⁴ The HPER also recommends the approach to be adopted by B/Ds in planning, execution and monitoring of their department preservation programme.⁷⁵ Ten general good practices and measures for preservation of electronic records are also included for B/Ds' reference.⁷⁶

(b) Management of email records

2.50 B/Ds are required to keep emails created or received in the course of their official business as records to evidence such business. In case of doubt as to whether an email should be kept as record, an officer should seek guidance from his supervisor. In the meantime and unless otherwise agreed by GRS, email correspondence should be "printed-and-filed" for record purposes.⁷⁷

2.51 The *Guideline on the Management of Electronic Mail* was issued by the GRS on 10 October 2001 to give B/Ds guidance on identifying, creating, filing and managing email records. In view of the increasing use of third-party messaging services⁷⁸ by B/Ds for conducting official business, GRS updated this publication in December 2017 and renamed it as "*Guideline on the Management of Electronic Messages*" ("GMEM") to reiterate the Government's policy and requirement for compliance by B/Ds and to ensure the proper management of electronic message records including e-mails, messages in SMS and other instant messaging applications.

⁷² Para 1.1 of HPER.

⁷³ HPER at p 15.

⁷⁴ Para 3.1 and chapter 3 generally of HPER.

⁷⁵ Para 4.4 and chapter 4 generally of HPER.

⁷⁶ Para 5.11 of HPER.

⁷⁷ Para 7 of GC09.

⁷⁸ For example, short message service (SMS), WhatsApp, WeChat, Facebook, etc.

Compliance and enforcement

(a) *Compliance with standards and guidelines*

2.52 The RMM requires all B/Ds to follow the RMM as far as possible to ensure quality, consistency, accountability, efficiency and cost-effectiveness in the management of government records.⁷⁹

2.53 Under the current administrative regime, the GRS is responsible for developing records standards, guidelines and procedures, and carrying out surveys, and studies of departmental records management programmes to facilitate and ensure B/Ds' compliance.⁸⁰ Specifically, RMP7 provides a checklist to help B/Ds evaluate the status of their records management programme and identify major records problems.

2.54 Where circumstances warrant, the GRS will also review the records management function of B/Ds to ensure their compliance.⁸¹ Such records review will be based on perceived needs of the GRS or specific requests by B/Ds.⁸² The GRS will give the B/Ds concerned at least three months' prior written notice of its intention to conduct a review.⁸³

2.55 A two-pronged approach is adopted in these reviews, namely:-

- (i) self-assessment by B/Ds; and
- (ii) departmental records management review by the GRS.⁸⁴

2.56 At the end of the review, the GRS will submit its findings and recommendations to the B/Ds concerned, which will be required to draw up an implementation plan. These documents will be further submitted to the Chief Secretary for Administration for any further steer, as needed.⁸⁵

⁷⁹ Para 103 of the RMM.

⁸⁰ Paras 220, 906 and 907 of the RMM.

⁸¹ Para 900 of the RMM and para 25 of GC09. See also para 915 of the RMM, which recommends that the DRM in each B/D should, as far as possible, conduct an evaluation of the records management function every five years or more often.

⁸² Para 901 of the RMM.

⁸³ Para 902 of the RMM.

⁸⁴ Paras 4 to 11 of *General Circular No 5/2012: Records Management Reviews ("GC12")*. See also paras 906 to 908 of the RMM, which provide that the GRS Director may also conduct records management studies and surveys, and B/Ds should implement the recommendations from such reviews, studies and surveys.

⁸⁵ Para 10 of GC12.

(b) Enforcement and sanctions

2.57 Where government servants disobey, neglect or fail to observe the terms of Government Regulations, Circulars or Circular Memoranda on Conduct and Discipline appertaining to their duties, disciplinary proceedings may be taken against them and they may be held pecuniarily responsible for any financial loss to government resulting from their disobedience, neglect or failure.⁸⁶

2.58 In case of loss or unauthorised destruction of records, the DRM of the B/D concerned has to conduct an investigation and consider whether any disciplinary action or other administrative action is necessary, and report the findings and follow-up actions to GRS.⁸⁷

2.59 As mentioned in chapter 1, GC09 sets out mandatory records management requirements that are binding upon all government servants, and non-compliance may result in disciplinary action. Depending on the circumstances and seriousness of the non-compliance, punishment includes verbal or written warnings, reprimand, severe reprimand, demotion, compulsory retirement and dismissal.⁸⁸

Training

2.60 One of the main responsibilities of the GRS is provision of records related training.⁸⁹ In this regard, the GRS provides training to records management personnel and general records users in B/Ds, in the form of classes, topical or in-house seminars, briefings, workshops, etc. Through training, GRS seeks to promote best practice amongst all government employees and to impart knowledge and skills to DRMs, their assistants and registry supervisors or staff by offering tailored courses. Further, the GRS has taken the initiative to review its strategy in providing training services. To this end, the GRS has been working on developing web-based training and self-learning materials to assist government officers, and seeking their feedback so as to improve the training services.

2.61 Within a B/D, the DRM is responsible for providing records management staff with appropriate training and guidance to supplement that provided by the GRS, having regard to the specific operational needs of the B/D concerned.⁹⁰

⁸⁶ Para 11 of General Regulations of The Government of The Hong Kong Special Administrative Region (Regulations of The Government of The Hong Kong Special Administrative Region, Volume 1) ("**GR**").

⁸⁷ Para 22 and Appendix I para (I) of GC09.

⁸⁸ Para 5 of the PAC Information Note.

⁸⁹ Para 220(c) of the RMM.

⁹⁰ RMM, Appendix C and GC09, Appendix I.

Chapter 3

Overview of records and archives management legislation in other jurisdictions

Introduction

3.1 Published in 1985, the RAMP Study¹ to date remains one of the most comprehensive studies conducted into archival and records management legislation, covering some 120 countries across the globe. As noted in the RAMP Study, different jurisdictions have different approaches to archival and records management. Given the lack of a universal approach, a wide range of jurisdictions have been covered in the Sub-committee's review.² In this Paper, we focus our attention on five jurisdictions, namely, Australia, England, Ireland, New Zealand and Singapore, and make references to others where relevant and necessary. These five jurisdictions are all common law jurisdictions, bearing closer resemblance to Hong Kong's legal system. This chapter summarises the archives laws in these five jurisdictions against their respective backgrounds, with the following relevant aspects to be explored further later in this Paper:-

- (i) governance of GRS (chapter 4);
- (ii) administration and operations of the GRS (chapter 5);
- (iii) impact of records-related legislation on administrative guidelines on records management (chapter 6);
- (iv) transfer of records to archival authority (chapter 7);
- (v) compliance framework of public records management regime (chapter 8); and
- (vi) coverage of public records management regime (chapter 10).

¹ Eric Ketelaar, *Archival and Records Management Legislation and Regulations: a RAMP Study with Guidelines* (UNESCO, 1985) (the "**RAMP Study**").

² The jurisdictions which have been more extensively reviewed are Australia, England, Ireland, New Zealand and Singapore. Other jurisdictions, including Canada, Macau SAR, Mainland China and the USA, have also been referred to.

Australia

Background

3.2 Australia did not generate records on a very large scale in its early years. Awareness of the preservation of records, especially those of historical value, grew in the years following the First World War, although it was the Second World War that provided the final stimulus for the establishment of a Commonwealth archival function.³

3.3 It was against this background that the War Archives Committee was established, and later renamed the Commonwealth Archives Committee in 1946. Its role was to oversee the disposal of all past and future records and to coordinate the archival work of the War Memorial and the Commonwealth National Library.⁴

3.4 By 1952, the Archives Division took over the archival responsibilities of the War Memorial and became the single archival authority. Further development came in 1961, when the Archives Division was separated from the National Library and became the Commonwealth Archives Office within the Prime Minister's Department.

3.5 A review of the Australian archives system was conducted in 1973 by the former Dominion Archivist of Canada, Dr WK Lamb, who, amongst other things, insisted that the role of archives should be recognised and be reinforced by legislation. He stated that the function of a modern archives system was to "*watch over the care, handling and disposition of the records of the Government from the time that they are created until they are destroyed or selected for permanent preservation*".⁵

3.6 Part of the government response was the renaming of the Commonwealth Archives Office into Australian Archives in 1974 with the establishment of a new position of Director-General in 1975.

3.7 The Archives Act was finally passed in 1983, following the enactment of the *Freedom of Information Act* 1982 a year earlier. In 1998, the Australian Archives was renamed to the National Archives of Australia ("**NAA**").⁶

³ Australian Law Reform Commission - *Australia's Federal Record: A Review of Archives Act 1983* (Report No 85, 1998), at paras 2.11 to 2.12.

⁴ See summary of "*Our History*" in the website of the National Archives of Australia at: <http://www.naa.gov.au/about-us/organisation/history/index.aspx>.

⁵ See summary of "*Our History*" in the website of the National Archives of Australia at: <http://www.naa.gov.au/about-us/organisation/history/index.aspx>.

⁶ Australian Law Reform Commission - *Australia's Federal Record: A Review of Archives Act 1983* (Report No 85, 1998), at para 2.16.

An overview of the Archives Act 1983

3.8 The Archives Act 1983 ("**1983 Act**") which represents the first attempt to put the management of records on a legislative footing has since gone through various amendments. Among these is the addition of an objects clause,⁷ which sets forth clearly the objectives of the Act, namely:-

- (i) to provide for a NAA, whose functions include:
 - (a) identifying the archival resources of the Commonwealth; and
 - (b) preserving and making publicly available the archival resources of the Commonwealth; and
 - (c) overseeing Commonwealth record-keeping, by determining standards and providing advice to Commonwealth institutions (as defined); and
- (ii) to impose record-keeping obligations in respect of Commonwealth records (as defined).

3.9 Established alongside the NAA under the 1983 Act is the National Archives of Australia Advisory Council ("**NAAAC**"),⁸ whose role and functions will be discussed later in this Paper.

3.10 The 1983 Act applies to all "*Commonwealth records*", which are defined to be records that are the property of the Commonwealth or of a Commonwealth institution, or records that are deemed to be Commonwealth records in accordance with regulations issued. "*Record*", for the purpose of the 1983 Act, includes a document or an object in any form including any electronic form.⁹

3.11 The 1983 Act governs all the major stages of records management including appraisal, disposal, transfer, custody, and preservation. Obligations and powers provided for in some of the provisions highlight the authority and central role envisaged for the NAA and its Director-General under the 1983 Act. For example, the Director-General has the authority to determine that a specified Commonwealth record or other material is part of the archival resources of the Commonwealth.¹⁰ Records so determined are generally required to be transferred to the NAA as soon as practicable after they cease to be "current Commonwealth records", and in any event within 15

⁷ S 2A of the 1983 Act.

⁸ S10 of the 1983 Act.

⁹ S 3 of the 1983 Act.

¹⁰ S 3C of the 1983 Act.

years of their coming into existence.¹¹ The destruction or other disposal of a Commonwealth record is prohibited unless the NAA has given permission or it is done in accordance with a practice or procedure approved by the NAA.¹²

3.12 The NAA and its Director-General also have an important role to play in terms of care and custody. Materials of the NAA are to be kept at places as the Director-General considers appropriate,¹³ or alternatively, where he/she considers it appropriate, the NAA may make arrangements with a person for records required to be transferred, or for material of the NAA, to be kept in the custody of the person.¹⁴

3.13 The NAA must also cause records that are in the "open access period"¹⁵ to be made publicly available unless an exemption applies,¹⁶ and accelerated or special access is possible even where they are not yet in the open access period.¹⁷ Furthermore, various channels of appeal are provided for in the 1983 Act against decisions refusing access.¹⁸

3.14 The 1983 Act also offers protections to, *inter alia*, the Commonwealth or any person concerned in giving access to records as required by the Act from certain actions, such as defamation and breach of confidence.¹⁹

England

Background

3.15 The Public Record Office ("**PRO**") was established under the Public Record Office Act in 1838 which had the aim to "keep safely the public records". The Master of the Rolls, a senior judge, had overall responsibility over the PRO in its function of keeping records, which at the time were only legal documents.²⁰

¹¹ S 27 of the 1983 Act. This 15-year timeframe was reduced from a timeframe of 25 years by an amendment in 2010 made to section 27(3)(b) of the 1983 Act. This reduction of timeframe was not phased.

¹² S 24 of the 1983 Act.

¹³ S 63 of the 1983 Act.

¹⁴ S 64 of the 1983 Act.

¹⁵ For the meaning of "open access period", see the relevant discussion in chapter 7.

¹⁶ Ss 31 to 35 of the 1983 Act.

¹⁷ S 56 of the 1983 Act.

¹⁸ Ss 42 to 55A of the 1983 Act.

¹⁹ S 57 of the 1983 Act.

²⁰ See "*History of the Public Records Acts*", available on the official website of TNA at: <<http://www.nationalarchives.gov.uk/information-management/legislation/public-records-act/history-of-pra/>>.

3.16 During the 1840s, papers and documents of government departments began to be accepted for preservation, although there was no formal requirement for government departments to transfer their papers and make them available for public access. Until the Public Record Office Acts of 1877 and 1898, there was also no provision for the destruction of material not selected for preservation.

3.17 A study conducted by the Grigg Committee in the early 1950s resulted in the Public Records Act 1958 ("**1958 Act**"), which came into force on 1 January 1959 and established for the first time a comprehensive framework for the management of public records.

3.18 The 1958 Act imposes a duty on those responsible for public records which are not in the PRO or an appointed place of deposit to make arrangements for the selection of those records which ought to be permanently preserved and for their safekeeping.²¹ Such records, subject to exceptions, were required to be transferred to the PRO or an appointed place of deposit not later than 30 years after their creation.²² This requirement survives the Public Records Act 1967, but the "30 years" timeframe was reduced to 20 years in 2010 over a ten-year transition period.²³

3.19 The Freedom of Information Act 2000 ("**FOIA 2000**") was enacted in 2000 and came into force in 2005. In replacing the "30-year rule",²⁴ FOIA 2000 provides for a general regime of access. Briefly stated, under this regime, the public can request to access a public record as soon as it has been created, subject to exemptions.²⁵

3.20 Between 2003 and 2006, the PRO was joined together with three other government bodies, namely, the Royal Commission on Historical Manuscripts, Her Majesty's Stationery Office, and the Office of Public Sector Information to form what is now known as The National Archives ("**TNA**").²⁶

An overview of the 1958 Act

3.21 Other than the changes on access brought about by the FOIA 2000, the 1958 Act continues to be the primary governing law. Similar to

²¹ S 3(1) of the 1958 Act.

²² S 3(4) of the 1958 Act (as enacted).

²³ S 3(4) of the 1958 Act (as amended by the Constitutional Reform and Governance Act 2010).

²⁴ Under the 1958 Act as enacted, public records preserved were, in general, made publicly accessible when they had been in existence for 50 years. This was shortened to 30 years by the Public Records Act 1967, and was commonly referred to as the "30 year rule".

²⁵ See generally: <<http://www.nationalarchives.gov.uk/information-management/legislation/public-records-act/public-records-system/>>.

²⁶ <<http://www.nationalarchives.gov.uk/about/our-role/what-we-do/our-history/>>.

Australia, established alongside the TNA is an independent advisory body, now the Advisory Council on National Records and Archives ("**ACNRA**").²⁷

3.22 The 1958 Act's First Schedule defines "*public records*" comprehensively,²⁸ and "*records*" are construed to include not only written records but records conveying information by any other means whatsoever.²⁹ Where records created at different dates are for administrative purposes kept together in one file or other assembly, all the records in that file or assembly shall be treated as having been created when the latest of those records was created.³⁰

3.23 One important obligation under the 1958 Act is the selection and transfer of public records for permanent preservation which is to be coordinated and supervised by the Keeper of Public Records (or now, the "Chief Executive and Keeper" in TNA).³¹ Public records which are not required for permanent preservation shall be destroyed or disposed of in any other way.³²

3.24 Although the FOIA 2000 has taken over the governance of access generally, the 1958 Act remains important in terms of *facilitating* access as it imposes a duty on the Keeper to arrange reasonable facilities to the public for inspecting and obtaining copies of those public records in the TNA made available in accordance with the FOIA 2000.³³ Likewise, a similar duty was imposed on the Secretary of State for public records held in other places of deposit outside the TNA appointed by him.³⁴

3.25 Miscellaneous provisions in the 1958 Act include provisions on the legal validity of records³⁵ and the admissibility of authenticated copies in legal proceedings.³⁶

²⁷ Its roles and functions are discussed later in this Paper. See also ss 1(2), (2A), (3) of the 1958 Act.

²⁸ The meaning of "*public records*" in the 1958 Act will be discussed in more details later in this Paper.

²⁹ S 10(1) of the 1958 Act.

³⁰ S 10(2) of the 1958 Act.

³¹ Ss 3(1), (2) and (4) of the 1958 Act. The selection and transfer of records will be discussed in more details later in this Paper.

³² S 3(6) of the 1958 Act.

³³ S 5(3) of the 1958 Act.

³⁴ S 5(5) of the 1958 Act.

³⁵ S 9(1) of the 1958 Act.

³⁶ S 9(2) of the 1958 Act.

Ireland

Background³⁷

3.26 In 1702, the State Paper Office was established as a repository for records relating to the administration of the various Lords Lieutenant (the English monarch's representative in Ireland) who until then, had taken all of their records with them on leaving office.

3.27 In 1867, the Public Record Office of Ireland was established under the Public Records (Ireland) Act 1867 to acquire administrative, court, and probate records over 20 years old.

3.28 In 1988, the National Archives of Ireland ("**NAI**") was established under the National Archives Act 1986 ("**1986 Act**") to take over the functions of the aforesaid two bodies, which were then abolished.³⁸

An overview of the 1986 Act

3.29 The NAI, headed by a Director³⁹ who enjoys extensive powers and duties,⁴⁰ is the central archival authority envisaged under the 1986 Act. Apart from performing the functions of the two bodies from which it has taken over, the Director of the NAI is also tasked with, amongst other things,

- (i) the preservation, restoration, arrangement and description of archives;
- (ii) the preparation of guides, lists, indexes and other finding aids to archives;
- (iii) making archives available for public inspection;
- (iv) making and providing copies of archives;
- (v) the publication of archives, finding aids, and other material relating to archives;
- (vi) the provision of educational services relating to archives.⁴¹

³⁷ See official website of the National Archives of Ireland ("NAI") in Ireland at: <http://www.nationalarchives.ie/about-us/history/>;

³⁸ S 3 of the 1986 Act.

³⁹ S 5 of the 1986 Act.

⁴⁰ S 4 of the 1986 Act.

⁴¹ S 4 of the 1986 Act. See also the official website of the NAI at: <http://www.nationalarchives.ie/about-us/functions/introduction-2/>.

3.30 The Taoiseach (the Prime Minister of Ireland) enjoys various powers and functions, including establishing the National Archives Advisory Council ("**Advisory Council (Ire)**").⁴² At the request of a public service organisation, he may declare the records or documents (or a particular class of them) of that organisation to be Departmental records.⁴³ After consultation with the Director of the NAI, the Taoiseach may also make regulations over a wide range of matters such as the management and work of the NAI, the transfer of Departmental records to the NAI, and other matters necessary to give effect to the 1986 Act.⁴⁴

3.31 The 1986 Act applies to all "*archives*", which is defined to include such records and documents as are held in the Public Record Office of Ireland or the State Paper Office at the commencement of this Act, and departmental records transferred to and accepted for preservation by the NAI under this Act.⁴⁵ The term "*Departmental records*" is defined to encompass papers, files, sound recordings, pictorial records, microfilms and other micrographic records, magnetic tapes, magnetic discs, optical or video discs, other machine-readable records, other documentary or processed material, etc; it is thus clear that electronic records fall within the 1986 Act.

3.32 Similar to the archives law in other jurisdictions already discussed, the 1986 Act also governs major stages of records management including appraisal, disposal, transfer, and custody. It provides that Departmental records which are more than 30 years old shall, subject to exceptions, be transferred by the Department of State in which they were made to the NAI.⁴⁶ Departmental records, unless they are transferred to the NAI or are disposed of in accordance with the 1986 Act, shall be retained in the Department of State in which they were made or held.⁴⁷

3.33 Archives that are transferred into the custody of the NAI may be disposed of by its Director if, in his opinion, they do not warrant preservation by the NAI (and the Advisory Council (Ire) concurs, and an appropriate member of the Government responsible for the transfer to the National Archives consents to such disposal).⁴⁸ Otherwise, all archives in the custody of the NAI or held elsewhere in accordance with the 1986 Act shall, subject to exceptions, be made available for public inspection.⁴⁹

⁴² S 20 of the 1986 Act. The functions of the Advisory Council (Ire) will be discussed in more details later in this Paper.

⁴³ S 13 of the 1986 Act.

⁴⁴ S 19 of the 1986 Act.

⁴⁵ Ss 2(1)(a) and (b) of the 1986 Act.

⁴⁶ S 8 of the 1986 Act.

⁴⁷ S 7 of the 1986 Act.

⁴⁸ S 9 of the 1986 Act.

⁴⁹ S 10 of the 1986 Act; see also s 8(1).

3.34 Miscellaneous provisions in the 1986 Act include provisions addressing copyright issues⁵⁰ and provisions outlawing unauthorised removal of archives.⁵¹

New Zealand

Background

3.35 In 1957, New Zealand enacted its first archives law, the Archives Act 1957,⁵² which established the National Archives. With this establishment came the appointment of a Chief Archivist, who was charged under the Act with the "custody, care, control, and administration of all public archives deposited in the National Archives."⁵³

3.36 Under the now repealed Archives Act 1957, all public archives of the age of 25 years or over, which were (in the Chief Archivist's opinion) of sufficient value to warrant their preservation, were to be transferred to the custody of the Chief Archivist and be deposited in the National Archives.⁵⁴ Access by the public to archives deposited in the National Archives was also provided for, subject to various limitations.⁵⁵

3.37 In 2000, the National Archives was established as a separate department, and its name was changed to Archives New Zealand ("**ANZ**") used until present day.⁵⁶

3.38 In September 2004, the Public Records Bill was introduced into the New Zealand Parliament which, amongst other things, sought to introduce a new recordkeeping framework that *"reflects the changes in technology, legislation and recordkeeping practices that have occurred in the last half century."*⁵⁷

3.39 The Public Records Act was subsequently enacted and came into force on 21 April 2005. It repeals the Archives Act 1957⁵⁸ and remains as the governing archival legislation in New Zealand today.

⁵⁰ S 17 of the 1986 Act.

⁵¹ S 18 of the 1986 Act.

⁵² Now repealed.

⁵³ S 6 of the Archives Act 1957 (repealed).

⁵⁴ S 8 of the Archives Act 1957 (repealed).

⁵⁵ S 20 of the Archives Act 1957 (repealed).

⁵⁶ A timeline of the development of the ANZ is available on the website of the ANZ at: <<http://archives.govt.nz/about/timeline>>.

⁵⁷ Media release issued by the Minister for Archives New Zealand on 1 September 2004 referred to in the Bill Digest of the Public Records Bill 2004. See: <<https://www.parliament.nz/resource/en-NZ/47PLLawBD11481/6184d4bda946495659207df2288fab1f6a1be36a>>.

⁵⁸ S 66 of the 2005 Act.

An overview of the Public Records Act 2005

3.40 Similar to the 1983 Act in Australia, the Public Records Act 2005 ("**2005 Act**") in New Zealand includes an objects clause. The comprehensiveness of the 2005 Act is consistent with the enlarged role entrusted to ANZ envisaged under this new regime, and its purposes are stated to be:-

- (i) to provide for the continuation of the repository of public archives called the National Archives with the name Archives New Zealand ; and
- (ii) to provide for the role of the Chief Archivist in developing and supporting government recordkeeping, including making independent determinations on the disposal of public records and certain local authority archives; and
- (iii) to enable the Government to be held accountable by —
 - (a) ensuring that full and accurate records of the affairs of central and local government are created and maintained; and
 - (b) providing for the preservation of, and public access to, records of long-term value; and
- (iv) to enhance public confidence in the integrity of public records and local authority records; and
- (v) to provide an appropriate framework within which public offices and local authorities create and maintain public records and local authority records, as the case may be; and
- (vi) through the systematic creation and preservation of public archives and local authority archives, to enhance the accessibility of records that are relevant to the historical and cultural heritage of New Zealand and to New Zealanders' sense of their national identity; and
- (vii) to encourage the spirit of partnership and goodwill envisaged by the Treaty of Waitangi, as provided for by section 7; and
- (viii) to support the safekeeping of private records.⁵⁹

3.41 The National Archives established under the repealed Archives Act 1957 continues to be the central repository under the 2005 Act, albeit with the new name "ANZ".⁶⁰ One major change, however, is the expanded role of

⁵⁹ S 3 of the 2005 Act.

⁶⁰ S 9 of the 2005 Act.

the Chief Archivist, who is effectively the head of ANZ and enjoys many and more specific duties and functions under the 2005 Act.⁶¹ Similar to other jurisdictions, an advisory body is also established under the 2005 Act and is known as the Archives Council ("**Archives Council (NZ)**").⁶²

3.42 The 2005 Act applies to all "*public record*" which is defined to mean a record or a class of records, in any form, in whole or in part, created or received by a public office in the conduct of its affairs. The term "*public office*" is further comprehensively defined.⁶³ A "*record*" means information, whether in its original form or otherwise, including a document, a signature, a seal, text, images, sound, etc compiled, recorded, or stored, as the case may be, in written form on any material, or on film, negative, tape, or other medium so as to be capable of being reproduced, or by means of any recording device or process, computer, or other electronic device or process.⁶⁴

3.43 Like the archives law in other jurisdictions, major stages of records management (such as disposal, transfer, and custody) are addressed in the 2005 Act. For example, every public office is generally required to transfer public records that have been in existence for 25 years⁶⁵ to the possession of ANZ (or an approved repository) and the control of the Chief Archivist.⁶⁶ The Minister may, on the advice of the Archives Council (NZ), given on the recommendation of the Chief Archivist, approve a relevant body (such as a museum, library) as an approved repository where public archives may be deposited for safekeeping.⁶⁷

3.44 When records have been in existence for 25 years or when they are about to be transferred as required, the administrative head of the controlling public office must classify such records, either as open access records or restricted access records.⁶⁸ Where a record is classified as an open access record, it must be made available for public inspection as soon as is reasonably practicable after a request to inspect it is made.⁶⁹ Public access may be prohibited by the Chief Archivist for any period he/she thinks necessary either in the interest of preserving the public archive or pending its classification, repair, or other treatment.⁷⁰

⁶¹ S 11 of the 2005 Act.

⁶² S 14 of the 2005 Act. The role and responsibilities of the Archives Council (NZ) will be discussed in more details later in this Paper.

⁶³ The meaning of "*public office*" will be discussed in more details later in this Paper.

⁶⁴ S 4 of the 2005 Act.

⁶⁵ S 21 of the 2005 Act.

⁶⁶ S 21(1) of the 2005 Act.

⁶⁷ S 26 of the 2005 Act.

⁶⁸ S 43 of the 2005 Act.

⁶⁹ S 47 of the 2005 Act.

⁷⁰ S 49 of the 2005 Act.

3.45 Miscellaneous provisions in the 2005 Act include provisions establishing an appeal mechanism against various decisions made by the Chief Archivist,⁷¹ and creating offences in relation to inflicting damage to, or destruction of, public records.⁷²

Singapore

Background

3.46 The National Archives of Singapore ("**NAS**"), which today is managed by the National Library Board ("**NLB**"), can trace its roots back to the creation of the post of Archivist in 1938 within the Raffles Museum and Library,⁷³ which itself had evolved from the library of The Singapore Institution established a few years after modern Singapore was founded by Sir Stamford Raffles in early 19th century.⁷⁴

3.47 In 1967, the National Archives and Records Centre Act was enacted to establish the National Archives and Records Centre "in which public records shall be stored and preserved". Under this now abolished regime, no public records were to be destroyed or otherwise disposed of without the authorisation of the Director of National Archives and Records. Any public records which had been more than 25 years old shall be transferred to the National Archives and Records Centre subject to exception. The public could inspect public archives made available for the purpose of reference or research subject to possible conditions.⁷⁵

3.48 In 1993, the National Archives and Records Centre Act was repealed. In 1995, the NLB was established pursuant to the National Library Board Act ("**NLBA**") to take over the duties of the National Library of Singapore.

3.49 In 2013, following reorganisation of government ministries, the NAS was transferred to become a part of, and managed to this day by, the NLB⁷⁶ which also manages the National Library and 26 public libraries across Singapore.⁷⁷

⁷¹ Ss 51-56 of the 2005 Act.

⁷² Ss 61-62 of the 2005 Act.

⁷³ See the history of the NAS described in the official website of the NAS at : <<http://www.nas.gov.sg/nas/AboutUs/History.aspx>>.

⁷⁴ See the website of the NLB at: <<http://www.nlb.gov.sg/About/HistoryofNationalLibrarySingapore.aspx>>.

⁷⁵ Ss 7, 9 and 10 of the National Archives and Records Centre Act 1967 (repealed).

⁷⁶ Above, official website of the NAS.

⁷⁷ For an overview about the NLB, see: <<http://www.nlb.gov.sg/About/AboutNLB.aspx>>.

An overview of the NLBA

3.50 The current record-management regime under the NLBA whereby the NAS is managed by the NLB is, in many respects, not too dissimilar from the previous regime briefly summarised above.

3.51 The NLB enjoys extensive functions and powers under the NLBA.⁷⁸ Following the institutional reshuffle that brought the NAS within its management, the NLB has the following additional roles:-

- (i) shall examine the public records in any public office and advise that office as to their care and custody;
- (ii) shall take necessary measures to classify, identify, preserve and restore public records;
- (iii) shall make known information concerning archives by any means, including publications, exhibitions and heritage promotional activities;
- (iv) shall conduct a records management programme for the efficient creation, utilisation, maintenance, retention, preservation and disposal of public records;
- (v) shall advise public offices concerning standards and procedures pertaining to the management of public records;
- (vi) may provide information, consultation, research and other services related to archives;
- (vii) may, subject to the terms and conditions, if any, on which the public archives were acquired, reproduce or publish any public archives; and
- (viii) may acquire by purchase, donations, bequest or otherwise any document, book or other material which, in the opinion of the NLB, is or is likely to be of national or historical significance.⁷⁹

3.52 However, the general management and control of the NAS shall be the responsibility of the Director of NAS, who is appointed from among the officers of the NLB.⁸⁰

3.53 Section 2 of the NLBA defines the key terms. "*Public records*" is defined to cover papers, documents, records, and specifically includes

⁷⁸ Ss 6 and 7 of the NLBA.

⁷⁹ S 14A(2) of the NLBA.

⁸⁰ S 14B of the NLBA.

"electronic records, sound recordings and other forms of records of any kind whatsoever, that are produced or received by any public office in the transaction of official business, or by any officer in the course of his official duties, and includes public archives." "Public archives" are public records which are more than 25 years old, are specified by the NLB as being of national or historical significance and have been transferred to the NLB or such other place as the NLB may determine. The term "*public office*" is also defined widely.⁸¹

3.54 Similar to the old regime, no public records are to be destroyed or otherwise disposed of without the authorisation of the NLB which may authorise the destruction of any specified classes of public records which by reason of their number, kind or routine nature do not in its opinion possess any enduring value for preservation as public archives.⁸²

3.55 Any public records which, in the opinion of the NLB, are of national or historical significance shall be transferred to the care and control of the NAS in accordance with such schedules or other agreements as may be agreed on between the NLB and the public office responsible for the public records.⁸³

3.56 Under the NLBA, public archives or recordings made available to the public may be inspected by any person for the purpose of reference or research subject to some possible conditions.⁸⁴

3.57 Miscellaneous provisions in the NLBA related to the NAS include provisions prohibiting unauthorised publication, reproduction,⁸⁵ export, and mutilation⁸⁶ of public records.

⁸¹ The meaning of the terms "*public records*" and "*public office*" will be discussed in more details later in this Paper.

⁸² S 14D of the NLBA.

⁸³ S 14C of the NLBA.

⁸⁴ S 14E of the NLBA.

⁸⁵ S 14G of the NLBA.

⁸⁶ S 14H of the NLBA.

Chapter 4

Governance of GRS

Introduction

4.1 A perceived inadequacy of the public records management system in Hong Kong is that the GRS is not sufficiently authoritative, and that it lacks the support of an advisory body in carrying out its mission to ensure proper management of government records. In this chapter, we first examine these comments on the governance of the GRS and also the systems and practices in other comparable jurisdictions before setting out some questions to seek views from the public on the subject.

Comments on the governance of the GRS

4.2 Currently, the GRS is under the auspices of the Administration Wing of the Chief Secretary for Administration's Office. Institutionally, no external body provides advice to the GRS on matters such as the disposal of records or other matters relating to government records management generally.¹

4.3 Having noted that the national archives in Australia, England, and New Zealand, being a part of the government, can consult an external independent advisory body which is required to report its work to the public annually,² The Ombudsman has made the following observation:-

*"GRS and Adm[inistration] Wing currently have absolute power to determine the fate of records. By the time their decisions are called in question, the evidence required for verifying their decisions ie the records themselves, may have already been destroyed. It is, therefore, imperative for a system to be established such that GRS regularly takes advice from an independent body. The setting up of such an advisory body would enable public engagement and scrutiny, and would help command more public confidence in Hong Kong's public records management system."*³

¹ Para 3.1 of The Ombudsman's Report.

² Paras 3.2 – 3.3 of *The Ombudsman's Report*.

³ Para 3.4 of The Ombudsman's Report.

Other jurisdictions

Australia

4.4 Established under the 1983 Act, the NAA is an executive agency⁴ of the Australian government administered by the Director-General under the direction of the Minister, who is currently the Attorney General.⁵

4.5 The 1983 Act provides for the establishment of an advisory council, namely the NAAAC (ie National Archives of Australia Advisory Council), to advise the Minister and the Director-General on matters relating to the NAA's functions either of NAAAC's own motion or upon referral by the Minister or the Director-General.⁶

4.6 The NAAAC is required to submit annual report to the Minister, who shall cause a copy of it to be laid before each House of the Parliament.⁷

England

4.7 TNA (formed by joining the PRO with three other bodies⁸) serves as the official archives. Governed under the 1958 Act, TNA is a non-ministerial department⁹ currently placed under the Secretary of State for

⁴ An "executive agency" is a category of Australian public service agencies established by the Governor-General by order in Gazette under the Public Service Act 1999, Act No 147, 1999. The Head of an executive agency is accountable to the government, the Parliament and the public in the same way as the Secretary of a Department.

⁵ See the NAA's official website: <<http://www.naa.gov.au/about-us/organisation/>> and s7 of the 1983 Act.

⁶ See ss10 to 12, 14 and 17 of the 1983 Act. The NAAAC consists of (a) a Senator chosen by the Senate, (b) a member of the House of Representatives chosen by that House and (c) 11 other members appointed by the Minister. All members hold office for up to three years. These members can be re-appointed. Members are remunerated, reimbursed their expenses or paid allowances pursuant to s14. The Chairman and Deputy Chairman of the NAAAC are appointed by the Minister. The NAAAC holds such meetings as are necessary for the performance of its functions. Sections 15 and 16 of the 1983 Act also provide for the termination of office or resignation of a member of the NAAAC.

⁷ S 68 of the 1983 Act.

⁸ Namely, the Royal Commission on Historical Manuscripts, Her Majesty's Stationery Office, and the Office of Public Sector Information:
<<http://www.nationalarchives.gov.uk/about/our-role/what-we-do/our-history/>>.

⁹ Non-ministerial departments in England do not have direct ministerial accountability. There is a 'sponsor minister' who has residual policy responsibility for such a department, but the department operates independently of ministers, generally receiving funding directly from Parliament, and is accountable directly to the Parliament. See the UK Parliament's website at:
<<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmpubadm/110/11013.htm>> and the UK Government's website at:
<<https://www.gov.uk/government/organisations>>.

Digital, Culture, Media and Sport ("**Secretary of State**").¹⁰

4.8 A Keeper of Public Records is appointed by the Secretary of State under the 1958 Act to take charge under his direction of TNA and the records therein.¹¹

4.9 The 1958 Act also provides for the establishment of the Advisory Council on Public Records to advise the Secretary of State on matters concerning public records in general and, in particular, on those aspects of TNA's work which affect members of the public who use its facilities. The Advisory Council on Public Records may also advise the Secretary of State on matters relating to the application of the FOIA 2000 to information contained in public records which are historical records within the meaning of Part VI of that Act.¹²

4.10 The Advisory Council on Public Records, and another advisory council called the Advisory Council on Historical Manuscripts,¹³ were subsequently subsumed under the Advisory Council on National Records and Archives ("**ACNRA**") which was established in 2003. Since then, the three Councils function as one body (ie ACNRA), chaired by the Master of the Rolls, to advise the Secretary of State as an independent advisory body.¹⁴

4.11 The Secretary of State shall in every year lay before both Houses of the Parliament a report on the work of TNA, which shall include any report made to him by the ACNRA.¹⁵

¹⁰ Main functions of the Lord Chancellor under the 1958 Act have been transferred to the Secretary of State for Culture, Media and Sport with effect from December 2015 by virtue of ss 6 and 7 of the Transfer of Functions (Information and Public Records) Order 2015/1897 (9 December 2015). The Department for Culture, Media and Sport changed its name to the Department for Digital, Culture, Media and Sport with effect from 3 July 2017, see:
<<https://www.gov.uk/government/news/change-of-name-for-dcms>>.

¹¹ S 2 of the 1958 Act.

¹² Ss 1(2) and (2A) of the 1958 Act. The Chairman of the Advisory Council is the Master of the Rolls and the remaining members shall be appointed by the Secretary of State on such terms as he may specify (s1(2)).

¹³ The Advisory Council on Historical Manuscripts was turned into a sub-committee, known as Forum on Historical Manuscripts and Academic Research, of the ACNRA in May 2010 to provide a means through which recommendations can be made to the ACNRA about activity relating to historical manuscripts (private archives), as well as a place for discussion about academic research issues:
<<http://www.nationalarchives.gov.uk/about/our-role/advisory-council/terms-of-reference/>>.

¹⁴ According to TNA's website, the ACNRA currently consists of 15 members, including historians, archivists, information management professionals, former civil servants and journalists: <<http://www.nationalarchives.gov.uk/about/our-role/advisory-council/>> and <<http://www.nationalarchives.gov.uk/about/our-role/advisory-council/terms-of-reference/>>.

¹⁵ S 1(3) of the 1958 Act.

Ireland

4.12 The 1986 Act assigns ministerial responsibility for the NAI to the Taoiseach. Currently, the NAI is placed under the Department of Arts, Heritage and the Gaeltacht.¹⁶

4.13 A Director of National Archives is appointed by the Minister for Arts, Heritage and the Gaeltacht (previously by the Taoiseach) to carry out his or her functions under the Act.¹⁷

4.14 A Council, known as the National Archives Advisory Council ("**Advisory Council (Ire)**") is established under the 1986 Act to advise the Minister in the exercise of his statutory powers and on all matters affecting the archives and their use by the public, and to discharge the other functions conferred on the Advisory Council (Ire) by the 1986 Act.¹⁸

4.15 Both the Director of National Archives and the Advisory Council (Ire) are required to submit annual reports to the Minister. Copies of both reports shall be laid by the Minister before each House of the Oireachtas (ie National Parliament).¹⁹

New Zealand

4.16 ANZ is placed under the Minister of Internal Affairs but under the 2005 Act, the Chief Archivist (defined in section 4) is to take a leadership role in recordkeeping in public offices and in the management of public archives in New Zealand.²⁰ The Chief Archivist is required to act independently in the performance of his functions and in his exercise of certain powers under the Act.²¹

¹⁶ Consequently, most of the functions conferred on the Taoiseach are now performed by the Minister for Arts, Heritage and the Gaeltacht although Taoiseach continues to perform certain functions relating to the retention by Departments of Departmental records which are more than 30 years old and the withholding of such records from public inspection. See the official website of the NAI:
<<http://www.nationalarchives.ie/about-us/ministerial-responsibility-for-archives/>>.

¹⁷ S 5 of the 1986 Act.

¹⁸ According to s 20 of the 1986 Act, the Advisory Council (Ire) shall consist of a chairman and not more than 11 other members (not less than two members of the Irish Manuscripts Commission and not less than two archivists not employed by the National Archives), appointed by the Minister on such terms and conditions as shall be determined by him, after consultation with the Minister for Public Service. The Minister may terminate the appointment of the chairman or any member at any time. Information about the Advisory Council (Ire) is available in its website at:-
<<http://www.nationalarchives.ie/about-us/national-archives-advisory-council/introduction/>>. According to the website, members of the Advisory Council (Ire) are currently appointed for a period of five years.

¹⁹ S 21 of the 1986 Act.

²⁰ S 11(1)(a) of the 2005 Act.

²¹ S 12 of the 2005 Act.

4.17 An unincorporated body called the Archives Council ("**Archives Council (NZ)**")²² is established under the 2005 Act to provide to the Minister, whether on his request or on the Archives Council (NZ)'s own initiative, advice concerning recordkeeping and archives matters, as well as recommendations on appeals by public office or local authority to the Minister under the 2005 Act.²³

4.18 Both the Chief Archivist and the Archives Council (NZ) must submit annual reports to the Minister, who must present the reports to the House of Representatives.²⁴

Singapore

4.19 The NAS is an institution of the NLB which is currently placed under the Ministry of Communications and Information.²⁵ The Minister may give the NLB any direction as to the performance of its functions.²⁶

4.20 The NLBA establishes the NLB as a statutory corporation responsible for exercising and discharging the powers and functions stipulated in the NLBA. The NLB shall consist of a Chairman, a Deputy Chairman and not less than ten but not more than 20 other members as the Minister may appoint.²⁷ There must be a chief executive officer of the NLB, who is responsible for the proper administration and management of its functions and affairs.²⁸ The NLB also appoints one of its officers as the Director of the NAS, who is responsible to the NLB for the general management and control of the NAS.²⁹

4.21 The NLB is required to submit an annual report to the Minister, who must present a copy thereof to the Parliament.³⁰

4.22 The NLBA empowers the NLB to appoint committee(s) for purposes which, in its opinion, would be better regulated and managed by means of such committees. The NLB may also appoint directors for the

²² Under ss14 and 16 of the 2005 Act, the Archives Council (NZ) must consist of not more than seven members appointed by the Minister. Council members hold office for a term not exceeding three years, and may be reappointed. They are entitled to be paid fees and allowances or expenses out of money appropriated by Parliament for such purpose.

²³ Ss 14, 15(1) and 55 of the 2005 Act.

²⁴ Ss 15(3) and (4), and 32 of the 2005 Act.

²⁵ See official website of the NLB: <<http://www.nlb.gov.sg/About/AboutNLB.aspx>>.

²⁶ S 14 of the NLBA and s5 of the Public Sector (Governance) Act 2018.

²⁷ Ss 3, 5, 6 and 7 of the NLBA.

²⁸ S 15 of the NLBA and ss12 and 14 of the Public Sector (Governance) Act 2018.

²⁹ Ss 5 and 14B of the NLBA.

³⁰ Ss 33 and 41 of the Public Sector (Governance) Act 2018.

management of libraries it established, as well as advisory committees to advise on the operation and services of those libraries.³¹

Summary of approaches in other jurisdictions

4.23 As remarked in the *RAMP Study*, there is no universally accepted model for organisational placement of the archival authority. While most developed jurisdictions have an archives law and place their archives under the direction or authority of a Minister,³² the responsible Minister differs from country to country (for example, Minister responsible for culture and heritage,³³ Minister responsible for internal affairs³⁴ or for communications and information³⁵) or may even change from time to time.

4.24 In Australia, England,³⁶ Ireland and Singapore, the administrative head of the archival authority is placed under a responsible Minister. The Minister may give directions to the administrative head (or the NLB in Singapore) in relation to the latter's performance of statutory duties and functions. The exception is New Zealand, where although the ANZ is also placed under a Minister, the 2005 Act expressly requires the Chief Archivist to act independently without being subjected to the Minister's direction.

4.25 An advisory council is established under the archives law in Australia, England, Ireland and New Zealand (but not in Singapore). The function of the advisory council is mainly to provide independent advice to the Minister on recordkeeping and archives matters. In Australia and New Zealand, this may be done on the advisory council's own motion or upon request by the Minister. In Australia, the advisory council also advises the Director-General of the NAA.

4.26 The Minister is not generally obliged to consult the advisory council or bound by the council's advice, if any. In Ireland however, the concurrence of, or prior consultation with the Advisory Council (Ire) is required on certain specific matters. These include the lending of archives by the NAI to other archival or educational institutions, museums or galleries, and the

³¹ Ss 8 and 9 of the NLBA.

³² Paras 70 to 72 of the *RAMP Study*.

³³ Examples are England and Ireland discussed in this chapter, and Canada in which the Library and Archives Canada is placed under the Minister of Canadian Heritage since 2015 (s 4 of Library and Archives of Canada Act, S C 2004, c11, and the Table of Public Statutes and Responsible Ministers in the official website of the Department of Justice of the Government of Canada, available at: <<http://laws-lois.justice.gc.ca/eng/TablePublicStatutes/L.html>>.)

³⁴ For example, New Zealand.

³⁵ For example, Singapore.

³⁶ As discussed above, although as a non-ministerial department TNA has a "sponsor minister", it is accountable directly to the Parliament.

disposal of archives by the archival authority.³⁷ The Minister must also consult the Advisory Council (Ire) before amending the list of specified bodies to which the Act applies in the Schedule to the 1986 Act.³⁸ Similarly in New Zealand, when the Minister makes a recommendation to the Governor-General for a body to be declared a "public office", or for varying the application of the 2005 Act, he must first have regard to the advice from the Archives Council (NZ).³⁹ In Australia, the NAA is required to furnish to the NAAAC particulars of the practices followed or approved by (or any alteration to such practices) the NAA for disposal of Commonwealth records before implementation of these practices. There is, however, no express requirement to seek the NAAAC's approval or consent before such implementation.⁴⁰

4.27 All in all, the functions and powers of the advisory council vary from one country to another. As observed in the *RAMP Study*:-

*"The concept of an Archives Council 'to enlist the participation of producers and users of archives in the framing of archival policy' is almost universally accepted. But the key issue whether the Council should be provided with executive powers has been dealt with differently. Too much power for the Council endangers the authority of the Archives and may even frustrate a fruitful development of a professionally and constitutionally (sic) responsible archival institution. On the other hand, National Archives without any outside sounding board risk a certain introversion and isolation. The responsible Minister may feel the need for expert advice to counter-balance the professionally specialized National Archives. ..."*⁴¹

4.28 In terms of composition, members of the archives council of the above jurisdictions and the NLB in Singapore consist of, *inter alia*, non-governmental members either appointed or chosen by the Minister. Members are generally appointed based on their experience and ability in records management or archival research, or such other experience or qualifications useful for the work of the advisory council. Besides, members of the ACNRA in England include historians, archivists, information management professionals, former civil servants and journalists.

4.29 The archives law may or may not stipulate the number of appointed members and their terms of service. In practice, the number of appointed members ranges from seven (New Zealand) to 15 (England), and the length of tenure ranges from three years (with the right to apply for

³⁷ Ss 4(1)(h), 9(1)(b) and (2)(b) of the 1986 Act.

³⁸ S 1(2)(d) of the 1986 Act.

³⁹ Ss 5(1), 5(5)(b) of the 2005 Act.

⁴⁰ S 25 of the 1983 Act.

⁴¹ Paras 73 to 83 of the *RAMP Study*.

reappointment) in Australia and New Zealand to not more than ten years (England⁴²).

4.30 Advisory councils in Australia, Ireland and New Zealand and the NLB in Singapore are required to submit to the Minister an annual report, which will ultimately be presented to the Parliament.

Issues for public consultation

4.31 As can be seen from the above discussion, no one single model of placement and governance structure of the archives is universally accepted as ideal, and each jurisdiction should decide what is in its best interest. The ultimate consideration is that the system adopted should best serve the archives, its users and the public, in the sense of facilitating achievement of the archives' mission and objective. As remarked in the *Parer's Report*:⁴³

*"There are advantages and disadvantages inherent in each choice. Decisions on placement may be guided by an archives' need for autonomy, or need for support or protection. How an archives is established and administratively placed within government is strategically important. Each country must decide what best fits its needs."*⁴⁴

4.32 Both the *RAMP Study* and *Parer's Report* emphasised that as an archives service should be involved in records management activities of all government departments, it should be placed within the government hierarchy so that it can best achieve its objectives. As a basic consideration, the archives should be placed under the jurisdiction of an influential Minister, who can be approached directly by the head of the archives.⁴⁵

4.33 The archives' placement and governance structure is, in our view, fundamental to the operation of the archives which may ultimately affect the

⁴² S 1(2) of the 1958 Act provides that, apart from the Chairman who shall be the Master of the Rolls, members of the advisory council shall be appointed by the Secretary of State on such terms as he may specify. According to para 3.6 of the *Governance Code on Public Appointments* (December 2016), published by the Cabinet Office of the UK Government, it is for the Secretary of State to determine the length of tenure of the appointed members, but there is a strong presumption that no individual should serve in one post for more than ten years unless in exceptional cases where the individual's skills and expertise is needed beyond such a tenure. The *Governance Code on Public Appointments* is accessible at the website of the Cabinet Office at:
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/578498/governance_code_on_public_appointments_16_12_2016.pdf>.

⁴³ Dagmar Parer, *"Archival Legislation for Commonwealth Countries"* (Association of Commonwealth Archivists and Records Managers, 2001).

⁴⁴ Para 5.1.2 of the *Parer's Report*. This remark should similarly be applicable to each jurisdiction and to Hong Kong SAR of the People's Republic of China under "one country two systems".

⁴⁵ Paras 70 and 72 of the *RAMP Study* and para 5.1.2 of the *Parer's Report*.

quality of the public records and archives to be preserved for and made available to the community. Various jurisdictions studied above have established an advisory council to assist and support their national archives, although these jurisdictions differ in relation to the composition, power, function and other aspects of the council. Given the value of the archives and the desirability of engaging the public in the shaping and development of a well-structured and responsible archival authority, we invite views on a number of issues as set out below.

Consultation Questions 1

- (i) Should the current placement of GRS within the Government continue?**
- (ii) If the answer to (i) is in the negative, in what way should the GRS' placement be changed, and what are the reasons for your suggestions?**
- (iii) Is there a need for the appointment of an advisory body to provide advice on public records and archives management matters?**
- (iv) If the answer to (iii) is in the affirmative, what should the role, composition and functions of the advisory body be?**

Chapter 5

Administration and operations of the GRS

Introduction

5.1 This chapter identifies various aspects of the administration and operations of the GRS over which comments have been made by concerned groups and individuals. We will then review the improvement measures that the Government has taken to address the comments, and the applicable laws and practices in various other jurisdictions in respect of each of these comments. We will then highlight some specific issues for public consultation.

(I) Dissemination of information about GRS' work

(a) *Comments*

5.2 GRS was criticised for lack of transparency as it did not report on its work by way of publishing annual reports. The lack of transparency was said to persist at various stages of records management, so that the public had no way of knowing what records of B/Ds had been destroyed or archived. Information such as the records management policy statement, disposal schedules, self-assessment surveys was not made available to the public. B/D's compliance with GRS requirements was also not made known.¹

5.3 The Ombudsman suggested that the Government should, pending legislation, regularly disseminate information about the disposal of records so as to facilitate public understanding and enable public scrutiny of the B/Ds' disposal (in particular, destruction) of records.²

(b) *Government's stance or response*

5.4 The GRS has since taken various measures to address the issue of transparency:-

- In March 2015, the GRS published its first annual report on its website. Since then, annual reports have been

¹ Paras 7.1-7.3 of *The Ombudsman's Report*.

² Para 9.4(10) of *The Ombudsman's Report*.

published regularly in subsequent years.³ GRS' annual report contains vital statistics on its major functions and activities, as well as highlights of newly released records, so as to facilitate public understanding of the Government's records management work as well as its archival collection.

- In May 2015, the GRS uploaded the GARDS onto its website for public inspection.⁴
- In June 2016, the GRS launched a central platform for each individual B/D to publish its records destruction information on an annual basis including the types, quantities, contents or subject matters of the records approved by GRS for destruction by individual B/Ds.⁵
- In April 2017, the GRS also uploaded the government records management manuals, guidelines and circulars onto its website.⁶
- In the GRS Annual Report 2016 issued in July 2017, the GRS included the information about B/Ds' compliance with the mandatory records management requirements.
- In July 2017, GRS revamped its website to provide a more user-friendly interface for users to browse the information therein and to access the archival holdings. To enhance the transparency of the records management system of the Government, there is a new section in the revamped website which gives an overview of the records management system in the Government and the work done by the GRS to preserve the archival holdings. Government circulars, standards, guidelines, manuals and publications on records management are also accessible on the revamped website.

(c) Other jurisdictions

5.5 Dissemination of information is achieved through different means in other jurisdictions. For example, their archives laws require the archival

³ The annual reports are accessible at:
<http://www.grs.gov.hk/en/grs_annual_reports.html>.

⁴ GARDS is accessible at: <[http://www.grs.gov.hk/pdf/P4\(Oct_2013\)\(Eng_only\).pdf](http://www.grs.gov.hk/pdf/P4(Oct_2013)(Eng_only).pdf)>.

⁵ The information for 2015 and 2016 is accessible at:
<http://www.grs.gov.hk/en/destruction_of_records_in_the_government.html>.

⁶ The manuals, guidelines and circulars are accessible at:
<http://www.grs.gov.hk/en/hksar_government_administrative_guidelines_on_record_management.html>.

authority and/or relevant advisory body to submit annual reports which will be presented to the legislature and uploaded to the archival authority's website. Other documents and information commonly shared in their archives' websites include information regarding their organisations, their records management policies, guidelines and advice, as well as their services, projects and action plans.⁷

5.6 While the archival authorities in Australia, England, Ireland and Singapore have published records management policies and guidelines on their websites, this is not required by their laws which generally simply impose upon them, *inter alia*, the broad responsibility to provide advice to public authorities on record management matters.⁸

5.7 Uniquely, the 2005 Act in New Zealand not only empowers the Chief Archivist to advise public authorities by issuing records management standards, it also requires him to *publish* such standards.⁹

5.8 Keeping registers available for public inspection is another way to enhance transparency. The 2005 Act in New Zealand requires the Chief Archivist to keep various registers, including a register of deferral of transfer of records and a register of different types of records, and make them available for public inspection.¹⁰ Similarly, the NAA in Australia is also required to maintain the Australian National Register of Records, the Australian National Guide to Archival Material and the Australian National Register of Research Involving Archives, with the latter two opened for public inspection.¹¹ No such specific obligation is found in the archives law in England, Ireland or Singapore, where comparable provisions are more open-ended and provide that the archival authority may compile and make available lists of records held in their custody and preservation.¹²

Issues for public consultation

5.9 Currently, GRS has no statutory duty to regularly publish reports on its work, or its standards and guidelines issued.

⁷ See, in particular, the information management web page of TNA in England: <<http://www.nationalarchives.gov.uk/information-management/>>, the Records Toolkit page of ANZ in New Zealand at: <<http://records.archives.govt.nz/>>, and the information management web page of NAA in Australia: <<http://www.naa.gov.au/information-management/>>.

⁸ For example, s 5(2)(c) of the 1983 Act in Australia and s 4(1)(e) of the 1986 Act in Ireland.

⁹ S 27(3) of the 2005 Act.

¹⁰ S 19 of the 2005 Act.

¹¹ Ss 65 to 67 of the 1983 Act.

¹² S 2(4)(a) of the 1958 Act in England; s 4(1)(g) of the 1986 Act in Ireland; and s14A(2)(c) of the NLBA in Singapore.

5.10 Legislation aside, we note that the Government has in recent years been proactively promoting public understanding of the GRS' work and B/Ds' records management activities as set out under the heading "(b) Government's Stance or Response" above. In particular, publishing its annual reports since 2015 is a big step forward in enhancing the transparency.

5.11 In the light of these latest measures, the Sub-committee would like to gauge the views of the public on a number of issues before considering the appropriate recommendation(s), if any, for enhancing the transparency of the Government's records management work.

Consultation Questions 2

- (i) Are the documents and information currently published on the GRS' website sufficient (paragraph 5.4)?**
- (ii) If the answer to (i) is in the negative, what other documents and information should the GRS disseminate and what are the reasons for your suggestions?**

(II) Creation of records

(a) Comments

5.12 Another comment was the lack of clear obligation on B/Ds to create records. The Audit Commission's Report observed that GC09, which imposed mandatory requirements on records management, contained no provision on records creation.¹³ The 2011 Civic Exchange Report also identified a number of incidents in which concerns had been raised in relation to the Government's creation of records.¹⁴

5.13 The Audit Commission recommended that the Government should consider setting mandatory requirements on records creation, to ensure that B/Ds create adequate, but not excessive, records.¹⁵

¹³ Para 2.9 of the Audit Commission's Report.

¹⁴ Chapter 6 of the *2011 Civic Exchange Report*. In a Report dated 19 April 2013 on the collision of vessels near Lamma Island on 1 October 2012, the Commission of Inquiry raised concerns about the lack of proper documentation of the considerations and reasons underlying certain important decisions of policy in the Marine Department. See paras 407 to 409 of the Commission of Inquiry's report, accessible at: <https://www.gov.hk/en/theme/coi-lamma/pdf/COI_Report.pdf>.

¹⁵ Para 2.13 of the *Audit Commission's Report*.

(b) Government's stance or response

5.14 The Government said that it fully recognised the importance of records management and was committed to identifying and preserving government records having archival value.

5.15 One of the goals of the RMM is to ensure "*accurate and complete documentation of the policies, procedures, decisions, functions, activities and transactions of the Government*" by way of, *inter alia*, requiring the "*making and keeping [of] full and accurate records of its official functions and activities*".¹⁶ Although the mandatory requirements in GC09 do not specifically refer to records creation, GC09 requires heads of B/Ds to accord appropriate priority and resources to implement a proper records management programme.

5.16 In response to the Audit Commission's Report, the then Director of Administration stated that, as an established practice, B/Ds would, in following the GRS guidelines, identify their business functions and assess their information needs so as to create and capture adequate but not excessive records. The GRS will review and improve such guidelines where necessary.¹⁷

5.17 Subsequently, GRS promulgated GCCR in 2012 to assist B/Ds to create and collect records. Under the GCCR, all B/Ds are required to develop business rules to document decisions as to what records are to be created and kept by B/Ds, covering all their business functions and activities by the end of 2015. According to the GRS, B/Ds have established over 33,500 business rules to cover all their business functions and activities by the deadline.

5.18 Besides, the GMEM was promulgated to help B/Ds identify, create, file and manage e-mail records. Pending the implementation of ERKS for keeping electronic records, all B/Ds are required to meet the "print-and-file" requirements for their e-mail correspondence.

5.19 According to the GRS, its random checks in the past few years indicated that the "print-and-file" requirement has been generally observed, with only a few non-compliance cases in one B/D which has since taken preventive measures.¹⁸

¹⁶ Paras 101(a), 108(a) of the RMM.

¹⁷ Para 2.14 of the Audit Commission's Report.

¹⁸ There were cases found during GRS' review where an e-mail record had not yet been printed out, and another printed e-mail not yet filed and referenced. The B/D concerned subsequently reminded its staff to observe the "print-and-file" requirement, and to ask all sections/units to conduct periodical random check to ensure that email records would be properly filed.

(c) Other jurisdictions

5.20 In Australia, the statutory functions of the NAA under the 1983 Act include:-

"to promote, by providing advice and other assistance to Commonwealth institutions, the creation, keeping and management of current Commonwealth records in an efficient and economical manner and in a manner that will facilitate their use as part of the archival resources of the Commonwealth;" (emphasis added)¹⁹

5.21 Similarly NLB in Singapore, amongst other things,

"shall conduct a records management programme for the efficient creation, utilisation, maintenance, retention, preservation and disposal of public records;"²⁰ (emphasis added)

5.22 The 1958 Act in England and the 1986 Act in Ireland contain no provision that imposes a specific obligation on records creation. Nevertheless, TNA in England has promulgated guidelines on proper creation of records, so have the NAA in Australia and ANZ in New Zealand. A common feature of these guidelines is that they require government agencies to decide themselves what records they need to keep, having regard to, *inter alia*, their own purposes and functions, and the legal and regulatory environment.²¹

5.23 Apart from citing records creation as one of the purposes, the 2005 Act in New Zealand also creates a specific legal obligation to create records:-

"Every public office and local authority must create and maintain full and accurate records of its affairs, in accordance with normal,

¹⁹ S 5(2)(c) of the 1983 Act.

²⁰ S 14A(2)(d) of the NLBA.

²¹ For example, "Information Management Standard – Australian Government" available at the NAA's website:-
<<http://www.naa.gov.au/information-management/information-management-standard/im-standard-document.aspx#section1>>.
England - "Guide 4 - Keeping Records to Meet Corporate Requirements", and s 8, Part 1 of the Lord Chancellor's Code of Practice on the management of records issued under section 46 of the Freedom of Information Act 2000 ("**Lord Chancellor's Code**"), available respectively at:
<<http://www.nationalarchives.gov.uk/documents/information-management/rm-code-guide-4.pdf>>; and <<http://www.nationalarchives.gov.uk/documents/information-management/foi-section-46-code-of-practice.pdf>>.
See also Principle 3 of the "Information and Records Management Standard" published by the ANZ in New Zealand:
<<http://records.archives.govt.nz/resources-and-guides/information-and-records-management-standard/>>.

*prudent business practice, including the records of any matter that is contracted out to an independent contractor."*²²

5.24 A breach of this obligation, like non-compliance with any other provision in the 2005 Act wilfully or negligently, is a criminal offence.²³ Section 27 of the 2005 Act also empowers the Chief Archivist to issue standards, whether mandatory or discretionary, in relation to the creation of records. An example is the "*Information and Records Management Standard*".²⁴ However, the consequence of non-compliance with a standard is unclear.

Issues for public consultation

5.25 Proper creation of records is not only fundamental to the ability of public agencies to meet requirements for evidence of business activity, but is also crucial to an open and accountable government, and the preservation of the documentary heritage of the community.²⁵

5.26 In Australia and Singapore, promoting the creation of records is featured as one of the functions of the NAA and NLB. New Zealand is the strictest, in that it imposes a positive legal duty upon public office or local authority to create records, the wilful or negligent breach of which constitutes a criminal offence.²⁶ The 1958 Act in England and the 1986 Act in Ireland are both silent on the duty to create records, although TNA in England has promulgated guidelines in this respect. Apart from New Zealand, the archives laws of the other jurisdictions reviewed do not contain provisions imposing specific obligation upon public authorities or their staff to create records. Failure to create records, *per se*, is also not made a criminal offence in such other jurisdictions.

5.27 In Hong Kong, although the requirement to create records is not specified in GC09 as a mandatory requirement, public officers are duty bound

²² S 17(1) of the 2005 Act. See also s 3(c) of the 2005 Act.

²³ S 61(c) of the 2005 Act.

²⁴ <<https://records.archives.govt.nz/resources-and-guides/information-and-records-management-standard/>>.

²⁵ The International Council on Archives' *Universal Declaration on Archives* (adopted by the 36th Session of the General Conference of UNESCO in 2011) emphasises the "*vital necessity of archives for supporting business efficiency, accountability and transparency, for protecting citizens' rights, for establishing individual and collective memory, for understanding the past, and for documenting the present to guide future actions*". See <http://www.ica.org/sites/default/files/UDA_June%202012_web_EN.pdf>.

²⁶ S 23 of the Public Records Bill drafted by the Archives Action Group suggested imposing criminal liability (with a fine at level 6 and imprisonment for 2 years) on staff member of a public agency who fails to create or manage public records. <<http://archivesactiongroup.org/main/wp-content/uploads/2017/03/AAG-Draft-Public-Records-Bill-Version-2-17.01.2017.pdf>>.

to create and capture adequate but not excessive records, failing which disciplinary sanction may follow.

5.28 While we are acutely aware of the importance of proper creation of public records, we are mindful of the need to balance other relevant factors, including the nature of the obligation, proportionality of sanction for failure of compliance and the impact on staff morale.

5.29 Given the importance of the issue, we believe it appropriate and necessary to gauge the views of the community at large before considering the appropriate recommendation(s) (if any) to be made.

Consultation Questions 3

- (i) Is the current obligation for the creation of public records, which is subject to the civil service general regulations in conjunction with the guidelines on creation and collection, adequate in ensuring the proper creation of records?**
- (ii) If the answer to (i) is in the negative, in what way can the current obligation be improved and what are the reasons for your suggestions?**

(III) Reviews of disposal schedules

(a) Comments

5.30 Under the current regime, B/Ds are required to dispose of their records in accordance with disposal schedules stipulated or approved by the GRS, which assumes overall responsibility for authorising the disposal of records.²⁷ B/Ds are also required to review the disposal schedules for their programme records at least every five years (or more often if necessary) according to guidelines provided by the GRS.²⁸ The problem identified by The Ombudsman was that such guidelines lacked specific guidance on the issues to be considered in a review of disposal schedules. This has caused some B/Ds to overlook important factors when determining the length of retention period of records.²⁹

5.31 In particular, The Ombudsman cited a case in which the Court of Appeal criticised a B/D's practice of destroying relevant documents before the

²⁷ Para 4.14 of The Ombudsman's Report.

²⁸ Para 4.18 of The Ombudsman's Report.

²⁹ Para 4.19 of The Ombudsman's Report.

expiry of time for seeking judicial review.³⁰ The Ombudsman suggested that the Government should, pending legislation, review the requirements on disposal schedules to determine whether there was a need for a longer retention period of certain kinds of records, and to provide specific guidelines to B/Ds on how to carry out reviews of disposal schedules.³¹

(b) Government's stance or response

5.32 The GRS has responded to these comments by taking various initiatives to encourage B/Ds to review their disposal schedules of their records at least once every five years to determine whether amendments are required.

5.33 In March 2015, the GRS issued a new *Guideline cum Checklist for Review of Records Retention and Disposal Schedules* ("**Guideline cum Checklist**") to facilitate B/Ds to set the length of the retention period to balance the need to meet the operational, policy, legal and fiscal requirements, and to transfer records with archival value to GRS expeditiously. To this end, the Guideline cum Checklist sets out a list of 28 questions on eight major aspects³² that B/Ds should take into account when reviewing their disposal schedules, for example, in relation to records on decisions which may still be appealed against or the time allowed for seeking appeal or judicial review has yet to expire.

(c) Other jurisdictions

5.34 There appears to be no distinct guideline devoted exclusively to the narrower and more specific issue concerning the *review* of disposal schedules in the jurisdictions studied. TNA in England has only noted the importance of regularly reviewing disposal schedules. Little guidance, however, is provided as to the exact criteria a public authority should follow when conducting such review. There is also a lack of specific guidance in this respect in New Zealand, although some guidelines issued by the ANZ relate to disposal generally.³³

³⁰ Item 8 "Premature destruction of records" in Annex C of *The Ombudsman's Report*.

³¹ Paras 9.4(5) and (6) of *The Ombudsman's Report*.

³² The questions mainly aim to ascertain whether there is any change in the B/Ds' recordkeeping requirements, change of records classification scheme and segregation of records, change to disposal schedule and arrangements (such as whether there is a need for a longer retention period for certain kind of records) and to assess any change in the need for early destruction of records.

³³ In relation to disposal schedule, the ANZ has only issued a template, available at: <http://records.archives.govt.nz/resources-and-guides/disposal-schedule-and-access-stat-us-template/>.

5.35 In Australia, disposal schedule is in the form of a document called "*records authority*".³⁴ The NAA advises that government agency's records authorities should be reviewed "*periodically*" to ensure that they remain current for the agency's business.

5.36 Guidelines on review of disposal schedules are not available in the websites of the NAI (Ireland) and the NAS (Singapore).

Issues for public consultation

5.37 The above review shows that it is neither a legal obligation, nor a common practice in the jurisdictions studied, for the archival authority to specify and publish the detailed criteria to be applied by government agencies in reviewing their disposal schedules.

5.38 As discussed under the heading "(b) Government's Stance or Response" above, the GRS has, in recent years, taken various measures to address the comments made on its guidelines on review of disposal schedules. By comparison, the new guideline issued by the GRS is much more detailed in terms of the criteria adopted in a review than those in other jurisdictions.

5.39 Regular review of disposal schedules is important for ensuring that the schedules are always up-to-date in meeting the operational, administrative, legal and regulatory, records management and financial requirements. We would like to gauge the views of the community on this matter before considering the appropriate recommendation(s) (if any) to be made.

Consultation Questions 4

- (i) Is the GRS' current guidance to B/Ds on review of records disposal schedules sufficient?**
- (ii) If the answer to (i) is in the negative, what other assistance should be provided to enable B/Ds to properly review their records disposal schedules and what are the reasons for your suggestions?**

³⁴

A "records authority" is described in the NAA's website as "a legal instrument that allows agencies to make decisions about keeping, destroying or transferring Australian Government records. They can also determine how long records need to be kept and arrange for their destruction after that time has passed." See: <<http://www.naa.gov.au/information-management/records-authorities/index.aspx>>.

(IV) Transfer of records to GRS

(a) Comments

5.40 Records disposal action generally includes destruction of records, transfer of records to the Public Records Office of the GRS for appraisal of archival value, or transfer of records to the Public Records Office for permanent retention.

5.41 The timeframe for records to be transferred to the Public Records Office for appraisal is based on the relevant disposal schedule and complemented by paragraph 637 of the RMM which requires that all government records reaching 30 years should be appraised by the Public Records Office.

5.42 The GRS is criticised for lack of effective control or means to ensure that records are transferred for disposal or appraisal in an orderly and timely manner. Some B/Ds have deferred transfer of records to the GRS for appraisal and preservation without justifications.³⁵ The Ombudsman observed that:-

*"... GRS' role in ensuring B/Ds' timely transfer of records is passive. B/Ds are at liberty to transfer records to GRS or request deferral of transfer of the records, with no need to provide justifications for such requests. Despite GRS' promulgation of various guidelines, there remain 16 B/Ds that have either not transferred any records to GRS or have not adhered to the schedules of transfer. Retention of records by B/Ds for unduly long periods of time without genuine business need is not conducive to the preservation of archival value records and eventual public access to such records. Sporadic, unpredictable and uncontrolled transfer of records to GRS has also caused serious backlogs of records pending GRS' appraisal."*³⁶

5.43 The Ombudsman suggested that the Government should, pending legislation, review its arrangement for deferral of transfer of records to the GRS to ensure that approvals for deferral are well justified.³⁷

³⁵ Paras 5.8 to 5.10 of *The Ombudsman's Report*, paras 4.6 to 4.8 of the *Audit Commission's Report* and para 3.9 of the *2011 Civic Exchange Report*. According to paras 5.3 and 5.5 of *The Ombudsman's Report*, between 2008 and 2012, seven B/Ds did not transfer any records to the GRS for appraisal at all, and another nine did not transfer at the required interval. There was also a 200% increase in the number of B/Ds (i.e. four in 2010 to 12 in 2012) with transfer deferrals between the 2010 review and that in 2012.

³⁶ Para 5.8 of *The Ombudsman's Report*.

³⁷ Para 9.4(7) of *The Ombudsman's Report*.

5.44 It is also suggested that Government Archivist should be empowered in the advocated archives law to direct and/or arrange transfer of records appraised as public archives to the Public Records Office as early as practicable, and no later than 20 years from the record creation date.³⁸

5.45 The Ombudsman suggested that the Government should review the GRS' system of closure of records (including the closure period) and the criteria for approving or refusing access to records (including whether the security grading of records should be a relevant factor).³⁹

5.46 In light of the above, we will review the *mechanisms* of transfer (or deferral of transfer) of records to the GRS, and determination of access status of records in the process.

(b) Government's stance or response

- *Deferral of transfer of time-expired records*

5.47 In response to The Ombudsman's various comments, the Director of Administration issued a letter dated 21 March 2014 to remind all B/Ds of the importance of timely transfer to the GRS of time-expired records⁴⁰ having archival value or potential archival value and to refrain from seeking deferrals unless absolutely necessary, such as due to on-going legal proceedings. B/Ds have also been advised that deferrals for more than two years should be approved in writing by a directorate officer at the level of deputy secretary or deputy head of department, and the GRS should be consulted in advance.

5.48 In processing B/Ds' requests for deferral, the GRS would critically examine the grounds and whether or not there are alternative means for the B/D to have access to the information in the records after transfer.⁴¹ B/Ds are required to provide well-justified and specific reasons to support the deferral. Simple reasons, such as "operational need" or "for reference", will

³⁸ See s 9(3) of the draft Public Records Bill attached to the *2011 Civic Exchange Report*, and s 9(3) of the slightly different draft Public Records Bill published on the website of the Archives Action Group, available at: <<http://archivesactiongroup.org/main/wp-content/uploads/2017/03/AAG-Draft-Public-Records-Bill-Version-2-17.01.2017.pdf>>.

³⁹ Paras 7.16, 7.20, 7.22, 7.27, 9.1(10) and 9.4(11) of *The Ombudsman's Report*. The GRS has since removed the security grading of records as a factor to be considered when vetting applications for inspecting closed records.

⁴⁰ Time-expired records refer to records which have been retained for the period specified in the GARDS for administrative records, or the approved disposal schedules for programme records. See item (1) of the press release of written reply by the then Chief Secretary for Administration to the LegCo on "Management of public records", 16 April 2014: <<http://www.info.gov.hk/gia/general/201404/16/P201404160440.htm>>.

⁴¹ *The Government Minute in Response to the Annual Report of The Ombudsman 2014* at paragraph 1311(h) available at: <https://www.admwing.gov.hk/pdf/GM_2014_e.pdf>.

not be accepted. GRS may object to any requested deferral if no good justification is given.⁴² Examples of approved reasons include the relevant policies being reviewed, final accounts of projects not yet settled and unresolved matters concerning some development projects which might have financial or legal implications.

5.49 Information from the GRS shows that since March 2014 up to the end of 2017, 11 out of 102 deferral requests from different B/Ds have been approved as they were found justified. The period of deferral was determined on a case by case basis and was normally not more than two years. As of early March 2018, 98 out of the abovementioned 102 requests were completed while the remaining four were being critically assessed by the GRS or pending supplementary information from the B/D concerned.⁴³

- *Determination of access status of archival records before transfer for open inspection*

5.50 Public records appraised to be of archival value have to be transferred to the Public Records Office, where they will be, subject to exemptions, made available for public inspection when they have been in existence for not less than 30 years. The transferring B/Ds should, before their transfer to the Public Records Office, review and determine the access status of the archival records when reaching 30 years old. Unless otherwise informed by the B/Ds, the Public Records Office will presume that the records transferred to it could be open for public access when reaching 30 years old. In deciding the access status of archival records, B/Ds should broadly adopt the exemptions listed in Part 2 of the CAI and security grading does not determine access. As a record should not be closed indefinitely, the GRS will require the B/Ds to review the records again every five years until the records are eventually opened.

Summary of steps involved in transfer process

5.51 For the sake of clarity, a summary of the steps involved in the transfer of time-expired records (for both paper and non-paper) process is shown in Annex II.

(c) Other jurisdictions

Australia

- *Deferral of transfer of time-expired records*

5.52 The 1983 Act requires Commonwealth records which have been determined to be archival resources to be transferred to the NAA within

⁴² Information provided by the GRS on 20 April 2017.

⁴³ Information provided by the GRS on 13 March 2018.

15 years of the record coming into existence for preservation and access (or as soon as practicable after the record ceases to be a current Commonwealth record).⁴⁴

5.53 Transfer may be deferred if, for example, a Commonwealth institution, with the concurrence of the Director-General, makes a determination to exempt a Commonwealth record from transfer to the NAA for a specified period.⁴⁵ This enables Commonwealth records that might otherwise be required to be transferred to the NAA to be retained in the Commonwealth institution.

5.54 In practice, records exempted from transfer under section 29 generally fall into the following categories:-⁴⁶

- (i) records required for ongoing business purposes that could not be met if they were transferred to the NAA, such as personnel records for current employees;
- (ii) records possessing exceptional sensitivity relating to security, defence or international relations; and
- (iii) where it is more convenient for a government agency to make arrangements for its own records.⁴⁷

● *Determination of access status of archival records before transfer for open inspection*

5.55 The identification of records as exempt records, which is the Australian equivalent to "sensitivity review" in England and "classification of access status" in New Zealand, may take place before the records concerned become records in the open access period.⁴⁸ Generally speaking, however, this determination is to be conducted after the transfer on the NAA's premises.⁴⁹ The Director-General, in consultation with the responsible Minister or his authorised person, is to make arrangements for determining whether Commonwealth records in the open access period are to be treated as being exempt records and the extent to which access thereto may be given

⁴⁴ Ss 24 and 27 of the 1983 Act.

⁴⁵ S 29(1) of the 1983 Act. The responsible Minister may also make such a determination without the Director-General's concurrence under s 29(2). Pursuant to s 29(8), the Director-General's concurrence is also not required for certain Commonwealth institutions related to, *inter alia*, security or intelligence.

⁴⁶ "Policy for Transfer of Commonwealth Records into the National Archives of Australia's Custody" issued by the NAA, January 2011, para 5.1, accessible at: <http://www.naa.gov.au/Images/Transfer-policy_tcm16-49146.pdf>.

⁴⁷ Such as the National Philatelic Collection managed by Australia Post.

⁴⁸ S 35(3) of the 1983 Act.

⁴⁹ S 35(2) of the 1983 Act.

in part. Sometimes this is done in consultation with departments and agencies.⁵⁰

5.56 Unless a record contains information that falls within an exemption under the 1983 Act,⁵¹ it is available for public access when it is in the "open access period" as defined.⁵²

5.57 Determinations to exempt records shall be reviewed at such intervals as the Director-General thinks appropriate having regard to, for example, the nature of the record concerned.⁵³

England

- *Deferral of transfer of time-expired records*

5.58 The 1958 Act specifies that public records selected for permanent preservation should be transferred to the PRO by the time they reach 20 years old, unless the Secretary of State authorises retention for a longer period for administrative purposes or other special reason.⁵⁴

5.59 Guidance on review and transfer of public records is set out in the *Lord Chancellor's Code*.⁵⁵ Authorities wishing to retain records for a further period must submit applications to TNA for review and advice. The ACNRA will then consider the application and may recommend approval by the Secretary of State.⁵⁶

5.60 Guidance published by TNA⁵⁷ requires government departments to put in place effective arrangements to determine which records selected for permanent preservation should be:-

⁵⁰ S 35(1) of the 1983 Act and Fact Sheet 10 on Access to Archival Records in the NAA's website: <<http://www.naa.gov.au/collection/fact-sheets/fs10.aspx>>.

⁵¹ S 33 of the 1983 Act.

⁵² For Commonwealth records which came to existence after 2000 other than a Cabinet notebook and record containing census information, the "open access period" is "1 January in the year that is 21 years after the creation year" (s 3(7)). For records created before 2000, see table at s.3(7).

⁵³ S 35(4) of the 1983 Act.

⁵⁴ Ss 3(4) to (5) of the 1958 Act. Special provisions are made under s 8 of the Act for the transfer of court records.

⁵⁵ Accessible at :
<<http://webarchive.nationalarchives.gov.uk/20150730125042/http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section-46-code-of-practice.pdf>>.

⁵⁶ The ACNRA will consider such applications on the basis of the guidance in chapter 9 of the White Paper "Open Government" (Cm 2290, 1993), which contains a review of the level of secrecy in government and the proposed ways of increasing openness, or subsequent revisions of government policy on retention. The White Paper is available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271975/2290.pdf>.

⁵⁷ Advice and guidance on information and records management published on TNA's website: <<http://www.nationalarchives.gov.uk/information-management/>>.

- (i) retained in the department beyond 20 years; or
- (ii) transferred to TNA.

5.61 Retention (ie deferral of transfer) of records beyond the 20-year period in (i) above generally falls into three types:

- (i) administrative retention – documents which are in continued use, or the selection and sensitivity review (as discussed below) has not been completed;
- (ii) retention for "any other special reason" – this applies to records whose sensitivity is such that it cannot be estimated when the record may be released;⁵⁸ and
- (iii) blanket retention – this means approval for retention of large categories of records of a similar character where the reasons for non-disclosure are the same for each record covered by such approvals, for example, blanket approvals to retain security and intelligence materials.⁵⁹

5.62 Normally a retention period of between one and five years is granted, except that a retention period of up to ten years is approved for records retained on security or other specified grounds.⁶⁰

- *Determination of access status of archival records before transfer for open inspection*

5.63 The process of determining the access status (ie open or closed for a period of time) of a record by a transferring department is called "sensitivity review" in TNA's guidance,⁶¹ ie whether the record is subject to access exemptions under the FOIA 2000.⁶² A transferring department should

⁵⁸ These are records which, if requested under FOIA 2000, would engage exemptions relating to intelligence bodies, national security or defence, international relation and law enforcement, especially where release would cause serious damage. These exemptions are within the ambit of the study by the ATI Sub-committee.

⁵⁹ TNA guidance entitled "*Retention*" available at:
<<http://www.nationalarchives.gov.uk/documents/information-management/retention.pdf>>.

⁶⁰ See above, TNA's guidance entitled "*Retention*", at 7.

⁶¹ Guidance on the sensitivity review process is available at TNA's website at <<http://www.nationalarchives.gov.uk/information-management/manage-information/select-ion-and-transfer/sensitivity-reviews-on-selected-records/>>. A "*Sensitivity Review Quick Reference Guide*" is also available at:
<<http://www.nationalarchives.gov.uk/documents/information-management/sensitivity-review-quick-reference-guide.pdf>>.

⁶² According to the *Sensitivity Review Quick Reference Guide* issued by TNA, the purpose of sensitivity review is to identify material that:-
(i) should be retained, as the records are too sensitive for transfer to TNA;

specify the exemption considered applicable at the time of transfer, explain why it applies and specify the time for which the records should be closed.

5.64 In case it is not possible at the time of transfer to identify a specific date on which a record can be opened, then a date should be set for when the record should next be reviewed by the department to assess whether continued closure is required.

Ireland

- *Deferral of transfer of time-expired records*

5.65 Disposal authorisations specifying conditions for disposal of Department records are made by the Director of NAI or his designated officer. Such authorisations may be made upon the originating Department's request, only if (i) the originating Department has certified that the records are not required, and the (ii) Director of NAI is satisfied that the records have no preservation value.⁶³

5.66 Unless disposed of in accordance with a disposal authorisation, all Department records of more than 30 years old shall be transferred to the NAI and be made available for public inspection. Retention of particular records (or deferral of transfer) by Departments is allowed only if such records are covered by certificates ("**Section 8 Certificate**"), issued by an officer of the Department, stating either that:-

- (i) they are in regular use in the Department or are required in connection with its administration;⁶⁴ or
- (ii) making them available for public inspection would or might be contrary to public interest, constitute a breach of statutory duty or good faith on the ground of confidentiality, or cause distress or danger to living persons on the ground that they contain personal information or might be likely to lead to an action for damages for defamation.⁶⁵

5.67 A deferral of transfer and hence retention of records within the Department on these grounds shall be reviewed at least once in every five years.⁶⁶

(ii) should be transferred to TNA as closed, as FOIA 2000 exemptions apply;

(iii) can be transferred to TNA as open, as no FOIA 2000 exemptions apply.

This ensures that material is held correctly according to its security classification and records are made available to the public as soon as possible in accordance with the FOIA 2000.

<<http://www.nationalarchives.gov.uk/documents/information-management/sensitivity-review-quick-reference-guide.pdf>>.

⁶³ S 7 of the 1986 Act.

⁶⁴ S 8(2) of the 1986 Act.

⁶⁵ S 8(4) of the 1986 Act.

⁶⁶ S 8(6) of the 1986 Act.

- *Determination of access status of archival records before transfer for open inspection*

5.68 The 1986 Act does not require a Department to specify the access status of records before they are transferred to the NAI. Departmental records with a Section 8 Certificate may still be transferred to the NAI for preservation, but shall not be made available to the public.⁶⁷

New Zealand

- *Deferral of transfer of time-expired records*

5.69 The 2005 Act makes it a mandatory requirement for every public office to transfer their records that have been in existence for 25 years to the archival authority, except where transfer is deferred in accordance with the Act.⁶⁸

5.70 Situations in which a transfer of records may be deferred include the following ones:

- (i) the administrative head of the controlling public office and the Chief Archivist agree to the deferral; or
- (ii) the Minister responsible for the controlling public office, after consultation with the Minister responsible for the ANZ, issue a certificate that the transfer may be deferred for a specified period on certain specified circumstances.⁶⁹

5.71 A deferral of transfer is required by law to be noted in the register of deferred transfers which should be open for public inspection. The administrative head of a controlling public office may appeal to the Minister against the Chief Archivist's refusal to its request to defer transfer.⁷⁰ If the deferral is made on ground (i) above, the maximum period of deferral is five years for each application.⁷¹ A deferral made under ground (ii) above may be renewed by the responsible Minister for the controlling office after consultation with the Minister responsible for ANZ.⁷²

⁶⁷ S 8(5) of the 1986 Act.

⁶⁸ Ss 21 and 22 of the 2005 Act.

⁶⁹ S 22 of the 2005 Act. These circumstances include possible prejudice to the security, defence or international relationship of New Zealand, confidentiality, maintenance of law and right to a fair trial, or endangering of the safety of any person.

⁷⁰ Ss 22(8) and 51(1)(a) of the 2005 Act.

⁷¹ See the "Deferral of transfer agreement form" and the "Deferred transfer and access status template" accessible respectively at :-
<<https://records.archives.govt.nz/assets/Guidance-new-standard/16-Fm6-Deferral-of-Transfer-Agreement-Form.pdf>> and <<http://records.archives.govt.nz/resources-and-guides/>>.

⁷² S 22(7) of the 2005 Act.

- *Determination of access status of archival records before transfer for open inspection*

5.72 The 2005 Act requires public offices to classify the access status of their records that have been in existence for 25 years, or are about to be transferred to the ANZ. The classification should either be: (a) open access records; or (b) restricted access records, based on the following considerations:

- (i) whether there are good reasons to restrict public access to the public record, having regard to any relevant standards or advice issued by the Chief Archivist; or
- (ii) whether another enactment requires the public record to be withheld from public access.⁷³

Singapore

5.73 The NLBA does not provide for deferral of transfer, or determination of the access status before transfer of records. Nor is there any published guideline on this. The relevant provision in the NLBA is less specific and more open-ended:-

*"Any public records which, in the opinion of the [NLB], are of national or historical significance shall be transferred to the care and control of the [NAS] in accordance with such schedules or other agreements for the transfer of records as may be agreed on between the [NLB] and the public office responsible for the public records."*⁷⁴

5.74 However, the Act also provides for a right to inspect "public archives" which is defined as "*public records that: (a) are more than 25 years old; (b) are specified by the Board as being of national or historical significance; and (c) have been transferred to the Board...*". It appears therefore that the yardstick is 25 years.

Issues for public consultation

5.75 On the issue of transfer of records, the RAMP Study observed that:-

⁷³ Ss 43, 44 of the 2005 Act. A determination of access status involves an assessment of, amongst other things, the security levels of records, cultural sensitivity and other exemption grounds under the Official Information Act. See, for example, guideline entitled "Access", October 2016, accessible at: <https://records.archives.govt.nz/assets/Guidance-new-standard/Access-16-G6.pdf>. The exemptions are within the study of the ATI Sub-committee.

⁷⁴ S 14C of the NLBA.

"... The following aspects of transfer should attract the attention of the legislator:

- (i) Prescription of the general retention period (the number of years after their creation, that records should generally be transferred) and the transfer procedure;*
- (ii) Statutory exceptions to the general retention period and the procedure for granting temporary exemption (postponement of transfer);*
- (iii) Procedure for allowing transfer before the statutory retention period has elapsed; ...*
- (vi) Exemption for certain government departments from the normal arrangements for transfer."* ⁷⁵

5.76 As to (i) in the preceding paragraph, the general retention period (or the ultimate time limit for transfer of records to the archival authority – this will be discussed in more detail in chapter 7) is 15 years in Australia, 20 years in England, 25 years in New Zealand and Singapore and 30 years in Ireland.⁷⁶ Regarding (ii), there are such statutory exceptions in Australia, England, Ireland and New Zealand, with greater details provided in the archival authority's guidelines or policies (eg in Australia and England). Usual grounds for deferral of transfer include continued administrative use and exceptional sensitivity, such as possible prejudice to security, defence and international relationship.

5.77 We believe that a public records and archives management system can only work effectively if there is in place an appropriate mechanism to ensure that government agencies timely and systematically transfer public records to the archival authority for appraisal of their archival value, and for records with archival value to be transferred there for preservation. Nonetheless, for legitimate administrative purposes or the protection of sensitive information, exceptions to the normal transfer arrangement should be allowed in specific circumstances.

5.78 Secondly, the records management system should also comprise the determination of the access status of archival records based on specified criteria, for example in Australia, England and New Zealand.

⁷⁵ Para 116 of the *RAMP Study*.

⁷⁶ Parer's Report at 31:- "There is no set period at which archives should be transferred to the custody of an archives. It is a decision each country makes based on its individual needs. However it is important that archival legislation makes reference to such decisions and specifies required times of transfer". This remark should similarly be applicable to each jurisdiction and to Hong Kong SAR of the People's Republic of China under "one country two systems".

5.79 We would like to consult the public on some relevant issues before making the appropriate recommendation(s) (if any).

Consultation Questions 5

- (i) Is the current mechanism for transfer of government records to the Public Records Office for appraisal appropriate?
- (ii) If the answer to (i) is in the negative, in what way should the current mechanism be improved, and what are the reasons for your suggestions?
- (iii) Is the current arrangement for deferral of transfer of records by B/Ds appropriate?
- (iv) If the answer to (iii) is in the negative, in what way should the current arrangement be improved, and what are the reasons for your suggestions?
- (v) Is the current mechanism on review and determination by B/Ds of the access status of records before their transfer to the Public Records Office for preservation and public access appropriate?
- (vi) If the answer to (v) is in the negative, in what way should the current mechanism be improved, and what are the reasons for your suggestions?

(V) Professional and staff support for GRS

- ***Lack of professional support***

- (a) *Comments*

5.80 Being the central records management and service agency of the Government under the existing framework, there have been opinions that the GRS is suffering from a lack of professional and staff support.

5.81 The 2011 Civic Exchange Report pointed out that most of the DRMs in B/Ds lack the appropriate expertise or professional training as records managers. The mandatory requirements in GC09 have placed inappropriate obligations on B/Ds whose core functions and expertise are not about records management.⁷⁷

⁷⁷ Paras 3.5 and 4.1 of the 2011 Civic Exchange Report.

5.82 The Civic Exchange also noted that the GRS Director post, who is intended as the professional personnel to "plan, lead and guide" all professional archives and records functions and activities of the GRS, is filled by a "generalist", and such an approach has rendered the GRS' operation ineffective.⁷⁸

5.83 In addition, the Archivist of the Records Management Office has been replaced by a Chief Executive Officer since 1994. Other archivist staff were also gradually removed from the Records Management Office, leaving training, records consultancy and professional development work to Executive Officer grade officers. It follows that GRS officers responsible for records management training courses are not trained themselves.

(b) Government's stance or response

5.84 Noting that the GRS Director plays an administrative role in managing the four offices of the GRS, the Government is mindful that the incumbent must possess strong leadership capabilities and extensive experience in government management. In executing his duties, the GRS Director is supported by Archivist, Curator, Executive Officer and Librarian grades officers. As there is yet an Archivist Grade officer ready for the GRS Director post, a Principal Executive Officer is currently taking up the post.

5.85 The Government has stated that it will keep in view the personnel development needs in GRS and will embark on reviews as necessary in future. It will also examine the staffing and skills mix of GRS (including the filling of the head of the Records Management and Administration Office by Executive Officer-Grade officer) in the longer term, having regard to the recommendations of the consultancy study commissioned by the Efficiency Office of the Government discussed below.⁷⁹ As regards the training of DRMs and their assistants who are responsible for the implementation of records management programme in the B/Ds, GRS has all along arranged various training courses regularly to facilitate them to perform their records management duties effectively and efficiently. GRS has also tailor-made seminars and workshops for B/Ds on a need basis to promote good records management practices. These training events cover different aspects of records management principles and requirements, such as filing practices, records creation, classification, scheduling and disposal. Officers responsible for these training events include Archivist, Curator and Executive Officer grade officers. These training events are open for government staff in addition to DRMs, including directorate officers, registry supervisors as well as other government servants from different grades and ranks.

⁷⁸ Para 4.4 of the 2011 Civic Exchange Report.

⁷⁹ Information provided by the GRS to the Sub-committee on 21 April 2017.

- **Shortage of staff in GRS and building up of backlog**

(a) *Comments*

5.86 According to The Ombudsman's Report, out of the total 13,117 draft disposals schedules submitted by the B/Ds to the GRS as at 31 December 2013, only 7% had been approved and established.⁸⁰ In the same period, over 139,000 records were pending "accessioning and description". However, the numbers of officers responsible for appraising records within the GRS had only increased from 2 in 2008 to 3 in 2011 and 5 in 2012, lagging behind the number of records coming in.⁸¹ The Civic Exchange was concerned that the number of archivists working for the Public Records Office had significantly reduced between 2003 and 2010 with vacant positions either unfilled or being filled very slowly.⁸²

5.87 The Ombudsman recommended that the Government should, pending legislation, review the staffing of GRS, so as to enable it to handle its heavy workload with efficiency and professionalism and to clear its backlogs expeditiously.⁸³

(b) *Government's stance or response*

5.88 In view of the comments and suggestions, the Government has increased the number of posts in GRS from 85 in 2011-12 to 111 in 2016-17 (ie an increase of 31% over the past five years). During the same period, the number of Archivist Grade posts has also risen from 11 to 19, an all-time high in history with an increase of 73%. As at 31 December 2017, GRS had a total of 104 staff members.

5.89 The GRS cleared the backlogs on appraisal of records and accessioning of archival records in May 2015. Separately, since December 2013, over 13,000 disposal schedules have been processed and around 450 draft disposal schedules were being processed as at 31 December 2017. According to the Government, additional resources will be sought and deployed for the GRS to further strengthen its manpower provision if necessary.⁸⁴

5.90 In 2014, the Efficiency Office of the Government commissioned a consultancy study to critically examine the staffing and skills mix of the GRS and to make recommendations for improvement. The resulting report

⁸⁰ Para 4.17 of The Ombudsman's Report.

⁸¹ Paras 5.14 and 7.15 of *The Ombudsman's Report*.

⁸² Para 4.5 of the 2011 Civic Exchange Report.

⁸³ Para 9.4(4) of The Ombudsman's Report.

⁸⁴ Information provided by the GRS on 21 April 2017.

published in 2015 ("**Consultancy Report**")⁸⁵ has made a number of recommendations. They include the need to upgrade the ranking of the GRS Director post,⁸⁶ and set up a unit to develop and implement a transition plan in order to reposition the GRS and to respond to the paradigm shift brought by digital technology.⁸⁷ The Consultancy Report noted, amongst others, that the current mix of Executive Officer and Archivist Grade staff is essential to help develop the GRS' capabilities in the long run.⁸⁸ It also observed that enhancing the collaboration between recordkeeping specialists and Executive Officer-grade staff would be beneficial for the GRS to become a leader in supporting the management of records and archives in the Government.⁸⁹ Furthermore, the Consultancy Report found that the heads of archival authorities in Australia, Canada and England were not required to have formal qualifications in archives management, whereas in the Netherlands, the General State Archivist must have formal archival qualifications. However, it should be noted that the General Director of the National Archives who was responsible for leading National Archives of the Netherlands as an institution, was not required to have similar qualifications.⁹⁰

5.91 The Administration Wing of the Chief Secretary for Administration's Office and the GRS will consider the recommendations in the Consultancy Report and the outcome of the Law Reform Commission of Hong Kong study in determining the way forward.

5.92 In August 2016, the Government widened the scope of academic qualification for appointment of Assistant Archivist to include the subjects of information management and library studies, and archives and records management in addition to history, political science, and public administration. The GRS believes that this is in line with the trend in overseas jurisdictions, and will enable it to recruit Assistant Archivists with suitable academic knowledge in order to build up a team with good mix of expertise to face the challenge under the paradigm shift.

5.93 In addition, Archivist Grade officers are provided with intensive on-the-job training in their first year. After passing the internal proficiency test, they will take a recognised postgraduate diploma programme in archives and records management. Obtaining this diploma is a prerequisite for being considered for promotion.⁹¹

⁸⁵ The Efficiency Office, Review of the Organisation and Staffing Structure of the Government Records Service, (22 December 2015), at: <http://www.grs.gov.hk/pdf/PwC_Final_Report.pdf>.

⁸⁶ Para 4.2.1 of the Consultancy Report.

⁸⁷ Para 4.2.2 of the Consultancy Report.

⁸⁸ Para 4.2.5.3 of the Consultancy Report.

⁸⁹ Para 4.3.2 of the Consultancy Report.

⁹⁰ Para 3.2.1 of the Consultancy Report.

⁹¹ Information provided by the GRS on 21 April 2017.

Our observation

5.94 Having reviewed comprehensively the situation in Hong Kong and the other jurisdictions, the Consultancy Report set out a number of recommendations around the GRS' role, structure and staffing requirements, including workforce skills and grade level or rank mix, to help the GRS face the challenges and make use of opportunities brought by changing information technologies and practices.

5.95 With the comprehensive study in the Consultancy Report, we do not intend to reinvent the wheel. Moreover, resources and manpower supply or allocation within the Government often involves policy, financial, operational and other practical considerations which are outside the Terms of Reference of this study. These considerations would best be deliberated and balanced by the Government in the light of all relevant data and information. In the circumstances, we do not make any recommendation on this matter.

(VI) Electronic records

(a) Comments

- *Print-and-file approach*

5.96 There have been concerns about the current "print-and-file" approach mandated by paragraph 7 of GC09, including that:-

- (i) It is environmentally hostile;
- (ii) It hinges predominantly on the conscientiousness of individual officers to print and file electronic documents, and is prone to mistakes and omissions;⁹²
- (iii) It does not ensure consistency and applicability across the board;⁹³
- (iv) It is unsatisfactory because electronic records can be easily and undetectably altered before being printed;
- (v) It is inefficient because some records such as audio and video files simply cannot be reproduced in printed form.⁹⁴

⁹² Para 8.33 of The Ombudsman's Report.

⁹³ Paras 8.14 and 8.15 of *The Ombudsman's Report*.

⁹⁴ Para 4.7 of the 2007 Civic Exchange Report.

- *Pace of implementation of ERKS*

5.97 The GRS has since 2001 been working with the OCGIO and the Efficiency Office to devise a policy, strategies, standards and management tools for the effective management of both electronic and non-electronic records with the long-term goal for each B/D to develop ERKS.⁹⁵

5.98 There were concerns that the progress was slow and the Government had not specified a timetable for B/Ds to develop or adopt ERKS. The Ombudsman cautioned that more records might fail to be captured and be lost forever. This would result in irreversible disappearance of information and hence risks in legal actions, decrease in efficiency and damage to reputation.⁹⁶

5.99 The Ombudsman suggested that the Government should, pending legislation,

- (i) map out as soon as possible a clear and comprehensive implementation plan of ERKS and electronic records management (ERM) with timelines for all parties concerned;
- (ii) as a matter of priority, conduct studies to gauge the electronic records management situations in B/Ds, with a view to identifying problems in the different practices and plugging loopholes; and
- (iii) provide B/Ds with specific and practical guidelines on the management of the hybrid of paper, electronic and other forms of records.⁹⁷

(b) Government's stance or response⁹⁸

5.100 The Electronic Information Management Steering Group convened by the Government Chief Information Officer (with members from GRS, OGCIO and EO) has been reviewing the implementation progress of electronic information management as well as the implementation plan for B/Ds to carry out initiatives relating to ERKS and ERM, and working on providing more concrete support for B/Ds with a view to promoting a wider rollout of ERKS in the Government.

⁹⁵ Para 8.16 of The Ombudsman's Report.

⁹⁶ Paras 8.26 and 8.35 of *The Ombudsman's Report*.

⁹⁷ Paras 8.36, 9.4(12), (13) and (14) of *The Ombudsman's Report*. More generally, the Civic Exchange recommended that an archives law was needed to ensure that all branches of government would comply with the recordkeeping policies and standards in respect of electronic records (para 7.2.4 of the *2011 Civic Exchange Report*).

⁹⁸ The Government Minute in Response to the Annual Report of The Ombudsman 2014 at paragraphs 1311(m), 1311(n) and 1311(o).

5.101 The Government has been implementing ERKS and five B/Ds have implemented ERKS in the first phase.⁹⁹ The second phase involves six B/Ds of a larger scale and with more complex recordkeeping requirements, with the aim of ensuring that implementation issues have been comprehensively addressed and a more certain evaluation of costs and benefits can be made before full extension of ERKS across the Government.

5.102 The second phase started in late 2015. Three out of the six B/Ds involved have successfully launched their ERKS by March 2017.¹⁰⁰ The remaining three have been implementing their ERKS progressively from March 2017 to January 2020.¹⁰¹ The Government will conduct a review in 2018 with a view to formulating the long-term strategy for full extension of ERKS across the Government.

5.103 Looking ahead, the Government has placed key priority on promoting a wider adoption of ERKS in B/Ds in a more rapid manner and equipping GRS to respond to the paradigm shift brought by digital technology by, *inter alia*, setting up a digital archive and developing transfer standards for B/Ds to transfer archival records to the digital archive. The proposed digital archive will follow the Open Archival Information System Reference Model, which is a widely adopted key standard for managing digital materials. Digital records with archival values will be transferred from B/Ds to the digital archive for preservation through a Submission Information Package which consists of the digital records, plus any descriptive and technical metadata accompanying the digital records and/or other information that B/Ds consider relevant.

5.104 The GRS, with the support of OGCIIO, conducted a survey to gauge the ERM situations in B/Ds in February 2015 with a view to making improvement. The GRS also conducted random checks and carried out on-site inspections in a number of B/Ds to verify the information gathered. The survey was completed in September 2015. According to the Government, the survey results show that most B/Ds have no major problems in ERM and have generally followed the mandatory "print-and-file" requirement for handling e-mails.

5.105 Apart from the seven ERM publications and guidelines issued for compliance and reference by B/Ds from 2011 to 2014, the GRS promulgated in early 2015 two new sets of ERKS implementation guidelines to B/Ds.¹⁰² The GRS also promulgated a new publication in March 2016 to

⁹⁹ They were the Efficiency Office, GRS, Communications and Creative Industries Branch of the Commerce and Economic Development Bureau, Rating and Valuation Department and Drainage Services Department.

¹⁰⁰ The three B/Ds were the Intellectual Property Department, OGCIIO and Administration Wing.

¹⁰¹ They are the Civil Engineering and Development Department, Architectural Services Department and Marine Department.

¹⁰² They are the "Guidelines on Implementation of an Electronic Recordkeeping System: Key Considerations and Preparation Work Required" and "A Handbook on Records Management Practices and Guidelines for an Electronic Recordkeeping System".

provide specific guidance to assist B/Ds in managing both electronic and non-electronic records under a hybrid records management environment.¹⁰³ In December 2017, the GRS updated the "*Guideline on the Management of Electronic Mail*" and renamed it as "*Guideline on the Management of Electronic Messages*" ("**GMEM**").¹⁰⁴ The GRS said that it would continue to issue guidelines to ensure proper creation, transfer and preservation of electronic records.

(c) Other jurisdictions

5.106 In most of the jurisdictions studied, "public record" or "record" is defined in their archives law to include a document in any form, including the electronic form.¹⁰⁵ Statutory provisions governing the creation, transfer and disposal of government records are thus equally applicable to records collected and received in an electronic form.

5.107 TNA in England has, on its website, acknowledged the importance of preservation of digital records:-

*"Everyone relies on the integrity of digital information, from the citizen to heads of government. It is essential that this information is preserved for future generations, just as traditional records have been preserved for us on paper and parchment."*¹⁰⁶

5.108 In addition, TNA has developed digital preservation tools and promulgated guidance on specific topics related to the preservation and management of public records in digital form.¹⁰⁷

5.109 The National Archives in Australia and New Zealand have similarly issued guidance and standards, and provided training to government agencies on the preservation and handling of digital records. The website of NAA in Australia specifically sets out a "Digital Continuity 2020" policy to records management, which is a whole-of-government approach to digital information governance aiming to support the Government's digital transformation initiatives and driving e-government. One of the

¹⁰³ "Guidelines for Managing Records in a Hybrid Environment"

¹⁰⁴ See also chapter 2.

¹⁰⁵ In Australia, for example, "record" under s 3 of the 1983 Act includes a document in any form, including "*any electronic form*". See also the definition of "record" in s 4 of the 2005 Act (New Zealand), the definition of "*public records*" in s 2 of NLBA (Singapore), the definition of "records" in s 10 of the 1958 Act (England) and the definition of "*Departmental records*" in s 2(2) of the 1986 Act (Ireland).

¹⁰⁶ <<http://www.nationalarchives.gov.uk/information-management/manage-information/preserving-digital-records/our-role/>>.

¹⁰⁷ The guidance issued by TNA is available at:
<<http://www.nationalarchives.gov.uk/information-management/manage-information/preserving-digital-records/guidance/>>.

recommendations is that all information generated as agency business will be created and managed digitally by 2020.¹⁰⁸

5.110 In Singapore, specific guidelines on the management of public records in electronic form cannot be found on the NAS' website, which, however, states that the NAS offers advisory and preservation services, as well as training to government agencies on managing public records (including digital records). Records are also digitised by the NAS for preservation and access by researchers and the public.¹⁰⁹

Our observations

5.111 We note that the current definition of "government record" in the RMM is wide enough to cover any recorded information in any physical form or media created or received by a B/D. Provisions under the GRS' rules and guidelines are thus applicable to both paper-based and electronic records. In this sense, the current regime is in line with the situation in other jurisdictions studied.

5.112 We also note the efforts that the Government has made to promote a wider implementation of ERKS by B/Ds, set up digital archives, develop and promulgate guidelines and standards to assist B/Ds. All these, in our view, are measures in the right direction. Publishing specific guidelines to assist B/Ds on managing both electronic and non-electronic records under a hybrid records management environment is another proactive move, especially when the "print-and-file" approach may have its own intrinsic value. For example, the physical document itself is of heritage value.

5.113 As regards the pace of implementation of ERKS, we are aware of other important considerations such as resources, technical, operational and other practical hindrance. Challenges affecting the pace of implementation of ERKS include different recordkeeping requirements of individual B/Ds; inadequate know-how, technical skills and readiness of the IT-service industry to support timely and service-wide ERKS implementation; time for staff to adapt to changes in records management practices and procedures under an e-filing environment; and the substantial costs and resources required for service-wide ERKS implementation. The challenges of the transition from paper-based recordkeeping to digital recordkeeping, exacerbated by issues of records integrity, authenticity and preservation presented by the new technology, are indeed affecting all jurisdictions worldwide.

5.114 Having said that, the Government should continue to provide the necessary advice and support to B/Ds in order to ensure that electronic

¹⁰⁸ More details of the Digital Continuity 2020 Policy are available on the NAA's website at: <<http://www.naa.gov.au/information-management/digital-transition-and-digital-continuity/index.aspx>>.

¹⁰⁹ See the role of the NAS on its website at: <<http://www.nas.gov.sg/nas/AboutUs/OurRoles.aspx>>.

records are properly created, securely maintained and preserved without loss of any vital information. The Government should also continue to equip the GRS so that it can capably respond to the challenges brought about by the widespread use of information technologies, which has led to the rapid increase in the volume and complexity of the information and records created, shared and managed.

Issues for public consultation

Consultation Question 6

In your view, what other measures should the Government adopt to expedite the implementation of ERKS and what are the reasons for your suggestions?

Chapter 6

Impact of records-related legislation on administrative guidelines on records management

Introduction

6.1 Administrative rules and guidelines, by nature, do not carry legal force. Where the rules and guidelines issued by the GRS conflict with laws that carry implications for records management, the latter always prevail. The concern is that as these *administrative* rules and guidelines and laws both pursue important and legitimate objectives, the tension between them ought not invariably be resolved in favour of the latter.

6.2 At the heart of this concern is that the objective of records management should not, as a matter of course, be treated as subservient to the objectives of the above laws. The Civic Exchange considers that the enactment of an archives law would help "*remove legislative obstructions to the effective management of government records.*"¹ But as illustrated later in this chapter, amending such laws can also achieve the same purpose.

6.3 In this chapter, we will address this concern primarily through discussing the (1) Personal Data (Privacy) Ordinance (Cap 486) ("**PDPO**"), and (2) Census and Statistics Ordinance (Cap 316) ("**Census Ordinance**") which are specifically mentioned by the Civic Exchange.² We will then explore how the respective laws in overseas jurisdictions reconcile the conflict (if any) with the archival laws there. Insofar as the Census Ordinance is concerned, we set out towards the end of this chapter our provisional view which is to follow the approach of the jurisdictions where census information is preserved.

Privacy or data protection legislation

Hong Kong – PDPO

6.4 The PDPO contains a number of provisions which directly or indirectly address and affect the management of government records insofar

¹ Para 4.6 of the 2007 Civic Exchange Report.

² See paras 4.1 and 4.6 of the 2007 *Civic Exchange Report* and para 3.2 of the 2011 *Civic Exchange Report*.

as such records contain personal data. The relevant provisions are summarised below:-

Definition of "personal data"

6.5 "Personal data" refers to data relating to a living individual.³ In practice however, like the archival authorities in other jurisdictions, it is usually impossible for the GRS to know whether the person to whom the personal data contained in its records relates is still alive, or even just impracticable for it to find out. This may give rise to uncertainty about whether or not the data in the records held by the GRS is subject to the PDPO.

Retention of personal data

6.6 Section 26 of the PDPO requires data users to erase personal data held by them where the data is no longer required for the purpose for which the data was used, or a directly related purpose.⁴ An exception is where it is in the public interest (including historical interest) for the data not to be erased.

6.7 However the term "*historical interest*" is not defined. Nor does the PDPO specify who is to determine whether it is in the "*historical interest*" to retain particular personal data. This may result in hesitation on the part of B/Ds as to whether they are obliged to erase personal data contained in the records held by them.

Transfer and disclosure of personal data

6.8 Principle 3 in Schedule 1 to the PDPO provides that personal data shall not be used ("use" is defined to include disclose or transfer⁵) for a new purpose without the prescribed consent of the data subject.⁶

6.9 In 2012, the PDPO was amended to introduce an exemption to Principle 3 so that the data subject's consent is not required for transfer of records containing his personal data to the GRS for the sole purpose of appraisal of preservation value of, or organising and preserving, the records.⁷ This new exemption in effect answers Civic Exchange's then concern over

³ Definition of "*personal data*" in s 2 of the PDPO.

⁴ Principle 2, para (2) in Schedule 1 to the PDPO also requires all practicable steps to be taken to ensure that personal data is not kept longer than is necessary for the fulfilment of the purpose (including any directly related purpose) for which the data is to be used.

⁵ See definition of the word "use" in s 2 of the PDPO.

⁶ "*New purpose*" in this context means any purpose other than the purpose for which the data was to be used at the time of the collection of the data, or a directly related purpose.

⁷ See s 63D of the PDPO as inserted by Personal Data (Privacy) (Amendment) Ordinance 2012 (Ord No 18 of 2012, at A2225), available at:
<<http://www.gld.gov.hk/egazette/pdf/20121627/es12012162718.pdf>>.

PDPO's "crippling effect on Hong Kong's archival operations since it restricts the disclosure or transfer of personal data without the consent of the data subject to safeguard the privacy of a living individual."⁸

Access

6.10 Principle 3 in itself may also limit the GRS' ability to grant an individual access to its records that contain personal data of a third party. However, personal data will also be exempted from Principle 3 where:

- (i) the data is to be used for preparing statistics or carrying out research;
- (ii) the data is not to be used for any other purpose; and
- (iii) the resulting statistics or results of the research are not made available in a form which identifies the data subjects or any of them.⁹

6.11 To bring itself within the foregoing exemption as appropriate, the GRS currently requires persons who request for access to archival holdings or, apply for a copy of document(s) it holds to declare that any personal data captured from the document(s) will be used in conformity with the above conditions.¹⁰

Australia – Privacy Act 1988

6.12 The Privacy Act 1988 sets out 13 Australian Privacy Principles ("APPs") that regulate the handling of personal information.¹¹ The following APPs are relevant to the management of Commonwealth records:-

Retention of personal information

6.13 For Australian government agencies, almost all personal information, collected in the course of business, is considered "*Commonwealth record*" as defined under the 1983 Act. As a general rule, a Commonwealth record can only be destroyed or altered in accordance with sections 24 and 26

⁸ See para 4.6 of the 2007 Civic Exchange Report and para 3.2 of the 2011 Civic Exchange Report.

⁹ S 62 of the PDPO.

¹⁰ The Undertaking Form for Access to Archival Records Containing Personal Data is available at the GRS' website: http://www.grs.gov.hk/pdf/PRO_Undertaking_English_2018.pdf. Moreover, the Photocopy Request Form and Request Form for Using Personal Photographic Device in Search Room, with the relevant parts of declaration, are available at the GRS' website: <http://www.grs.gov.hk/pdf/photocopy.pdf> and http://www.grs.gov.hk/pdf/photodev_app.pdf respectively.

¹¹ The APPs are set out in Schedule 1 to the Privacy Act 1988. The Office of the Australian Information Commissioner has also issued guidelines giving detailed advice on the application of the APPs which are available at: <https://www.oaic.gov.au/agencies-and-organisations/app-guidelines/>.

of the 1983 Act. Three APPs, namely APP4, APP11 and APP13, intersect with these two provisions.¹²

6.14 APPs 4 and 11 respectively require an APP entity (which includes government department) to destroy or de-identify unsolicited personal information and personal information which is no longer needed for any authorised purpose. These APPs however make it clear that personal information contained in a Commonwealth record can only be destroyed or altered in accordance with the 1983 Act.¹³

6.15 APP13 concerns the correction of personal information. Alteration of a Commonwealth record, however, can generally only be done in accordance with section 24 of the 1983 Act as noted above. Alteration of a Commonwealth record which has been in existence for more than 15 years is an offence unless done in compliance with section 26.

Transfer and disclosure of personal information

6.16 APP6 prohibits generally the use or disclosure of personal information for a purpose other than the one for which it was collected. One exception to this is where the relevant individual has consented to this. Another exception is where such use or disclosure is required or authorised by or under an Australian law. Thus the transfer of a record containing personal information to the NAA as required by section 27 of the 1983 Act does not violate APP6.

6.17 To facilitate the work of the NAA, the Privacy Act 1988 also makes it clear that an act or practice does not breach an APP if it involves the disclosure by an organisation of personal information in a record (as defined in the 1983 Act) solely for the purpose of enabling the NAA to decide whether to accept, or to arrange, care (as defined in the 1983 Act) of the record.¹⁴

Access

6.18 APP12 requires an APP entity to comply with an individual's request for access to personal information it holds about that individual. Access may be refused, and the grounds for refusal differ depending on whether the APP entity is an "agency" or an "organisation" (ie under APP 12.2 and APP 12.3 respectively).¹⁵ An agency may refuse access under APP 12.2

¹² See NAA guidance on "*Australian Privacy Principles and Commonwealth records*" at: <<http://naa.gov.au/information-management/information-governance/legislation-standard-s/records-privacy/index.aspx>>.

¹³ APP4.3 and APP11.2 ensure that the requirement for agencies to retain such Commonwealth records under s 24 of the 1983 Act will override the destruction and de-identification requirements under the APPs.

¹⁴ S 6A(3) of the Privacy Act 1988.

¹⁵ The term "agency" includes a "Minister" and a "Department" (s 6 of the Privacy Act 1988). The term "organisation" includes an individual, a body corporate, a partnership, a trust, etc (s 6C of the Privacy Act 1988).

if it is required or authorised to do so by or under (i) the Freedom of Information Act 1982, or (ii) any other Act that provides for access by persons to documents. Under this latter ground in (ii), access to records that have been identified as "exempt records" under the 1983 Act can be refused.¹⁶

England – General Data Protection Regulation and Data Protection Act 2018

6.19 The legal landscape on data protection and privacy in the European Union was changed with the coming into force of the General Data Protection Regulation (the "**GDPR**")¹⁷ on 25 May 2018. The bedrock of this new regime is some key principles relating to the processing of personal data set out in the GDPR, namely (a) lawfulness, fairness and transparency;¹⁸ (b) purpose limitation;¹⁹ (c) data minimisation;²⁰ (d) accuracy;²¹ (e) storage limitation;²² (f) integrity and confidentiality;²³ and (g) accountability.²⁴

6.20 Ushering in a new era for data protection that gives individuals more control over their personal data,²⁵ the GDPR equally recognises the importance of "processing for archiving purposes in the public interest" which manifests in its various provisions. First, despite the principle of purpose limitation, further processing for archiving purposes in the public interest in

¹⁶ Para 12.32 of the Australian Privacy Principles Guidelines available at: <https://www.oaic.gov.au/agencies-and-organisations/app-guidelines/chapter-12-app-12-access-to-personal-information>.

¹⁷ As a *regulation*, the GDPR is directly applicable in all Member States of the European Union: Article 288 of the Treaty on the Functioning of the European Union.

¹⁸ "Personal data shall be ... processed lawfully, fairly and in a transparent manner in relation to the data subject" – Article 5(1)(a).

¹⁹ "Personal data shall be ... collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes ..." – Article 5(1)(b).

²⁰ "Personal data shall be ... adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed" – Article 5(1)(c).

²¹ "Personal data shall be ... accurate and, where necessary, kept up to date ..." – Article 5(1)(d).

²² "Personal data shall be ... kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed ..." – Article 5(1)(e).

²³ "Personal data shall be ... processed in a manner that ensures appropriate security of the personal data ..." – Article 5(1)(f).

²⁴ Article 5(2).

²⁵ See:
<https://ec.europa.eu/commission/priorities/justice-and-fundamental-rights/data-protection/2018-reform-eu-data-protection-rules_en> and
<https://ec.europa.eu/commission/sites/beta-political/files/data-protection-factsheet-changes_en.pdf>.

accordance with Article 89 is not to be considered to be incompatible with the initial purposes.²⁶ Secondly, in spite of the principle of storage limitation, personal data may be stored for longer periods insofar as such data will be processed solely for archiving purposes in the public interest in accordance with Article 89 subject to implementation of appropriate safeguards.²⁷

6.21 Article 89(1) requires that processing for archiving purposes in the public interest shall be subject to appropriate safeguards for the rights and freedoms of the data subject. Those safeguards must ensure that technical and organisational measures are in place in particular to ensure respect for the principle of data minimisation. Article 89(3) provides that where personal data are processed for archiving purposes in the public interest, Member State law may provide for derogations from the rights in Articles 15, 16, 18, 19, 20 and 21²⁸ subject to the conditions and safeguards in Article 89(1) in so far as such rights are likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes.²⁹

6.22 In England, further details of the law are fleshed out in the Data Protection Act 2018,³⁰ many provisions of which took effect on the same day as the GDPR itself.³¹ In practical terms, processing for archiving purposes under the GDPR and the Data Protection Act 2018 is not very different from the previous Data Protection Act 1998.³² Generally, processing for archiving purposes that has been legal under the Data Protection Act 1998 will likely continue to be lawful under the new regime.³³ In relation to general processing,³⁴ section 19 of the Data Protection Act 2018 supplements the

²⁶ Article 5(1)(b).

²⁷ Article 5(1)(e).

²⁸ These Articles respectively concern: Article 15 (right of access by the data subject); Article 16 (right to rectification); Article 18 (right to restriction of processing); Article 19 (notification obligation regarding rectification or erasure of personal data or restriction of processing); Article 20 (right to data portability); and Article 21 (right to object to processing).

²⁹ In England, paragraph 28 of Part 6 of Schedule 2 in the Data Protection Act 2018 provides for derogations from rights in Articles 15, 16, 18, 19, 20 and 21 for archiving purposes in the public interest ("to the extent that the application of those provisions would prevent or seriously impair the achievement of those purposes").

³⁰ The Information Commissioner advises that it is important to read the GDPR and the Data Protection Act 2018 side by side:
<<https://ico.org.uk/for-organisations/data-protection-act-2018/>>.

³¹ See: Data Protection Act 2018 (Commencement No 1 and Transitional and Saving Provisions) Regulations 2018.

³² TNA, *Guide to Archiving Personal Data* (2018), at para 1.
<<http://www.nationalarchives.gov.uk/documents/information-management/guide-to-archiving-personal-data.pdf>>.

³³ TNA, *Guide to Archiving Personal Data* (2018), at para 16.

³⁴ As distinct from law enforcement processing and intelligence services processing, governed separately under Parts 3 and 4 of the Data Protection Act 2018.

GDPR by providing that the processing of personal data necessary for archiving purposes in the public interest does not satisfy the requirement in Article 89(1) outlined above if the processing:-

- (i) is likely to cause substantial damage or substantial distress to a data subject; or
- (ii) is carried out for the purposes of measures or decisions with respect to a particular data subject (unless the purposes include the purposes of approved medical research).

6.23 Both the GDPR and the Data Protection Act 2018 do not give third parties rights of access to personal data. Access to such data in archives by someone other than the data subject should take place only after the likely impact on the data subjects' right of privacy is assessed. It may be impossible until data subjects are, or can be presumed to be deceased.³⁵

Ireland – GDPR and Data Protection Act 2018

6.24 As a Member State of the European Union, the GDPR is also directly applicable in Ireland. Similarly, it has enacted its own Data Protection Act 2018, many provisions of which took effect on the same day as the GDPR itself.³⁶

6.25 Section 42 of Ireland's Data Protection Act 2018 provides that subject to suitable and specific measures being taken to safeguard the fundamental rights and freedoms of data subjects, personal data may be processed, in accordance with Article 89, for archiving purposes in the public interest. However, such processing must respect the principle of data minimisation.

6.26 In Ireland, section 61 of its Data Protection Act 2018 provides for derogation as allowed by Article 89(3) discussed above.

³⁵ TNA, Guide to Archiving Personal Data (2018), at para 72.

³⁶ See: Data Protection Act 2018 (Commencement) Order 2018.

New Zealand – Privacy Act 1993³⁷

6.27 The Privacy Act 1993 sets out a total of 12 information privacy principles to be observed by agencies, including government departments.³⁸ Importantly, the Privacy Act 1993 expressly provides that nothing in principle 6 or 11 derogates from any provision in any enactment that authorises or requires personal information to be made available;³⁹ and that an action is not a breach of any of principles 1 to 5, 7 to 10 and 12 if that action is authorised or required by or under law.⁴⁰

6.28 More specifically, it is noted that the 2005 Act provides that the Chief Archivist may only authorise the discharge of a public record or a class of public records that contains information about identified persons if, amongst other conditions also to be satisfied, the discharge is consistent with the principles of the Privacy Act 1993.⁴¹ Moreover, when determining the access status of public records which have been in existence for 25 years or are about to be transferred to the ANZ, the controlling public office is responsible for dealing with requests for personal information under the Privacy Act 1993.⁴²

Singapore – Personal Data Protection Act 2012⁴³

6.29 The Personal Data Protection Act 2012 provides that unless otherwise expressly provided in the Act its rules on the collection, use, disclosure, access and care of personal data do not affect any authority or right conferred by, or limitation or obligation imposed under the law; and to the extent of any inconsistency, the provisions of other written law shall prevail.⁴⁴ These other laws include, of course, the NLBA.

³⁷ Privacy Act 1993 No 28.

³⁸ The 12 Information Privacy Principles are: Principle 1 on Purpose of collection of personal information; Principle 2 on Source of personal information; Principle 3 on Collection of information from subject; Principle 4 on Manner of collection of personal information; Principle 5 on Storage and security of personal information; Principle 6 on Access to personal information; Principle 7 on Correction of personal information; Principle 8 on Accuracy, etc, of personal information to be checked before use; Principle 9 on Agency not to keep personal information for longer than necessary; Principle 10 on Limits on use of personal information; Principle 11 on Limits on disclosure of personal information; and Principle 12 on Unique identifiers.

³⁹ S 7(1) of the Privacy Act 1993.

⁴⁰ S 7(4) of the Privacy Act 1993.

⁴¹ Ss 25(1)(c), (2)(e) of the 2005 Act.

⁴² S 44(8) of the 2005 Act.

⁴³ No 26 of 2012.

⁴⁴ S 4(6) of the Personal Data Protection Act 2012.

Summary

6.30 The jurisdictions studied have provisions to resolve the conflict between privacy/data protection law and archives law.⁴⁵ In Australia, England, Ireland and New Zealand, there are exceptions to the application of the privacy/data protection law to facilitate archival work. In Singapore, it is the other written law (including the NLBA) that prevails over its data protection law.

6.31 As discussed above, an exception in section 26 of Hong Kong's PDPO allows certain personal data not to be erased if it is in the public interest (including historical interest) to do so. In addition, the legislative amendment in 2012 to the PDPO introduced an exemption to Principle 3 for the purposes of facilitating preservation of records containing personal data.

Consultation Questions 7

- (i) Has the current PDPO struck the right balance between the preservation of archives and protection of personal data?**
- (ii) If the answer to (i) is in the negative,**
 - (a) what in your view is the right balance?**
 - (b) what other measures can be adopted to achieve this balance? and**
 - (c) what are the reasons for your suggestions?**

Census and statistics legislation

6.32 Raw data in census forms and returns obtained in a Government census or statistical survey often contain detailed personal particulars and information. Proper guarantee of confidentiality is crucial to ensure the public's willingness to provide correct information, and hence the success of these exercises. On the other hand, sociologists, genealogists, policy makers or other researchers may want to have access to study these data. These competing objectives raise questions about the approach towards the preservation of these data as archives.

⁴⁵ The above study includes some discussion about access, for the purposes of giving a more complete picture. As stated in the Preface, the issue of access is handled by the ATI Sub-committee.

Hong Kong – Census Ordinance

6.33 Under the Census Ordinance, the completed schedules collected or received for the census or statistical survey are required to be destroyed on a specified date,⁴⁶ usually one to two years after the census or survey in question.⁴⁷ Once destroyed, they will not be available for transfer to the GRS for appraisal and preservation.

6.34 During the passage of the Census Bill 1960, the following explanation was given for requiring the destruction:-

*"Clauses 14 and 15 provide for the ultimate destruction of all forms or returns containing personal particulars and for their proper custody until destroyed. These provisions are considered necessary in order to maintain the confidential nature of census."*⁴⁸

6.35 Any person who discloses any schedule (or part thereof), any answer or any particulars obtained which enables identification of an individual otherwise than in the performance of any function under the Census Ordinance is an offence except in certain limited situations (such as where the production of such information is necessary for the purpose of any proceedings instituted for an offence under the ordinance).⁴⁹

Australia – Census and Statistics Act 1905

6.36 The primary pieces of legislation are the Census and Statistics Act 1905 ("**1905 Act**")⁵⁰ and the Australian Bureau of Statistics Act 1975⁵¹ which set up the Australian Bureau of Statistics headed by the "Australian Statistician".

6.37 Unlike the Census Ordinance in Hong Kong, the foregoing Acts do not contain provisions requiring the destruction of census forms after a census.

6.38 Confidentiality of census information is instead protected mainly by two provisions. Section 19A of the 1905 Act makes it clear that a person who is or has been the Australian Statistician or an officer as defined under the Act must not divulge any census information for 99 years from the census day

⁴⁶ Ss 9(2)(a)(v), 11(2)(a)(iv) and 11A(2)(a)(iii) of the Census Ordinance.

⁴⁷ See the orders under Cap 316A to Y.

⁴⁸ Official Report to Proceedings, Hong Kong Legislative Council, meeting of 20 January 1960, p 20. Available at: <<http://www.legco.gov.hk/1960/h600120.pdf>>.

⁴⁹ S 22 of the Census Ordinance.

⁵⁰ No 15 of 1905.

⁵¹ No 60 of 1975.

other than in accordance with the Act, and the equivalent offence is created in section 19.

6.39 Section 8A of the 1905 Act provides for the transfer of census information to the NAA:-

"If

- (a) a form is given to the [Australian] Statistician or an authorised officer under section 10 in relation to the Census taken in the year 2001 or a later year; and*
- (b) a person has consented, in accordance with the form, to the information contained in the form being transferred to the custody of the [NAA] under this section;*

the [Australian] Statistician must transfer the information to the custody of the [NAA] in a form and manner agreed by the Statistician and the Director-General of the [NAA]."

6.40 Section 8A was originally inserted by the *Census Information Legislation Amendment Act 2000* on a trial basis such that in the 2001 Census, people would have the option to decide whether to have their information transferred to and retained by the NAA. Responses to this piloting option were positive, and the *Census Information Legislation Amendment Act 2006* further inserted the words "or a later year" into section 8A(a) to make it a routine arrangement.

6.41 These legislative changes largely reflected the recommendations of the inquiry conducted by the House of Representatives' Standing Committee on Legal and Constitutional Affairs in the late 1990s,⁵² when the prevailing practice was to destroy all the census forms once all the statistical data had been extracted.⁵³ Many genealogical researchers, however, had lobbied over many years for the retention of census information for family history research, which eventually prompted this Standing Committee's inquiry.⁵⁴ The Australian Bureau of Statistics was against such retention for the fear of rising non-response rates and less accurate information if people knew that their information would be kept and released in the future. This would mean a deterioration in data quality as well as erosion of public confidence.⁵⁵

⁵² See the report of the inquiry titled *Saving Our Census and Preserving Our History* which was tabled in the House of Representatives on 25 May 1998, available at: <http://www.aph.gov.au/parliamentary_Business/Committees/House_of_Representatives_Committees?url=/laca/inquiryincensus.htm>.

⁵³ Para 1.11 of the above report. See also the Introduction.

⁵⁴ Para 1.13 of the above report. See also the Introduction.

⁵⁵ Paras 7.3-7.5 of the above report.

6.42 The Standing Committee appreciated the possible risk of deterioration in data quality,⁵⁶ but was unconvinced that it was conclusive.⁵⁷ It therefore recommended, amongst other things, that (1) name-identified information in census forms be retained;⁵⁸ but (2) should be closed for 99 years;⁵⁹ and (3) specific legislation be enacted to put these arrangements in place.⁶⁰

6.43 That led to the enactment of section 8A which is worded to strike the right balance:-

*"Australia has a justifiably strong reputation for the quality of its census information.... This reputation has been achieved not only by the Australian Bureau of Statistics' sound work but also by the public trust that the information collected will be protected. The government believes that nothing should be done which will put at risk public cooperation and hence the quality of census information. For this reason, and in keeping with good privacy practice, the bill requires the consent of households before the name-identified information is kept. This information from households which do not consent will be destroyed as soon as statistical processing is completed."*⁶¹

6.44 Thus, the census form clearly states: "[a] person's name-identified information will not be kept by the [NAA] where a person does not agree or the answer is left blank."⁶²

6.45 Where an individual consents to his census information being retained, its confidentiality is further protected by section 30A(1) of the 1983 Act which provides:

"An Archives officer must not, at any time before a record containing Census information from a Census is in the open access period"⁶³ for that Census, divulge or communicate any of

⁵⁶ Para 7.10 of the above report.

⁵⁷ Para 7.12 of the above report.

⁵⁸ Para 7.35 of the above report and Recommendation 1.

⁵⁹ Recommendation 2 of the above report.

⁶⁰ Recommendations 1 and 2 of the above report.

⁶¹ See, for example, the speech made by the Minister for Financial Services and Regulation during the Bill's Second Reading on 17 February 2000, available at: <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2000-02-17%2F0009%22>>.

⁶² The census form for the latest census in 2016 (question 60) is available at: <[http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2901.0Main%20Features802016/\\$FILE/2016%20Census%20Sample%20Household%20Form.pdf](http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2901.0Main%20Features802016/$FILE/2016%20Census%20Sample%20Household%20Form.pdf)>.

⁶³ S 22B of the 1983 Act. The open access period is 99 years from the census day.

that information to another person (except to another Archives officer for the purposes of, or in connection with, the performance of that other officer's duties under this Act)." (introduced by the Census Information Legislation Amendment Act 2000)

England – Census Act 1920 Statistics and Registration Service Act 2007

6.46 The Census Act 1920 and the Statistics and Registration Service Act 2007 ("**SRSA**") do not contain provisions mandating the destruction of census data after the completion of a census exercise.

6.47 Confidentiality of census data is nonetheless protected under the SRSA, which prohibits the disclosure of personal information with a maximum penalty on conviction on indictment of imprisonment for two years, a fine or both, except where, *inter alia*, a disclosure:-

- (i) is required or permitted by any enactment, or
- (ii) is made with the consent of the person to whom it relates.⁶⁴

6.48 The form of census questionnaire states clearly that personal information collected is protected by law and that census information is kept confidential for 100 years.⁶⁵ The specific reference to "100 years" is found in neither the Census Act 1920 nor the SRSA, and appears to reflect simply the presumed lifespan of an individual.⁶⁶ Moreover, during the passage of the relevant legislation, there did not appear to be any discussion, as in Australia, of giving an individual the choice to agree to have his own census information to be made available. The census records currently available are those conducted between 1841 and 1911, and can be accessed online.

Ireland – Statistics Act 1993

6.49 The primary piece of legislation in Ireland is the Statistics Act 1993 ("**Statistics Act**"). It does not require census records to be destroyed after the completion of a census. The Statistics Act however stipulates that all information collected under the Act shall be used only for statistical

⁶⁴ S 39 of the SRSA. Under ss 39(2),(3), "*personal information*" in this regard means information which relates to and identifies a particular person in that the identity of that person –

- "(a) is specified in the information,
- (b) can be deduced from the information, or
- (c) can be deduced from the information taken together with any other published information."

⁶⁵ The latest questionnaire for the 2011 census is available at:
<<http://webarchive.nationalarchives.gov.uk/20160105160709/http://ons.gov.uk/ons/guide-method/census/2011/how-our-census-works/how-we-took-the-2011-census/how-we-collected-the-information/questionnaires--delivery--completion-and-return/index.html>>.

⁶⁶ TNA, *Guide to Archiving Personal Data* (2018), at para 73.

compilation and analysis purposes; and that no information which can be related to an identifiable person or undertaking shall be disseminated save in limited circumstances, for example, for bringing a prosecution for an offence under the Act. Contravention of these provisions is an offence.⁶⁷ In the case of a census of population, however, these restrictions shall cease to apply 100 years after the date of the relevant census.⁶⁸ The most recent census records available for inspection are those conducted in 1911. They are held in the custody of the NAI and are also accessible online.⁶⁹

New Zealand — Statistics Act 1975

6.50 Similarly, the Statistics Act 1975 ("**1975 Act**") in New Zealand stipulates that information furnished to the Statistician shall only be used for statistical purposes save in limited circumstances. Violation of the restriction may result in criminal sanction.⁷⁰

6.51 Of particular interest is section 37D of the 1975 Act which provides that despite section 37 (which protects the security of information), the Statistician may authorise the disclosure, after 100 years, of census schedules that the Statistician has classified as historical documents, after having regard to the advice of the Chief Archivist as defined in the 2005 Act.⁷¹

6.52 Under the 2005 Act, the census schedules must be transferred to the control of the Chief Archivist and the possession of ANZ after 100 years from the census day appointed under the 1975 Act.⁷² On and from the date of transfer, the Statistician must authorise their disclosure solely for statistical purposes.⁷³

⁶⁷ Ss 32, 33 and 38 of the Statistics Act.

⁶⁸ S 35 of the Statistics Act.

⁶⁹ See the page on census information in the official website of the NAI at <<http://www.census.nationalarchives.ie/>>.

During the passage of the Bill, the importance of, on one hand, ensuring confidentiality of the particulars provided by people while they were living, and, on the other hand, allowing timely access to census information given their values for genealogical and social research was considered. It was suggested that 100 years might be too restrictive and hence there was a proposal to reduce it to 50 years (see: Seanad debates on 17 June 1993; Dail debates on 22 June 1993). There did not appear to be any discussion as to whether individuals should be given a choice to consent to their particulars to be made available, if at all.

⁷⁰ Ss 37 to 38 and 45A, 46 of the 1975 Act.

⁷¹ There does not appear to be any discussion in the legislative process over whether to give individuals the choice to consent to making his particulars publicly available after the passage of time, say, 100 years.

⁷² S 22(3)(a) of the 2005 Act.

⁷³ S 37DA of the 1975 Act.

Singapore – Census Act (Cap 35)
Statistics Act (Cap 317)

6.53 Neither the Census Act (Cap 35) nor the Statistics Act (Cap 317) in Singapore requires the destruction of census or statistical information. These Acts contain similar provisions prohibiting the disclosure of information that may identify any person without the person's prior written consent. Exceptions to the restriction are limited and appear to be exhaustive,⁷⁴ including where disclosure is made for the purpose of proceedings for an offence under the relevant Act (but without allowing a general disclosure after 100 years or otherwise). Unauthorised disclosure of census or statistical information in contravention of the restriction is punishable by a fine or imprisonment or both.⁷⁵

Summary

6.54 Amongst the census and statistical legislation discussed above, the Census Ordinance in Hong Kong is the only piece of legislation that requires the destruction of census schedules as a means of confidentiality protection. In all other jurisdictions, confidentiality is primarily protected by criminalising unauthorised disclosure. In England, Ireland and New Zealand, the protection of confidentiality lapses 100 years from the census in question, and census information will then become publicly available. In Australia, the relevant period is 99 years, and an individual can choose whether to have his particulars retained. Unlike these jurisdictions, it appears there is no stipulated period after which the protection of confidentiality would expire in Singapore.

6.55 Confidentiality of census and statistical information will promote public cooperation in their responses, and hence enhance the quality, integrity and accuracy of the information obtained (which, in turn, enhances its historical value). On the other hand, the information obtained is of historical value and should be preserved for policy-makers, sociologists, genealogists and other researchers. Census information is therefore preserved and made publicly available after a period of time in some of the jurisdictions studied above. This shows that it is possible to strike a balance between the objective of keeping confidentiality and that of preserving the information for future references.

Our provisional view

6.56 After careful deliberation, **our provisional view is to follow the approach of the jurisdictions where census information is preserved.**

⁷⁴ Ss 17 and 18 of the Census Act (Cap 35) and s7 of the Statistics Act (Cap 317).

⁷⁵ Ss 18(4), 19(e) and 20(e) of the Census Act (Cap 35) and s7(4) of the Statistics Act (Cap 317).

To this end, we invite views from the public specifically on some relevant questions.

Consultation Questions 8

- (i) Should census schedules be preserved as archives after a census exercise?**
- (ii) If the answer to (i) is in the affirmative, should the subject individual's consent be required as a precondition for preserving his census schedule and what are your reasons?**

Chapter 7

Transfer of records to archival authority

Introduction

7.1 There is one provision that may be referred to as the "30-year Rule" on access: Rule 3 of the PRAR which provides that public records having existed for not less than 30 years should generally be made available to the public for inspection. The "30-year Rule" on access is another aspect of the current regime that has been studied. In this regard, The Ombudsman made the following observations and suggestions:-

"In Hong Kong, decisions to withhold records from public access or to keep records closed beyond 30 years are made by GRS Director and B/Ds ...

In many of the jurisdictions that we have studied, there have been reforms in recent years to reduce the period of closure of public records ...

*Compared to the progressive liberalisation of restrictions on opening of records in other jurisdictions, Hong Kong has been inert in its promotion of transparent and open government. It is time for Government to review its system of closure of records, in particular the **closure period** and the criteria for approving/refusing public access to records including the need for considering the security grading of records ..." ¹ (emphasis added)*

The "30-year Rule" on access

7.2 The Ombudsman's above observations and suggestions are about Rule 3 of the PRAR which reads as follows:-

"Subject to the provisions of these Rules and the laws of Hong Kong, public records

*(a) which have been in existence for not less than thirty years;
or*

¹ Paras 7.23, 7.25 and 7.27 of *The Ombudsman's Report*.

(b) *the contents of which have at any time been published or otherwise wholly disclosed to the public,*

shall be available for public inspection."

7.3 Notably, the PRAR, like overseas regimes that we will come to later on in this chapter, provides for exceptions to, and exemptions from, this general position. Access before the expiry of the 30 year period is possible and permission may be sought from the GRS Director.² Equally, access can also be denied after the end of 30 years if, upon advice by the Head of the B/D by which the record is deposited, the Chief Secretary for Administration considers that the records contain information the disclosure of which would not be in the public interest, or that the records contain information which was obtained from members of the public under conditions such that their disclosure would or might constitute a breach of good faith.³

7.4 In practice, if the requested records are deemed unsuitable for public access, the originating or transferring agency is required to provide reasons with reference to Part 2 of the CAI, which sets out the specific grounds on which B/Ds may refuse disclosure of government information.

7.5 As mentioned in the Preface, we were tasked with looking at, amongst other things, the *management* of physical access; insofar as the *right to access* is concerned, it falls within the purview of the ATI Sub-committee.

7.6 Given this division of labour, we will not address the merits or demerits of the "30-year Rule" on access under Rule 3 of the PRAR (along with its exceptions and exemptions under Rules 6 and 7). What we do seek to examine in this chapter is the *transfer* of records to the GRS for appraisal and retention.

Transfer of records to GRS

7.7 Under the current regime, disposal of records is done in accordance with the relevant disposal schedules. As mentioned in chapter 2, the GARDS (ie the General Administrative Records Disposal Schedules) apply to administrative records; whereas for programme records, the disposal schedules approved by the GRS should be followed.

7.8 Possible disposal actions specified under the disposal schedules include the *transfer* of the records to the GRS for appraisal of their archival value, or the *transfer* of them to the GRS for permanent preservation (if already appraised to be of archival value).⁴ In addition, para 637 of the RMM provides that "[a]ll government records reaching 30 years old should be

² Rule 7(1) of the PRAR.

³ Rule 6 of the PRAR.

⁴ Paras 625 and 626 of the RMM.

[transferred to and] appraised by the P[ublic] R[ecords] O[ffice] to determine whether or not they possess archival value for permanent preservation." Records that are appraised to possess archival value will be permanently preserved and made available for public inspection.

7.9 According to information provided by the Government for the present study, B/Ds in practice dispose of their records according to GARDS or approved disposal schedules at a timeframe set usually shorter than 30 years. Para 637 of the RMM serves to complement the GARDS or approved disposal schedules to set 30 years as the deadline by which B/Ds should make the transfer for appraisal. Para 626 of the RMM requires that those records appraised as possessing archival value by Public Records Office should be transferred to and preserved by the Public Records Office of GRS. The transfer of records is an indispensable *procedural* stage that makes subsequent access to them by the public possible.

Terminology

7.10 From the above we can see that the "30-year Rule" primarily governs and touches upon public access to such records (while such rule also mandates transfer in the case of England as discussed in the next section). Phrases like "closure period" or the antithetical term "open access period" used in some jurisdictions are somewhat confusing in our view, and we therefore adopt the phrase "30-year Rule" in this Paper instead for two reasons set out in the paragraphs below.

7.11 First, the "30-year Rule" on access entails different exceptions and exemptions as discussed above. The effect is that the public may be able to access government records that are "closed" or before the expiry of the so-called "closure period", and by the same token, public access may be denied even if the records become "open" or have reached the so-called "open access period". A reference to either "open" or "closed" is therefore not indicative or conclusive, and the "30-year Rule" is more neutral.

7.12 Secondly, the term "closure period" is not a term of art. In some jurisdictions, this phrase is conveniently used (say, in a TNA guideline in England,⁵ albeit not in the 1958 Act itself); in others, the same concept exists but is described in antithetical terms (such as "*open access period*" in Australia and "*open access record*" in New Zealand). Ireland does not coin its own specific term, but the essence of this concept is provided for under section 10 of the 1986 Act addressing access. There is thus no one single term adopted universally.

7.13 Where discussing the laws of a particular jurisdiction in the paragraphs below, we will therefore use the terminology as adopted in that

⁵ See the guide entitled "*Closure Periods*" (Feb 2016):
<<https://www.nationalarchives.gov.uk/documents/information-management/closure-periods.pdf>>.

regime. Whilst our focus is on the law on *transfer* of records, the following paragraphs will also briefly discuss the law on public access to records, but only for the purposes of giving a more complete picture for the sake of our consultation.

Other jurisdictions

Australia

(i) Transfer of records to archival authority

7.14 Under the 1983 Act, Commonwealth records that are in the custody of a Commonwealth institution other than the NAA and have been determined to be part of the archival resources of the Commonwealth in accordance with the Act must be, subject to exemptions,⁶ transferred to the care of the NAA as soon as practicable after they ceased to be "*current Commonwealth records*",⁷ and in any event within 15 years of the record coming into existence.⁸ This 15-year timeframe was reduced from a timeframe of 25 years by an amendment in 2010 made to section 27(3)(b) of the 1983 Act.⁹ This reduction of timeframe was not phased.

(ii) Public access

7.15 Speaking not in terms of "*closure period*" but "*open access period*", the 1983 Act provides that the NAA must generally cause a Commonwealth record: (1) which is in this period, and (2) which is in its care or in the custody of a Commonwealth institution, and (3) which is not an exempt record, to be made available for public inspection.¹⁰ The determination of a record to be an exempt record is effectively the equivalent to the process of sensitivity review in England. However, in Australia, generally this appraisal of access status is to be performed after the records have been transferred and on the premises of the NAA.¹¹

7.16 The current open access period of 20 years for Commonwealth records¹² was reduced from 30 years in November 2010, to be phased over a

⁶ S 29 of the 1983 Act.

⁷ Namely, Commonwealth records that are required to be readily available for the purposes of a Commonwealth institution other than purposes under the 1983 Act – s 3 of the 1983 Act.

⁸ S 27 of the 1983 Act.

⁹ Schedule 3 to the Freedom of Information Amendment (Reform) Act 2010.

¹⁰ Ss 31(1A) and (1) of the 1983 Act.

¹¹ S 35(2) of the 1983 Act.

¹² Under ss 22A and 22B of the 1983 Act, different open access periods exist for Cabinet notebooks and records containing Census information. For the former, it is being reduced from 50 years to 30 years over a transitional period between 2011 and 2021. For the latter, it is 99 years.

10 year period. Under this change, Commonwealth records created after 2000 will be in the open access period on and after 1 January in the year that is 21 years after the creation year.

7.17 Access to a record is, however, not dependent on it being first transferred to the NAA.¹³ Where the relevant record is still in the custody of the relevant Commonwealth institution, that institution must make necessary arrangements with the NAA to enable the latter to meet its obligation to make it publicly available.¹⁴

7.18 Similar to other jurisdictions, a Commonwealth record can be made publicly available before reaching the general open access period (20 years) if authorised by the Minister.¹⁵ Conversely, public access may still be denied even after the end of the 20 years if the record is an exempt record.¹⁶

England

7.19 The FOIA 2000 that came into force in 2005 marked an important watershed as it brought significant changes to public access to public records.

Regime before the FOIA 2000

7.20 Under the 1958 Act, public records selected for permanent preservation were required to be transferred to the Public Record Office (or such other appointed place of deposit) not later than 30 years after their creation subject to possible exception.¹⁷ However, these transferred records shall not be made available for public inspection until they had been in existence for 50 years, or such longer or shorter period as may be prescribed in accordance with the Act.¹⁸

7.21 The Public Records Act 1967 amended the 1958 Act by abridging the time span before the records could be accessed, such that, subject to exceptions, records generally became available for public inspection at the expiration of the period of 30 years "*beginning with the first day of January in the year next after that in which [the records] were created*". Thus, for example, a record created in 1973 would be released to the public domain on 1 January 2004.¹⁹

¹³ Ss 31(1A)(b),(1) of the 1983 Act.

¹⁴ S 31(2) of the 1983 Act.

¹⁵ S 56 of the 1983 Act.

¹⁶ S 33 of the 1983 Act.

¹⁷ S 3(4) of the 1958 Act (as enacted).

¹⁸ S 5(1) of the 1958 Act (as enacted).

¹⁹ See generally, <<http://www.nationalarchives.gov.uk/information-management/legislation/public-record-s-act/public-records-system/>>.

7.22 It should be noted that the 1967 Act did not change the relevant deadline for transfer (ie 30 years), bringing *access* to government records into line with their *transfer* in what was effectively a consolidated "30-year Rule".²⁰

Regime after the FOIA 2000

(i) Transfer of records to archival authority

7.23 The "30-year Rule" on transfer survives the FOIA 2000 - public records selected for permanent preservation are still required to be transferred to the now TNA (or an appointed place of deposit) not later than 30 years after their creation, subject to exceptions. An independent review of the "30-year Rule" in 2009 recommended replacing it with a "15-year Rule".²¹ Eventually, both the 1958 Act and FOIA 2000 were amended by the Constitutional Reform and Governance Act 2010 which, instead, introduced a "20-year Rule". This reduction from a "30-year Rule" to "20-year Rule" on *transfer* was to take place over a 10-year transitional period.²² When a record is to be transferred, the department concerned should conduct a "sensitivity review", determining whether the record is "*open on transfer*" (ie access exemptions under the FOIA 2000 not applicable) or "*transferred as closed*" (ie such exemption(s) applicable).²³

(ii) Public access

7.24 The "30-year Rule" on access is abolished under the FOIA 2000 regime, and the public can generally have access to a government record *as soon as it is created*, unless an exemption in the FOIA 2000 applies. Moreover, this general right to access a public record does not depend on it having been transferred to the archival authority (or an appointed place of deposit), and where it has not been so transferred, the public could simply approach the relevant authority that holds it.²⁴

²⁰ *Review of the 30 Year Rule: Final Report* (Jan 2009) at para 2.12, available at: <<http://webarchive.nationalarchives.gov.uk/20090516124151/http://www2.nationalarchives.gov.uk/30yrr/30-year-rule-report.pdf>>.

²¹ *Review of the 30 Year Rule: Final Report* (Jan 2009) at para 7.6, available at: <<http://webarchive.nationalarchives.gov.uk/20090516124151/http://www2.nationalarchives.gov.uk/30yrr/30-year-rule-report.pdf>>.

²² The transition for some records is phased between 2013 and 2022; others between 2015 and 2024. For the former arrangement, see: The Constitutional Reform and Governance Act 2010 (Commencement No 7) Order 2012 (SI 2012/3001) and The Public Records (Transfer to the Public Record Office) (Transitional and Saving Provisions) Order 2012 (SI 2012/3028). For the latter arrangement, see: The Constitutional Reform and Governance Act 2010 (Commencement No 9) Order 2014 (SI 2014/3245) and The Public Records (Transfer to the Public Record Office) (Transitional and Saving Provisions) Order 2014 (SI 2014/3249).

²³ Guidance on sensitivity review of selected records can be found at: <<http://www.nationalarchives.gov.uk/information-management/manage-information/selection-and-transfer/sensitivity-reviews-on-selected-records/>>.

²⁴ See generally: <<http://www.nationalarchives.gov.uk/information-management/legislation/public-records-act/public-records-system/>>.

7.25 The point was succinctly put by the 30 Year Rule Review team in its Final Report published in January 2009:-

*"Before the [FOIA 2000] came into force, official records were presumed closed until they were at least 30 years old and had been transferred to [TNA]. Under [FOIA 2000], such information is presumed open from the time it is created, and long before it is transferred to [TNA], and it must be made available unless specific exemption criteria apply."*²⁵

7.26 Following this latest development, a record would become a "historical record" at the end of 20 years beginning with the year following that in which it was created.²⁶ The implication is that the categories of exemptions to public inspection would be fewer.²⁷

Ireland

7.27 The 1986 Act does not adopt closure period, open access period, or other similar phrases. Instead, the substance of this concept is enunciated in the relevant provisions concerning transfer and access, both of which carry a deadline of 30 years.²⁸

(i) Transfer of records to archival authority

7.28 The 1986 Act provides that departmental records which are more than 30 years old shall, subject to exceptions (such as where the record (or a class of records) concerned is in regular use),²⁹ be transferred by the Department of State in which they were made to the NAI.³⁰ For the purposes of the 1986 Act, the deposit of specified Departmental records in any place approved by the Taoiseach after consultation with the Director of the NAI shall constitute a transfer to the NAI.³¹

²⁵ *Review of the 30 Year Rule: Final Report* (Jan 2009) at para 2.18, available at: <<http://webarchive.nationalarchives.gov.uk/20090516124151/http://www2.nationalarchives.gov.uk/30yrr/30-year-rule-report.pdf>>.

²⁶ S 62(1) of the FOIA 2000.

²⁷ See generally, Part VI of the FOIA 2000.

²⁸ We note that the National Archives (Amendment) Act 2018 was enacted in July 2018 but has not yet come into force. Its main purpose, according to the Explanatory Memorandum of the Bill, is to provide for the phased implementation of a "20 Year Rule" for the transfer of Departmental records to the NAI by amending the 1986 Act.

²⁹ Ss 8(2) and 8(5) of the 1986 Act.

³⁰ S 8(1) of the 1986 Act.

³¹ S 14 of the 1986 Act.

(ii) *Public access*

7.29 The 1986 Act goes on to provide that all archives in the custody of the NAI or held elsewhere in accordance with the Act shall, subject to regulations made in accordance with the Act, be made available for public inspection, except:-

- (i) archives which were formerly Departmental records (other than court or testamentary documents) and are less than 30 years old,
- (ii) archives which were formerly Departmental records and have been certified by an authorised officer that to make them available for public inspection
 - (a) would be contrary to the public interest, or
 - (b) would or might constitute a breach of statutory duty, or a breach of good faith on the ground that they contain information supplied in confidence, or
 - (c) would or might cause distress or danger to living persons on the ground that they contain information about individuals, or would or might be likely to lead to an action for damages for defamation.³²

7.30 Thus, there is a built-in mechanism for the appraisal of access status and public inspection of records aged more than 30 years to be withheld if so certified in accordance with the Act. Conversely, a member of the Government is empowered to grant access to records that are less than 30 years old.³³

New Zealand

7.31 Unlike Australia, 25 years after the creation of a public record is the deadline for both its transfer and determination of its access status in New Zealand.

7.32 Under the 2005 Act, every public office is generally required to transfer from its possession and control public records that have been in existence for 25 years, although an earlier or deferred transfer is possible.³⁴ The transfer is made to the possession of the ANZ or an approved repository, and to the control of the Chief Archivist.

³² Ss 10(1) and 8(4) of the 1986 Act.

³³ S 10(6) of the 1986 Act.

³⁴ Ss 21(1), (2)(b) and 22 of the 2005 Act.

7.33 Similar to the "*sensitivity review*" in England, the appraisal of access status of records is closely bound up with their transfer to the archival authority. Specifically, the 2005 Act obliges the administrative head of the relevant public office to classify public records as either (a) open access records; or (b) restricted access records when they have been in existence for 25 years or are about to be transferred to ANZ and the Chief Archivist.³⁵

7.34 If there are no good reasons to restrict public access or if no other enactment requires a public record to be withheld from public access, the record concerned must be classified as an open access record.³⁶ Such record must be made available for public inspection as soon as is reasonably practicable after a request to inspect it is made.³⁷

Singapore

7.35 Access to a record is not available until it is more than 25 years old, and is dependent on its having been first transferred to the NLB or other designated repositories.

7.36 This is derived from the definition of "*public archives*" in s2 of the NLBA which means:

"Public records that:

- (a) are more than 25 years old;*
- (b) are specified by the [NLB] as being of national or historical significance; and*
- (c) have been transferred to the [NLB] or to such other place as the [NLB] may from time to time determine." (emphasis added)*

7.37 In practice, rather than being transferred to the NLB itself, it appears that public records are mostly transferred to the NAS one of whose mandate is to "take custody of records transferred from public agencies".³⁸ This is indeed what the NLBA generally provides for in section 14C:-

"Any public records which, in the opinion of the [NLB], are of national or historical significance shall be transferred to the care and control of the [NAS] in accordance with such schedules or other agreements for the transfer of records as may be agreed on between the [NLB] and the public office responsible for the public records."

³⁵ S 43 of the 2005 Act.

³⁶ S 44(2) of the 2005 Act.

³⁷ S 47 of the 2005 Act.

³⁸ <<http://www.nas.gov.sg/About-Us/Mandate>>.

7.38 Public archives made available may be inspected by the public but only for the purpose of reference or research, and the inspection may be subject to conditions/restrictions.³⁹

Our observations

7.39 Focusing on the current 30-year time frame on *transfer* of records from B/Ds to the GRS for appraisal, the following observations can be distilled from the overseas models studied:

- (i) the term "transfer" in other jurisdictions refers to "transfer for retention", rather than "transfer for appraisal";
- (ii) access to records may or may not depend on the records first having been *transferred* to the archival authority for retention. As such, the deadline for *transfer* may not have an impact on when the records can be made available for public access;
- (iii) there is no universal deadline for transfer of records to archival authority for retention:- currently 30 years in Ireland, 25 years in New Zealand and Singapore, 20 years in England and 15 years in Australia. In determining the appropriate deadline, it is important to bear in mind considerations such as the costs, resources, ramifications on the operations of the transferring authorities (such as government departments) and expertise available in a particular regime;
- (iv) even with a specified deadline for transfer, the deadline is not absolute, and exceptions, exemptions and deferrals can be allowed; and
- (v) moving forward the specified deadline may realistically have to be phased over a number of years, again bearing in mind the considerations mentioned in (iii) above.

7.40 Bearing in mind the discussion in this chapter (in particular the above observations), there are some benefits of shortening the current 30-year timeframe on transfer of records to the GRS and specifying it for the purpose of retention, including:-

- (i) enabling the GRS to get hold of records from B/Ds earlier for retention purposes;
- (ii) reinforcing the government's commitment to put in place a vigorous public records management regime; and
- (iii) putting Hong Kong on par with some jurisdictions studied.

³⁹

S 14E(2) of the NLBA.

7.41 On the other hand, shortening the current 30-year timeframe on transfer of records has its disadvantages, including:-

- (i) some policies may be ironed out over a long period of time, and B/Ds may need to refer to the relevant records during the whole time. Too close a deadline for transfer will hinder B/Ds' use of or reference to those records essential for their operational needs. There will be time and resources implications if B/Ds have to apply for deferral of transfer and wait for GRS' processing and approval; and
- (ii) this may strain the GRS if no phase-in period is allowed for or no additional resources is provided for. The problem is that there is not enough supply of archivists in Hong Kong as discussed in chapter 10.

Issues for public consultation

7.42 All in all, this is about striking a proper balance. Having set out the observations distilled from the overseas jurisdictions, as well as the advantages and disadvantages of moving forward the deadline for transfer, we wish to seek the views of the public in relation to some relevant questions.

Consultation Questions 9

- (i) **Should the current 30-year timeframe on the transfer of records by B/Ds to the GRS be retained?**
- (ii) **If the answer to (i) is in the negative, (a) what are your reasons, and (b) what in your view is the appropriate timeframe and why?**

Chapter 8

Compliance framework of public records management regime

Introduction

8.1 Another observation made about the administrative records management regime in Hong Kong is the GRS' lack of effective measures to ensure B/Ds' compliance with the relevant rules and guidelines. In this chapter, we review the compliance framework of the public records management regime in Hong Kong, focusing on three specific comments, namely (1) inherent weakness of an administrative regime to ensure compliance; (2) the lack of legal authority to inspect records and audit records management practices; and (3) handling of loss and unauthorised destruction of records. In respect of each, we will (i) outline the comments, (ii) track the Government's stance or response and (iii) explore the laws and practices in other jurisdictions. We will then, towards the end of this chapter, put forward our provisional views before setting out some issues for consulting the public. Our provisional views are that a good public records management regime must include adequate and effective measures to ensure due compliance. Whilst these measures may take the more stringent form of laws or mandatory requirements, equally important are other measures which seek to develop a stronger culture and promote higher awareness of proper records management.

(I) Regulating compliance under an administrative framework

8.2 The 2007 Civic Exchange Report, in view of the lack of legislative framework, commented on the inadequacies of the current records management regime:-

*"[t]he records authority (the GRS and its subordinate offices), which is supposed to play a key role in ensuring an effective records regime across government, is neither empowered nor has the competency to perform such a role. The GRS cannot monitor the recordkeeping of government agencies or impose penalties in cases of non-compliance with guidelines. Moreover, the GRS is neither adequately funded nor supported in developing its capacity and professional expertise."*¹

¹ 2007 Civic Exchange Report, at 29.

Government's stance or response to comments

Records management through administrative measures

8.3 The Government acknowledges the importance of records as valuable resources to support evidence-based decision-making and meet operational and regulatory requirements, and their significance for an open and accountable government. The Government explained that, although an archives law is not in place, essential principles of good records management have been incorporated into the current administrative rules and guidelines. These principles include the promulgation of recordkeeping standards, designation of obligations and responsibilities of government agencies relating to the creating, keeping, maintaining and protection of public records, destruction of records to be subject to prior authorisation of archival authority, setting out of responsibility for safe custody and conservation of archival materials, and provisions for public access to public records.²

Promulgation of mandatory records management requirements

8.4 Since 2009, the GRS and the Administration Wing has been issuing and updating a number of major General Circulars, Circular Memoranda, guidelines and publications,³ one of which is GC09 issued in April 2009 setting out mandatory recordkeeping requirements for B/Ds' compliance.

² Reply by the then Chief Secretary for Administration in LegCo motion debate on "Enacting an archives law", Hong Kong Hansard, 16 November 2011, pages 2195; press release "Government will co-operate with The Ombudsman", 4 January 2013 (<http://www.cmab.gov.hk/en/press/press_3101.htm>); press release of written reply by the then Chief Secretary for Administration to the LegCo on "Government records management", 23 January 2013 (<<http://www.info.gov.hk/gia/general/201301/23/P201301230319.htm>>); the Government minute in response to The Annual Report of The Ombudsman 2014 by the then Chief Secretary for Administration in the Legislative Council, Hong Kong Hansard, 10 December 2014, pp 3386 to 3387 (<<http://www.legco.gov.hk/yr14-15/english/counmtg/hansard/cm20141210-translate-e.pdf#nameddest=add01>>); press release of written reply by the then Chief Secretary for Administration to the LegCo on "Management of public records", 23 November 2016 (<<http://www.info.gov.hk/gia/general/201611/23/P2016112300555.htm>>).

³ Including: (a) General Circulars and Circular Memorandum issued: – GC09, GC12, Administration Wing of the Chief Secretary for Administration's Office Circular Memorandum No 3/2011 entitled "*Sharing Good Records Management Practices with Government-owned or Funded Statutory Bodies*", GCCR and EDRMP; (b) Publications revised and updated: – GARDS; (c) New publications – DOR, FRERKS, HPER, *Recordkeeping Metadata Standard for the Government of the Hong Kong SAR: Implementation Guidelines*, *Guidelines on Implementation of an Electronic Recordkeeping System: Key Considerations and Preparation Work Required*, *Guidelines on mapping out Implementation of an Electronic Recordkeeping System in the Context of Developing Organisational Electronic Information Management Strategies*, *A Handbook on Records Management Practices and Guidelines for an Electronic Recordkeeping System*, *Manual on Evaluation of an Electronic Recordkeeping System*.

8.5 Some of the mandatory requirements under GC09⁴ are:-

- (i) To print-and-file e-mail records;
- (ii) To establish draft disposal schedules for programme records series within a period of two years of creation;
- (iii) To transfer records having archival value to the GRS according to the respective disposal schedules;
- (iv) To obtain prior agreement from the GRS Director before destruction of records, and ensure that the records disposal process is properly supervised;
- (v) To put in place arrangements to ensure proper custody and storage of records, and investigate any loss or unauthorised destruction of records, and consider whether any disciplinary action or other administrative action is necessary; and
- (vi) To review records management practices regularly.

8.6 GC09 carries the same force as Government Regulations which are binding upon government servants. The memorandum of conditions of service deployed for the appointment of government servants makes it clear that government servants are subject to, amongst others, Government Regulations and Circulars.⁵

8.7 General Regulation 11 provides that a Government servant who disobeys or neglects or fails to observe the terms of Government Regulations, Circulars or Circular Memoranda on Conduct and Discipline appertaining to his duties may result in disciplinary proceedings and he may be held pecuniarily responsible for any financial loss to the Government resulting from his disobedience, negligence or failure. Accordingly, government servants are liable to disciplinary action if they fail to comply with requirements in GC09 or other government regulations and circulars pertaining to records management. Possible punishment includes verbal or written warnings, reprimand, severe reprimand, demotion, compulsory retirement and dismissal.⁶

⁴ See Annex I where the mandatory requirements are underlined for easy reference.

⁵ The memorandum of conditions of service is not a published document, but the terms of appointment of public servants in Hong Kong had been considered by the Court of Final Appeal in the case of *Secretary for Justice v Lau Kwok Fai & Another* (2005) 8 HKCFAR 304 at para 20-21:-

"... the employment of public officers in Hong Kong has at all times been governed by provisions contained in a letter of appointment and an accompanying memorandum of conditions of service. ..."

⁶ Para 5 of the PAC Information Note available at:
<http://www.grs.gov.hk/pdf/Information_note_E.pdf>.

Law and practice in other jurisdictions

Australia

8.8 In Australia, some records-related duties imposed upon a Commonwealth institution by the 1983 Act and the Archives Regulations 2018 are:-

- (i) to transfer records which are determined as archival resources in its custody to the care of the NAA;⁷
- (ii) keep, in writing, information relating to the destruction or other disposal of a Commonwealth record in that institution's custody.⁸

8.9 Neither the 1983 Act nor the Archives Regulations 2018 spell out the consequence of non-compliance with all the obligations imposed thereunder, and the consequence is thus unclear. Nonetheless, certain specific dealings with Commonwealth records do attract criminal sanctions under the 1983 Act. These include destruction or other disposal, transfer, alteration of and damage to a Commonwealth record otherwise than required or permitted by law or the NAA or in accordance with an approved practice or with a normal administrative practice.⁹ It is also an offence for a person to engage in conduct resulting in an addition to or an alteration of a Commonwealth record which has been in existence for over 15 years, unless it is done as required by law, or with the NAA's permission or in accordance with its approved practice.¹⁰ Where accelerated or special access to records is authorised before they fall into open access period on conditions, a breach of those conditions will also be an offence.¹¹

8.10 Under the 1983 Act, the NAA may provide advice and other assistance to Commonwealth institutions to promote proper records management.¹² Over the years it has published and issued different standards and guidelines.¹³ These publications, however, do not appear to have empowered the NAA to impose sanctions in cases of non-compliance.

⁷ S 27 of the 1983 Act.

⁸ Reg 11(a) of the Archives Regulation 2018.

⁹ See ss 24(1) and (2) of the 1983 Act. For the purpose of these offences, strict liability applies to the physical element of circumstance of the offence, that the record is a Commonwealth record.

¹⁰ See s 26 of the 1983 Act. Section 26(1A) provides that strict liability applies to s26(1)(a) (ie a Commonwealth record has been in existence for more than 15 years). The penalty for the offences under ss 24 and 26 is both 20 penalty units. Under s 4AA of the Crimes Act 1914, a penalty unit means the amount of AU\$210.

¹¹ S 56 of the 1983 Act.

¹² Ss 5, 6 of the 1983 Act.

¹³ See generally: <<http://www.naa.gov.au/information-management/index.aspx>>.

Nor is the NAA empowered to issue mandatory instructions to Commonwealth institutions the non-compliance of which may result in sanction.¹⁴

8.11 Finally, Parliamentary oversight is provided for under the 1983 Act, as the NAAAC is required to submit to the responsible Minister an annual report on its operations which will ultimately be laid before the Parliament.¹⁵

England

8.12 The 1958 Act imposes a duty upon every person responsible for public records to, under the guidance of the Keeper (ie Keeper of Public Records):-¹⁶

- (i) make arrangements for the selection of records which ought to be permanently preserved and for their safe-keeping;
- (ii) transfer public records selected for permanent preservation to the PRO or to other appointed place of deposit not later than 20 years after their creation (subject to exceptions); and
- (iii) destroy or otherwise dispose of public records not selected for permanent preservation.

8.13 Similar to other jurisdictions studied, Parliamentary scrutiny is provided for under the 1958 Act, as the Secretary of State is required to lay before both Houses of Parliament a report on the work of the PRO every year.¹⁷ Unlike other jurisdictions, however, there is no offence provision in the 1958 Act. The consequence for non-compliance with obligations is by naming and shaming.

8.14 It is noteworthy that section 46 of the FOIA 2000 requires the Secretary of State (formerly the Lord Chancellor)¹⁸ to issue a code of practice ("**Lord Chancellor's Code**") to provide guidance to all relevant authorities on records management practices that they should follow. The Lord

¹⁴ In its Report on the review of the 1983 Act, the Australian Law Reform Commission recommended that the NAA be given power to make, as legislative instruments, mandatory standards in relation to the creation, maintenance, disposal and preservation of Commonwealth records (Recommendation 36). See Australian Law Reform Commission Report No 85, *Australia's Federal Record: A review of Archives Act 1983* (1998) available at: <<http://www.austlii.edu.au/au/other/lawreform/ALRC/1998/85.html>>. To date, this recommendation has not been taken up.

¹⁵ S 68 of the 1983 Act.

¹⁶ S 3 of the 1958 Act.

¹⁷ S 1(3) of the 1958 Act.

¹⁸ The functions of the Lord Chancellor under s 46 of the FOIA 2000 have been transferred to the Secretary of State with effect from 9 December 2015 by virtue of s 6(3)(a) of the Transfer of Functions (Information and Public Records) Order 2015/1897.

Chancellor's Code sets out practices across the different stages of records management ranging from the keeping, management, transfer, to the disposal of records.

8.15 However, the Lord Chancellor's Code does not have statutory force. Neither does the FOIA 2000 impose any direct duty on public authorities to follow or to have regard to it. The Lord Chancellor's Code only states that:-

*"Authorities should note that if they fail to comply with the Code, they may also fail to comply with legislation relating to the creation, management, disposal, use and re-use of records and information, for example the Public Records Act 1958 ... and they may consequently be in breach of their statutory obligations."*¹⁹

8.16 Under the FOIA 2000, the Information Commissioner is responsible for, amongst other things, promoting observance of the provisions of the Lord Chancellor's Code by public authorities. If it appears to him that an authority's practice does not conform to that proposed in it, he may, after consulting the Keeper where the records concerned are within the meaning of "public records" under the 1958 Act, issue a *"practice recommendation"* specifying the provisions of the Lord Chancellor's Code that have not been met and the steps that should be taken to promote conformity.²⁰

8.17 Again, the FOIA 2000 does not specify the consequences of a failure to observe a practice recommendation. It is only stated in the Lord Chancellor's Code itself that *"a failure to comply with a practice recommendation may lead to a failure to comply with the [FOIA 2000] or could lead to an adverse comment in a report to Parliament by the Information Commissioner."*²¹

8.18 The "report to Parliament by the Information Commissioner" used to be made under section 49 of the FOIA 2000 which requires him to lay before each House of Parliament an annual general report, and empowers him, from time to time, to lay before each of them such other report as he thinks fit.²²

8.19 During the passage of the Freedom of Information Bill through Parliament, Lord Bassam of Brighton, Parliamentary Under-Secretary of State, Home Office commented on this "naming and shaming" approach as follows:-

¹⁹ Foreword to the Lord Chancellor's Code, para (viii).

²⁰ Ss 47 and 48 of the FOIA 2000. See also Foreword to the Lord Chancellor's Code, para (x).

²¹ Foreword to the Lord Chancellor's Code, para (x).

²² S 49 of the FOIA 2000 has since May 2018 been repealed, but the Information Commissioner is now under a similar reporting obligation under s 139 of the Data Protection Act 2018.

*"[C]ompliance with the published codes of practice would not be enforceable in the courts in the same way that a statutory duty might be. ... I believe it would be an exceptional authority which wilfully ignored ... a [practice] recommendation, particularly given the commissioner's powers to name and shame in any report that she might make to Parliament. An additional point is that the code of practice could be referred to in any test case which was the subject of judicial review. **The powers of naming and shaming should not be underestimated** in regard to public sector bodies keen to keep the confidence of the public they serve."*²³ (emphasis added)

8.20 It is further noted that the FOIA 2000 specifically provides that the Act itself does not confer any right of action in civil proceedings in respect of any failure to comply with any duty imposed under the Act.²⁴

Ireland

8.21 The 1986 Act imposes various requirements, for example:-

- (i) departmental records of more than 30 years old are generally required to be transferred by the Department of State in which they were made to the NAI for inspection by the public;²⁵
- (ii) departmental records, unless transferred to the NAI or otherwise disposed of in accordance with the 1986 Act, shall be retained and preserved in the Department of State in which they were made or held.²⁶

8.22 No sanction is imposed under the 1986 Act for non-compliance with the above duties. Nor does the 1986 Act spell out the consequences for non-compliance with regulations that the Taoiseach is empowered to make after consultation with the Director of the NAI in relation to, for example, the transfer and disposal of Departmental records.²⁷ The Director of NAI himself does not enjoy express power under the 1986 Act to issue mandatory guidelines or requirements.

8.23 The 1986 Act, however, provides that it is an offence for any person to remove archives from the NAI otherwise than provided by law, or

²³ Hansard HL, vol 617 col 944 (17 October 2000).

²⁴ S 56 of the FOIA 2000. But note also s77 FOIA 2000 which creates an offence for the altering, etc of records with intent to prevent disclosure. This, however, falls within the purview of the ATI Sub-committee.

²⁵ S 8 of the 1986 Act.

²⁶ S 7 of the 1986 Act.

²⁷ S 19(1) of the 1986 Act.

conceal or damage archives, or without the consent of the Director of the NAI remove or destroy archives.²⁸

8.24 The Director of the NAI is also required to submit annual reports to the Taoiseach on the work of the NAI, and copies of the reports will be laid by the Taoiseach before each House of the Oireachtas.²⁹

New Zealand

8.25 The 2005 Act imposes various different duties and requirements, including the following important ones:-

- (i) every public office and local authority must create and maintain full and accurate records of its affairs in accordance with normal, prudent business practice;³⁰
- (ii) no person may dispose of, or authorise the disposal of, public records except with the authority of the Chief Archivist given in accordance with the 2005 Act ;³¹ and
- (iii) every public office must transfer public records that have been in existence for 25 years to the control of the Chief Archivist and the possession of the ANZ or other approved repository.³²

8.26 The 2005 Act provides that it is an offence for anyone, whether wilfully or negligently, to damage, dispose of or destroy a public record otherwise than in accordance with the Act. But unlike all other jurisdictions studied, the 2005 Act also makes it an offence for anyone who wilfully or negligently contravenes or fails to comply with any provision of the Act or any regulations made thereunder, hence, including the duties and requirements outlined above.³³

8.27 Separately, the 2005 Act confers power upon the Chief Archivist to issue standards, including mandatory standards, in relation to the creation, maintenance, management, appraisal of and access to public records or local authority records for the compliance by public offices and local authorities.³⁴

²⁸ Under s 18 of the 1986 Act, a maximum fine of £800 or, imprisonment term for not more than 12 months or both may be imposed on summary conviction. On conviction on indictment, the maximum fine is £10,000 or imprisonment term for 2 years or both.

²⁹ S 21 of the 1986 Act.

³⁰ S 17 of the 2005 Act.

³¹ S 18 of the 2005 Act.

³² S 21 of the 2005 Act.

³³ S 61 of the 2005 Act. Under s 62, the maximum penalty is NZ\$5,000 for an individual or NZ\$10,000 for every other case. A person convicted of any of the offences may additionally be prohibited from having access to the ANZ for a period the court thinks fit.

³⁴ Ss 27 and 28 of the 2005 Act.

Before issuing a mandatory standard, the Chief Archivist is obliged to consult every public office to which he considers the proposed standard will apply.³⁵ The legal consequence, if any, for non-compliance with the standards, including mandatory ones, is however unclear. It is doubtful if such non-compliance amounts to non-compliance of the 2005 Act itself or regulations made under it, thereby attracting criminal sanctions outlined above.

8.28 Annual reports on the state of recordkeeping within public offices are required to be submitted by the Chief Archivist to the responsible Minister, who in turn is required to submit them to the House of Representatives.³⁶

Singapore

8.29 Some important duties and requirements under the NLBA are:-

- (i) any public records which in NLB's opinion are of national or historical significance are required to be transferred to the care and control of the NAS in accordance with the schedules or other agreements agreed on between the NLB and the public office responsible for the records;³⁷ and
- (ii) no person shall, without NLB's authorization destroy or otherwise dispose of, or authorize the destruction or disposal of, any public records in his possession or under his control.³⁸

8.30 The NLBA is silent on the consequences for non-compliance with the statutory duties outlined above. It does, however, make it clear that it is an offence for any person to (i) take or send out of Singapore any public records without the written permission of the NLB; (ii) write on, mark, inscribe or otherwise deface any public records; or (iii) mutilate, excise or otherwise damage them.³⁹

8.31 On the other hand, in exercising its power to make regulations, the NLB may prescribe in the regulation that any act or omission in contravention of the provisions thereof is an offence and impose penalties in the form of fines not exceeding SG\$5,000.⁴⁰

³⁵ S 27(2) of the 2005 Act.

³⁶ S 32 of the 2005 Act.

³⁷ S 14C of the NLBA.

³⁸ S 14D of the NLBA.

³⁹ S 14H of the NLBA. A person guilty of the offence is liable on conviction to a fine not exceeding SG\$5,000 or to imprisonment for a term not exceeding 12 months or to both.

⁴⁰ S 35(h) of the NLBA.

8.32 Finally, the NLB is also required to transmit annual reports of its activities to the Minister, who shall cause a copy to be presented to the Parliament as soon as practicable.⁴¹

Summary

8.33 As discussed above, the archives law in Australia, Ireland and Singapore is silent on the consequences of non-compliance with the duties and requirements therein, although certain serious conducts (analogous to, *inter alia*, theft, criminal damage, etc) are criminalised. On the other hand, no offence provision is found in the 1958 Act in England, which largely adopts a "naming and shaming approach". In contrast, the 2005 Act in New Zealand expressly provides that wilful or negligent contravention or non-compliance with any provision therein is a criminal offence. It appears that the approach adopted by New Zealand stipulating that non-compliance with any provisions of the 2005 Act will be a criminal offence is not a common feature found in other jurisdictions studied by the Sub-committee. In addition, parliamentary scrutiny is seen in all five jurisdictions through annual reporting.

(II) Power to inspect records and audit records management practices

8.34 Another comment in relation to ensuring compliance is the GRS' lack of legal authority to inspect government records held by B/Ds and audit their records management practices. The Ombudsman's Report observed that the GRS monitors B/D's compliance with its records management requirements mainly through (1) B/D's self-assessment surveys, and (2) GRS' records management studies.⁴²

8.35 Both, however, were considered unsatisfactory for gauging B/D's compliance. In relation to the former, "the questions and replies in such surveys are broad-brushed and may not accurately reveal the real practices of B/Ds and their staff."⁴³ Whilst the records management studies may be better, "the studies with comprehensive scope have so far been carried out on only some B/Ds."⁴⁴ The Ombudsman expressed the frustration that "there is a complete lack of independent auditing of B/Ds' records management practices like that in other jurisdictions."⁴⁵

8.36 The 2011 Civic Exchange Report similarly observed that "*[g]overnments with modern archives law typically give archivists the power to inspect or audit records management practices throughout the bureaucracy*

⁴¹ S 41 of the Public Sector (Governance) Act 2018.

⁴² Para 2.6 of The Ombudsman's Report.

⁴³ Para 2.12 of The Ombudsman's Report.

⁴⁴ Para 2.12 of The Ombudsman's Report.

⁴⁵ Para 2.12 of The Ombudsman's Report.

(subject to legally specified exceptions)."⁴⁶ In conclusion, they, amongst other things, recommended:-

*"The archival authority must be given a clear legislative mandate and statutory status to pursue its mission and role efficiently and effectively. In particular, it requires stronger monitoring and regulatory powers with an appropriate level of resources and professional expertise to ... ensure compliance."*⁴⁷

Government's stance or response to comments

GRS' monitoring measures

8.37 At present, the GRS oversees the management of government records on a government-wide basis, whereas the DRM (ie Departmental Records Manager) designated by each B/D oversees the records management programme within the B/D.⁴⁸ In relation to the two ways of monitoring mentioned above:-

(i) Departmental records management reviews

These serve to review B/Ds' performance of their function to ensure compliance with records management policies and procedures. Relevant aspects covered in such a review include records management policies and guidelines, roles/responsibilities and training of staff, recordkeeping systems, and creation/collection, registration/classification, storage, access, protection and disposal of records.

For the purpose of a review, the GRS will collect facts and data on departmental records management programme through various means, including review of documentation, examination of recordkeeping systems, surveys and visits, interviews and focus group discussion.⁴⁹

In practice, the GRS team would attend at B/Ds to see how their records were managed, and to spot-check files against their inventories. Although the GRS has no statutory authority to demand documents from B/Ds when conducting such reviews, according to the GRS, B/Ds were generally cooperative and there has not been any case in which the GRS' request for

⁴⁶ Para 5.1 of the 2011 Civic Exchange Report.

⁴⁷ Para 7.2.2 of the 2011 Civic Exchange Report.

⁴⁸ This is discussed, above, in chapter 2.

⁴⁹ Paras 8 to 9 of GC12.

information was refused.⁵⁰ Given the depth and breadth of the reviews, the process will normally take a few months to complete for each B/D.⁵¹

The GRS' findings and recommendations, if any, from the review will be presented to the B/D concerned, which is required to draw up a plan for implementation of the recommendations. The GRS will assist in and monitor the implementation progress. B/Ds being reviewed are required to submit half-yearly progress reports to inform the GRS of their progress in implementing the recommendations.⁵² The GRS' review findings and recommendations as well as the B/Ds' implementation plan will be submitted to the Chief Secretary for Administration for steer, as needed.⁵³

Under GC12,⁵⁴ the GRS will draw up a review schedule, and contact selected B/Ds separately to work out a detailed review programme with their DRM. B/Ds selected are required to cooperate with the GRS for these reviews.⁵⁵ Since the issue of GC12 in October 2012, the GRS has reviewed ten B/Ds, making various recommendations to improve the various aspects of their records management work.⁵⁶ As at February 2018, two such reviews were underway and another one will be conducted later in 2018.⁵⁷ The effectiveness of these reviews will be further enhanced when more resources are allocated to cover more B/Ds under this scheme.

(ii) ***Self-assessment by B/Ds***

Internal assessment and evaluation of records management function of B/D should be conducted by its DRM periodically,

⁵⁰ Information provided by the GRS to the Sub-committee's meetings on 24 October 2013, 15 November 2013, 12 December 2013, 14 May 2015, 30 June 2015, 3 December 2015 and 16 June 2016.

⁵¹ Information provided by the GRS for the Sub-committee's meeting on 14 May 2015.

⁵² As an administrative arrangement, requests by the GRS for B/Ds to provide half-yearly reports has been put in practice since the first departmental records management review in 2012.

⁵³ Para 10 of GC12.

⁵⁴ Para 11 of GC12.

⁵⁵ Para 11 of GC12.

⁵⁶ The ten B/Ds were the Civil Engineering and Development Department, Legal Aid Department, Office of the Communications Authority, Census and Statistics Department, Hong Kong Observatory, Home Affairs Bureau, Buildings Department, Social Welfare Department, Water Supplies Department, and Labour and Welfare Bureau.

⁵⁷ The B/Ds concerned are: the Intellectual Property Department (review underway), Transport Department (review underway) and Home Affairs Department (review to be conducted).

making reference to the provisions in the RMM.⁵⁸ Such assessment should include:-

- (a) assessment of compliance with the mandatory requirements set out in GC09; and
- (b) identification of areas requiring improvement with regard to desirable best practices, and formulation of plan to implement improvement measures.⁵⁹

To assist B/Ds in carrying out self-assessment, the GRS in 2010 developed a comprehensive compliance review form and coordinated B/Ds' first self-assessment of their records management practices. The findings of the assessment and the GRS' recommendations on improvement measures were conveyed to B/Ds in November 2011. The GRS has also reviewed the scope of self-assessment and identified in GC12 the various aspects required to be covered. Two similar self-assessments were subsequently carried out in 2012 and 2015 and their scope covered the entire spectrum of records management issues ranging from records creation to disposal of records (with the next review in late 2018).

(iii) ***GRS can inspect records upon appraisal***

The GRS may also request to inspect the physical records for appraisal of their archival value when:

- (a) B/Ds submit the draft disposal schedules;⁶⁰
- (b) B/Ds submit the disposal requests for time-expired records according to GARDS or approved disposal schedules;⁶¹ or
- (c) GRS appraises B/Ds' records which have reached 30 years old.⁶²

B/Ds are requested to submit the records for appraisal timely upon request by the GRS.⁶³

⁵⁸ Paras 900 - 917 of the RMM.

⁵⁹ Paras 25 - 26 of GC09.

⁶⁰ Paras 15 - 16 of GC09.

⁶¹ Paras 16 - 17 of GC09.

⁶² Para 637 of the RMM.

⁶³ Letter dated 21 March 2014 from the Director of Administration to all Permanent Secretaries and Heads of Departments, para 3(d).

Law and practice in other jurisdictions

Australia

8.38 In terms of inspection power, the NAA is, subject to relevant provisions, expressly given full and free access to all Commonwealth records in the custody of a Commonwealth institution under the 1983 Act. However, subject to certain exceptions, a Commonwealth institution with the concurrence of the Director-General or the Minister may determine that the NAA is to be denied access to certain record, or to be given access only on conditions.⁶⁴

8.39 The 1983 Act does not confer statutory power upon the NAA to audit recordkeeping practices in individual Commonwealth institutions.⁶⁵ However, it does empower the NAA to conduct survey of Commonwealth records.⁶⁶ The NAA has been exercising this power regularly to gather information about the record management practices in government agencies. The main surveys conducted were⁶⁷:-

- (i) Whole-of-government online survey - "Survey of Information and Records Management Practices in Australian Government Agencies" has been conducted once every three years since 2008. Participation is voluntary.⁶⁸
- (ii) Check-up Digital – This is an annual self-assessment survey to help government agencies gauge their digital information management maturity and set direction for improved practice.

England

8.40 The duty to promote the following of good practice by public authorities is found in the FOIA 2000, and falls on the shoulders of the

⁶⁴ Ss 28, 29 of the 1983 Act.

⁶⁵ In its Report on review of the 1983 Act, the Australian Law Reform Commission recommended that the primary responsibility for auditing compliance with the standards promulgated should lie with the Auditor-General (as opposed to the NAA given the conflict of interests between the roles of standards setter and auditor) (Recommendation 38). That said, it took the view that the NAA should retain a right of entry to the premises of other Commonwealth institutions to ensure proper creation and management of records on their part in accordance with the legislation and standards issued (Recommendation 39). See Australian Law Reform Commission Report No 85, *Australia's Federal Record: A review of Archives Act 1983* (1998) available at <<http://www.austlii.edu.au/au/other/lawreform/ALRC/1998/85.html>>. To date, these recommendations are yet to be implemented.

⁶⁶ S 6(1)(b) of the 1983 Act.

⁶⁷ We note that the mode of surveys has been replaced by a new online survey tool "Check-up PLUS" from July 2018:
<<http://www.naa.gov.au/information-management/check-up/index.aspx>>.

⁶⁸ Report of the findings of the latest survey dated August 2016 is available at:
<<http://www.naa.gov.au/naaresources/documents/2016Survey-Findings.pdf>>.

Information Commissioner⁶⁹ who in particular has to promote the compliance by public authorities with, amongst other things, the FOIA 2000 itself and also the Lord Chancellor's Code.⁷⁰

8.41 The Information Commissioner does not enjoy a general inspection power. However, where he reasonably requires any information for the purpose of determining whether the practice of a public authority is in conformity with the Lord Chancellor's Code, he has power to issue an "information notice" to require information from the public authority.⁷¹ Non-compliance with an information notice may result in the Court dealing with the public authority as if it had committed a contempt of court.⁷²

8.42 The Information Commissioner's power to audit public authorities' records management practices is relatively indirect. With the consent of the public authority, the Information Commissioner may assess whether it is following good practice.⁷³ He may issue a "practice recommendation" to a public authority where he considers its records management practices do not conform to the Lord Chancellor's Code as discussed above.

8.43 TNA has, since 2008, developed the Information Management Assessment programme. Under this voluntary programme, authorities can self-assess the effectiveness of their approach to information and records management based on a tool devised by TNA. Results of self-assessment will be given with an overall rating on each area and feedback on improvement actions to be taken. Other aspects of the programme include the publication of *Good practice report* and *Lessons learned report*.⁷⁴

Ireland

8.44 Under the 1986 Act, the Director of the NAI has the express power to inspect and examine the arrangements for the preservation of

⁶⁹ S 47(1) of the FOIA 2000.

⁷⁰ S 47(1) of the FOIA 2000.

⁷¹ S 51 of the FOIA 2000.

⁷² S 54 of the FOIA 2000. In the first five years of the implementation of the FOIA 2000 from January 2005 to June 2010, the Information Commissioner's Office issued 109 information notices to a wide range of authorities but raised the prospect of contempt proceedings in only one of these cases. See Judy Goodall and Oonagh Gay, "*Freedom of Information: the first five years*", Library Standard Note SN/PC/05666 (last updated on 28 July 2010) available at: <<http://researchbriefings.files.parliament.uk/documents/SN05666/SN05666.pdf>>, item 5.2.

⁷³ S 47(3) of the FOIA 2000.

⁷⁴ See generally: <<http://www.nationalarchives.gov.uk/information-management/manage-information/ima/>> and the *Information Management Assessment programme strategy 2015-19*, revised up to August 2016, available at: <<http://www.nationalarchives.gov.uk/documents/information-management/information-management-assessment-programme-strategy.pdf>>.

Departmental records. With the consent or at the request of the appropriate member of the Government, the Director may also examine the Departmental records concerned.⁷⁵ Moreover, when the authorisation for disposal of Departmental records is being considered by the Director or a designated officer, he may also inspect and examine those records.⁷⁶

New Zealand

8.45 Under the 2005 Act, the Chief Archivist has a wide power to direct public offices to report to him on any specified aspect of their recordkeeping practice, or the public records that they control or have possession.⁷⁷

8.46 The Chief Archivist must also commission independent audits of recordkeeping practices in each public office every five to ten years. A report on the audit results shall be presented to the House of Representatives.⁷⁸

8.47 In terms of inspection powers, the Chief Archivist can, after giving reasonable notice to a public office or local authority, inspect the records or archives held in their possession or under their control, except those that carry security classifications or are subject to access restrictions under other legislation (unless with the consent of the administrative head of the relevant public office or local authority).⁷⁹

Singapore

8.48 The NLBA imposes a general duty upon the NLB to examine the public records in any public office and give advice on their care and custody.⁸⁰ The Director of NAS (who is an officer appointed from the NLB) or its representative must, however, satisfy applicable security requirements, and take the requisite oath of secrecy before being given access to public records.⁸¹

8.49 The NLB also enjoys a more specific power of inspection which appertains to its power to authorise records destruction/disposal. Under the NLBA, any person intending to destroy or dispose of, or to authorise the destruction or disposal of, any public records must first notify the NLB of that intention and specify the nature of the public records in question.⁸² The NLB

⁷⁵ S 4(1)(d) of the 1986 Act.

⁷⁶ S 7(7) of the 1986 Act.

⁷⁷ S 31 of the 2005 Act.

⁷⁸ Ss 33 and 35 of the 2005 Act.

⁷⁹ S 29 of the 2005 Act.

⁸⁰ S 14A(2)(a) of the NLBA.

⁸¹ S 14B of the NLBA.

⁸² S 14D(2) of the NLBA.

may then inspect the records specified and require them to be made available to it.⁸³

Summary

8.50 Whilst a power of inspection is similarly provided for in the archives law in Australia, Ireland, New Zealand and Singapore, how such power may be exercised differs. For example, the power to inspect records is exercisable on giving reasonable notice to the relevant public office (New Zealand), or with the consent (or at the request) of the appropriate member of the Government (Ireland), or on a "full and free" basis subject to certain exemptions (Australia). In England, whilst the Information Commissioner is not endowed with a general power of inspection, he may issue an "information notice" to the relevant public authority to request further information.

8.51 The power to audit records management practices also differs in these jurisdictions, with such power found expressly in New Zealand's 2005 Act. In Ireland, one of the functions of the Director of the NAI is the "inspection and examination of arrangements" for the preservation of Departmental records, whilst it appears that there is no power of auditing in Singapore. In Australia and England, one way to evaluate the records management practices of government bodies is through survey and/or their self-assessment.

(III) Handling of loss or unauthorised destruction of records

8.52 The Ombudsman's Report noted:-

*"Between August 2011 and end February 2013, GRS received reports from 20 B/Ds of a total of 38 cases of loss or unauthorised destruction of records. Those cases involved 500 files, 53 documents and 18.2 lm of records."*⁸⁴

8.53 Although B/Ds are required to report to the GRS Director immediately any loss or unauthorised destruction of records,⁸⁵ The Ombudsman found that numerous cases were not reported instantly because the B/Ds concerned refused to admit that the records had been lost; and some cases were not even reported at all.⁸⁶ In two of the cases reported and investigated, despite GRS' view that disciplinary action or administrative action should be taken against the staff concerned, the B/Ds did not agree and GRS did not pursue the matters any further.⁸⁷

⁸³ S 14D(3) of the NLBA.

⁸⁴ Para 6.3 of The Ombudsman's Report.

⁸⁵ Para 606 of the RMM. See also para 6.1 of *The Ombudsman's Report*.

⁸⁶ Para 6.6 of The Ombudsman's Report.

⁸⁷ Para 6.4 of The Ombudsman's Report.

8.54 The Government was thus recommended to empower the GRS by way of legislation to effectively enforce the records management requirements with a view to avoiding loss or unauthorised destruction of records, and to impose sanctions against those who do not abide by the stipulations. Pending such legislation, the Government was recommended to reinforce “its training and education for staff so that everyone who may create, keep, or use records handles the records carefully.”⁸⁸

Government's stance or response to comments

Mandatory requirements against loss or unauthorised destruction

8.55 GC09 has imposed various requirements to guard against loss or unauthorised destruction of records, for example:-

- (i) B/Ds must obtain the GRS Director's agreement before destruction of records;⁸⁹
- (ii) B/Ds should put in place arrangements to ensure proper and safe custody of records;⁹⁰
- (iii) B/Ds are required to report any loss or unauthorised destruction of records immediately to their respective DRMs with a copy of the report sent to the GRS simultaneously. The DRMs should conduct investigation to:-
 - (a) ascertain the facts and identify the circumstances leading to the incidents;
 - (b) reconstruct the records where necessary;
 - (c) take steps to prevent recurrence;
 - (d) consider whether any disciplinary action or other administrative action is necessary; and
 - (e) reports of their findings and actions on the above matters should be given to the GRS within three months.⁹¹
- (iv) B/Ds must prepare and maintain an accurate records inventory.⁹²

⁸⁸ Paras 6.10, 6.11, 9.1(2) and (3) of *The Ombudsman's Report*.

⁸⁹ Para 18 of GC09.

⁹⁰ Para 21 of GC09. To minimise the risk of losing records during bulk relocation of files, appropriate arrangement should be made during the process. In this regard, the GRS has provided further guidance by publishing the *Guidelines on Bulk Relocation of Government Records* (July 2015).

⁹¹ Para 22 of GC09.

⁹² Para 6 of GC09.

Departmental records management reviews

8.56 As mentioned under the heading "Power to inspect records and audit records management practices" above, the GRS conducts departmental records management reviews to evaluate B/Ds' compliance with records management requirements and practices. If any incident of loss or unauthorised destruction of records is found, the B/D concerned will be required to follow up as set out above, thus serving as an additional safeguard.

Investigation and sanction

8.57 The GRS staff has to follow up upon any case of loss or unauthorised destruction of records by B/Ds, whether during the departmental records management review or during the appraisal of records. Statistics on loss or unauthorised destruction cases recorded in recent years are as follows:-

2011: 16 cases
2012: 21 cases
2013: 39 cases
2014: 28 cases
2015: 26 cases
2016: 31 cases
2017: 33 cases⁹³

8.58 As discussed above, disciplinary action may be taken against a government servant if he disobeys or, neglects or fails to observe, the mandatory requirements in GC09 or other government regulations and circulars pertaining to records management. According to the updated figures from the GRS, in the three years from 2015 to 2017 B/Ds have instituted disciplinary actions against 12 staff who were involved in 11 loss or unauthorised destruction of records cases.⁹⁴

Training

8.59 Whilst sanction may deter non-compliance, training and education can be more effective in fostering a stronger culture of compliance. The GRS is responsible for providing training to records management personnel and general records users in B/Ds, in the form of classes, topical or in-house seminars, briefings, workshops, etc. It has stepped up its efforts to promote best practices amongst all government employees and to impart knowledge and skills to DRMs, their assistants and registry supervisor or staff by offering tailored courses. In 2017, a total of 2,476 government officers were trained through regular classroom courses. Another 17 records management seminars and briefings, attended by 1,948 government officers, have been conducted for B/Ds on a need basis. In each B/D, the DRM is responsible for providing records management staff with appropriate training

⁹³ Information provided by GRS on 13 March 2018.

⁹⁴ Information provided by GRS on 13 March 2018.

and guidance to supplement that provided by the GRS, having regard to the specific operational needs of the B/D concerned. In parallel, the GRS has been developing web-based training and self-learning materials to assist government officers.

8.60 The GRS has also drawn up a comprehensive three-year training programme, setting out the strategy for providing effective and adequate training opportunities to meet the needs and requirement of B/Ds on records management.

Law and practice in other jurisdictions

Australia

8.61 As discussed under the heading "Regulating compliance under an administrative framework" above, certain dealings with Commonwealth records, including unauthorised destruction, will attract criminal sanction under section 24 or section 26 of the 1983 Act.

8.62 While there have been suspected cases of destruction of public records reported in the media,⁹⁵ we are, however, unable to find in our research any reported prosecution brought under either section 24 or section 26 of the 1983 Act.⁹⁶

8.63 The NAA may, on request, assist Commonwealth institutions in providing training to persons responsible for the keeping of current Commonwealth records or train or assist in the training of other persons responsible for records and archives related work.⁹⁷

England

8.64 The 1958 Act does not contain any offence provision, although under the FOIA 2000, it is an offence for a public authority or its employee or officer to, after a request for information has been made to the public authority, alter, deface, destroy, erase any records with intent to prevent disclosure by the authority.⁹⁸

⁹⁵ See, for example, news articles dated 20 July 2017 at: <<http://www.abc.net.au/news/2017-07-19/mark-bailey-personal-email-usage-possibly-corrupt-ccc/8724996>>.

⁹⁶ There are reports on persons suspected of destroying documents and being charged with an offence in other legislation. <<http://www.smh.com.au/business/workplace-relations/excfmeu-boss-dave-hanna-charged-with-destroying-documents-20170803-gxp24i.html>>.

⁹⁷ Ss 6(1)(j), (k) of the 1983 Act.

⁹⁸ S 77 of the FOIA 2000.

8.65 Where the loss or unauthorised destruction of public records is the result of non-compliance with the Lord Chancellor's Code,⁹⁹ the public authority concerned may be issued with a "practice recommendation" by the Information Commissioner as discussed above under the heading "Regulating compliance under an administrative framework".

8.66 Both TNA and the Secretary of State (formerly the Lord Chancellor) provide guidance to public record bodies on proper safekeeping and disposal of public records.

Ireland

8.67 As noted above under the heading "Regulating compliance under an administrative framework", section 18 of the 1986 Act criminalises several specific conducts including the unauthorised destruction of *archives* (as opposed to Departmental records). This penalty is brought to the attention of the users of the NAI through the *Rules for Readers*, which stipulates that "[t]heft or concealment of archives and wilful damage to archives are criminal offences under [section 18 of the 1986 Act]".¹⁰⁰

8.68 Under the 1986 Act, the Director of National Archives is responsible for giving advice to Government member or any public service organisation on the proper management and preservation of records.¹⁰¹

New Zealand

8.69 As noted under the heading "Regulating compliance under an administrative framework" above, unauthorised destruction of public records, whether committed wilfully or negligently, is a criminal offence.¹⁰²

8.70 The Chief Archivist may, from time to time, provide training services on records management for a fee as agreed by the Chief Archivist and the relevant administrative head of the public office or local authority.¹⁰³

⁹⁹ Para 10.6 of the Lord Chancellor's Code requires that storage of records should follow accepted standards in respect of the storage environment in order to minimise the risk of loss.

¹⁰⁰ See Rule 15 of the *Rules for Readers* in NAI's website at: <<http://www.nationalarchives.ie/services/service-for-our-visitors/rules-for-readers/>>. In its Annual Report 2013, the Advisory Council (Ire) suggested: "[i]t should be an offence to destroy records that are of core value to the history of each listed body and each department of Government". It appears that this suggestion has not yet been implemented. <<http://www.nationalarchives.ie/wp-content/uploads/2016/01/NAAC-Annual-Report-2013.pdf>>.

¹⁰¹ S 4(1)(e) of the 1986 Act.

¹⁰² S 61 of the 2005 Act.

¹⁰³ S 11(2) of the 2005 Act.

Singapore

8.71 Section 14D of the NLBA prohibits any person from destroying, otherwise disposing, or authorising the destruction or disposal of, any public records in his possession or control without the NLB's authorisation and any person intending to do any of these things must first notify the NLB.¹⁰⁴

8.72 Whilst the NLBA does not specify the consequence of breach of section 14D, it appears that the following general provision from the Penal Code, Cap 224 can be prayed in aid:-

*"Whoever does anything which by any law in force in Singapore he is prohibited from doing, or omits to do anything which he is so enjoined to do, shall, when no special punishment is provided by the law for such commission or omission, be punished with fine not exceeding \$2,000."*¹⁰⁵

8.73 The position is less clear, however, when it comes to a breach of provisions such as section 14C, which requires records to be transferred to the NLB without specifying the person responsible for doing so.

8.74 One of NLB's duties is to advise public offices on the standards and procedures pertaining to the management of public records.¹⁰⁶

Summary

8.75 The archives law in Australia, Ireland, New Zealand and Singapore outlaws unauthorised destruction of records (and other similarly serious conducts).¹⁰⁷ In England, the 1958 Act does not create any offence, whilst the FOIA 2000 contains an offence criminalising, amongst other things, the destruction of a record with intent to prevent disclosure after a request for information has been made. Where the loss or unauthorised destruction of public records is the result of non-compliance with the Lord Chancellor's Code, the public authority concerned may be issued with a "practice recommendation".

8.76 In all five jurisdictions studied, the archival authorities also provide training, guidance, or advice on records and archives management.

¹⁰⁴ S 14D of the NLBA.

¹⁰⁵ S 225C of the Penal Code. There is no general provision similar to s 225C in England, Australia and Ireland. For New Zealand, as already noted, contravention of provisions of the 2005 Act and its regulations is an offence under s 61(c) of the Act.

¹⁰⁶ S 14A(2)(e) of the NLBA.

¹⁰⁷ In Ireland, section 18 of the 1986 Act criminalises several conducts including the removal, concealing or damaging of archives (as opposed to Departmental records). In Singapore, section 14D of the NLBA has to be read with the Penal Code.

Our provisional views

8.77 **We believe that a good public records management regime must include adequate and effective measures to ensure due compliance. These measures may take the more stringent form of laws or mandatory requirements. However, we observe that equally important are other measures which seek to develop a stronger culture and promote higher awareness of proper records management.** Training, advice, and the development of self-assessment tools have been used in both Hong Kong and other jurisdictions. Given the importance of the issue, we believe it appropriate and necessary to gauge the views of the community before considering the appropriate recommendation(s) (if any) to be made.

Consultation Questions 10

- (i) Are the existing measures sufficient in ensuring B/Ds' compliance with their records management obligations?**
- (ii) If your answer to (i) is in the negative, what additional measures would you suggest and what are the reasons for your suggestions?**

Chapter 9

Archives law for Hong Kong?

Introduction

9.1 Amongst the comments made by relevant stakeholders, the lack of legal backing stands out as arguably the foremost of all shortcomings identified in the current public records management regime. A comparison reveals that almost all other jurisdictions, including all five studied more closely by this Sub-Committee, have in place an archives law of varying breadths and depths. In this chapter, we will discuss the fundamental issue whether an archives law ought to be enacted in Hong Kong. As discussed below, there are considerations in favour of the enactment of an archives law in Hong Kong, as well as practical concerns over its implementation. On balance, our provisional views are that we do see a case for the introduction of an archives law to further strengthen the management, protection and preservation of public records and archives in Hong Kong.

Comments

9.2 The administrative nature of the existing regime in Hong Kong has been criticised for leading to an unsatisfactory state of affairs. One perceived shortcoming is that the GRS lacks effective means to ensure compliance by B/Ds with the records management requirements contained in the administrative rules which have no legal force.¹ In some other jurisdictions in which an archives law is in force, criminal prosecution can be brought against wrongdoers for unauthorised destruction or mutilation of official records or archives. Another concern is that, without legal status, administrative guidelines issued by the GRS are subordinate to a number of records-related laws and regulations, which may have a crippling effect on Hong Kong's archival operations.²

9.3 To address these perceived inadequacies, there have been calls for supporting the current administrative regime in Hong Kong with an archives law covering, amongst others, the scope of authority of the archival authority, obligations on B/Ds to create, keep, manage public records and transfer those having archival value to GRS, as well as sanction for unauthorised destruction

¹ Para 2.11 of The Ombudsman's Report and para 3.1 of the 2011 Civic Exchange Report.

² Para 3.2 of the 2011 Civic Exchange Report.

of records.³ The Civic Exchange believes that a *"legislative framework would establish an effective records system where the rights, entitlements and obligations of both citizens and government are recognised."*⁴

Government's stance to the proposed legislation

9.4 The Government's stance is, in gist, that there are in place comprehensive administrative arrangements to regulate the management of government records, with the GRS tasked to oversee and ensure that government records are properly managed and those with archival value are preserved for public access. Notwithstanding that there is no archives law, the essential elements of records management adopted internationally have been implemented in Hong Kong through these administrative arrangements. These elements include the promulgation of recordkeeping standards; designation of obligations and responsibilities within government agencies relating to creating, keeping, maintaining and protecting government records; transfer of records to archival authority; destruction of records only with prior authorisation of archival authority; imposing responsibility for safe custody and conservation of archival materials; and provision for public access to public records.

9.5 Indeed, it was stated in the Chief Executive's 2018 Policy Address as follows:-

*"19. Historical archives not only record the decision-making process, but also preserve the collective memory of society. I would reiterate that the current-term Government attaches importance to the integrity of government records and holds a positive view towards the enactment of an archives law. The Law Reform Commission (LRC) of Hong Kong has completed its study on our existing records management system and the relevant laws of other jurisdictions. Public consultation is expected to commence by the end of this year. The Government will follow up on this after receiving the report from LRC. At the present stage, the Government will continue to enhance its records management work, including formulating a more comprehensive training plan for bureaux and departments, providing more professional training programmes for staff of the Government Records Service, and reviewing the implementation progress of electronic recordkeeping systems, etc."*⁵

³ Annex to the *Information Note to LegCo Panel on Constitutional Affairs on Code on Access to Information and Management of Public Records* dated October 2010, LC Paper No CB(2)159/10-11(01), accessible at <<http://www.legco.gov.hk/yr09-10/english/panels/ca/papers/ca0517cb2-159-1-e.pdf>>. See also the draft archives law drawn up by the Archives Action Group and posted on its website, accessible at: <http://archivesactiongroup.org/main/?page_id=4>.

⁴ 2007 Civic Exchange Report, at 29.

⁵ See also the Chief Executive's 2017 Policy Address, para 22.

Considerations favouring the enactment of archives law

9.6 Regardless of the nature and structure of the public records and archives management system, we believe that the ultimate goal is to ensure that all Government records, whether digital or analogue, are created, captured, maintained and preserved with their authenticity, integrity, reliability and usability intact, so that these materials may be used for any purpose, such as legal or administrative purposes, historical or other types of research. The system must also be able to stand up to the challenge brought about by the widespread use of digital information technologies which has resulted in a marked increase in the volume and complexity of Government records held, and an ever-increasing demand for greater transparency in government policy-making.

9.7 Having regard to the law, practice and experience of the other jurisdictions discussed in the previous chapters, it appears that the current administrative records and archives management regime in Hong Kong has covered the essential elements of archives law in other jurisdictions and largely follows international best practice. The current regime is operated through administrative measures, covering the creation, collection, classification, scheduling and disposal of records. In particular, B/Ds are required to establish retention and disposal schedules for all records, transfer records having archival value for permanent retention by the GRS and destroy records with no archival values with prior agreement of the GRS Director. There is sanction by way of disciplinary action in case of government servants' non-compliance with mandatory records management requirements and/or dereliction of records management duties. Access to archival records kept by the GRS is also provided for under the PRAR.

9.8 Key considerations which support the enactment of an archives law in Hong Kong are as follows:-

- (i) The introduction of an archives law will bring greater visibility, clarity, certainty and transparency to the Government's records and archives management system.
- (ii) The need for introducing an archives law is recognised by a number of authorities and international recordkeeping standards. For instance, the introduction of archives law is a goal set out in the International Council on Archives' Universal Declaration on Archives, adopted by UNESCO in 2011.⁶ The International Organisation for Standardisation and other recordkeeping standards also recognise the importance of identifying the

⁶ The Universal Declaration on Archives states, inter alia, as follows: "We [International Council on Archives] therefore undertake to work together in order that: appropriate national archival policies and laws are adopted and enforced". The Universal Declaration on Archives is accessible at: http://www.ica.org/sites/default/files/UDA_June%202012_web_EN.pdf.

regulatory environment in which records are created, managed and used, and enhancing archival institution's ability to play an authoritative role in all aspects of recordkeeping.⁷

- (iii) Apart from the jurisdictions discussed in the previous chapters, many other jurisdictions (including Macau SAR⁸ and Mainland China⁹) have enacted archives law.
- (iv) An archives law will promote the role, professionalism, functions and effectiveness of the archival authority, and will help develop a culture within the community on the importance of preservation of records.
- (v) Putting different records management requirements on a statutory footing is one way to prevent them from being rendered ineffective or compromised by conflicting provisions in other legislation.

Concerns regarding the introduction of an archives law in Hong Kong

9.9 A number of challenges besetting Hong Kong are relevant to the practicality of implementing an archives law in the near future. These challenges include:-

- (i) Concerns about public bodies' readiness and willingness to be covered by a uniform recordkeeping regime as discussed in chapter 10.
- (ii) Shortage of archives management professionals in Hong Kong –

As discussed in chapter 10, the supply of full-fledged specialists for undertaking professional archival duties at present is limited by the shortage of local universities which offer the necessary degree programme in records and archives management. While it is noted that the trend is to go for a multidisciplinary team (such as archivists, lawyers, information architects, IT professionals and librarians, etc) as seen in the overseas archives such as England, Australia and Canada as a response to the paradigm shift to the digital age, nevertheless, if an archives law is enacted in the near future, Hong Kong will still

⁷ International Organisation for Standardisation Standard 15489-1:2016, Part 1, at 4.

⁸ <第73/89/M號法令> ("Decreto-Lei n.º 73/89/M") available at: <http://bo.io.gov.mo/bo/i/89/44/declei73_cn.asp>.

⁹ <中華人民共和國檔案法> and <中華人民共和國檔案法實施辦法> available respectively at: <http://www.saac.gov.cn/xxgk/2017-03/29/content_1704.htm> and <http://www.saac.gov.cn/xxgk/2010-02/05/content_1541.htm>.

need many more archivists to carry out the appraisal of records and other archives management work.

(iii) Challenges brought by the digital era –

The GRS is facing some daunting challenges on preservation of electronic records. These challenges are shared by archival authorities in other jurisdictions. In particular, the media upon which electronic records are recorded are fragile, and such records are technology dependent and may appear in different file formats. They can easily be manipulated and tampered with without being discovered. In this connection, the Sub-committee notes that archival authorities worldwide are making efforts in setting up digital archives to cater for the proper preservation of archival records in electronic form to ensure their authenticity, integrity, reliability and usability over time. At present, technological obsolescence is still a major challenge to be resolved by them. The GRS is no exception to the challenge.

Our provisional views

9.10 As discussed above, there are considerations in favour of the enactment of an archives law in Hong Kong, but there are also practical concerns over its implementation. **On balance, we do see a case for the introduction of an archives law to further strengthen the management, protection and preservation of public records and archives in Hong Kong.**

Consultation Question 11

Do you think there is a case for introducing an archives law to strengthen the current public records and archives management framework and what are your reasons?

Chapter 10

Coverage of public records management regime

Introduction

10.1 Currently, the Government's records management regime covers almost exclusively B/Ds. This chapter examines whether this regime should be extended to other public bodies in Hong Kong. An examination of this issue of the *scope* of public bodies to be covered naturally brings up the issue of the *extent* of oversight by the archival authority. For reasons discussed below, our provisional views on the former issue are that it is more advisable to follow the approach in England, Ireland, New Zealand and Singapore, ie enumerating from time to time specific bodies that should be subject to the public records management regime. On the issue of the extent of oversight, we consider that a "bespoke" approach is more appropriate.

"Public body"

10.2 Definitions of "*public body*", "*public bodies*" and other related terms can be found in different legislation (for example, the Interpretation and General Clauses Ordinance (Cap 1),¹ the Prevention of Bribery Ordinance (Cap 201)² and The Ombudsman Ordinance (Cap 397)³) and different contexts in Hong Kong. But they are by no means identical.

¹ In s 3 of the Interpretation and General Clauses Ordinance (Cap 1), "public body" is defined to include:-

- "(a) the Executive Council;
- (b) the Legislative Council;
- (c) ...
- (ca) any District Council;...
- (cb) ...
- (d) any other urban, rural or municipal council;
- (e) any department of the Government; and
- (f) any undertaking by or of the Government."

² In s 2 of the Prevention of Bribery Ordinance (Cap 201), "public body" is defined to mean –

- "(a) the Government;
- (b) the Executive Council;
- (c) the Legislative Council;
- (d) ...
- (da) any District Council;...
- (db) ...
- (e) any board, commission, committee or other body, whether paid or unpaid, appointed by or on behalf of the Chief Executive or the Chief Executive in Council; and

10.3 Currently, there are about 130 bodies specified in Schedule 1 of the Prevention of Bribery Ordinance (Cap 201), including the Securities and Futures Commission, Hospital Authority, Airport Authority, Hong Kong Housing Authority, Equal Opportunities Commission, Hong Kong Trade Development Council, Mandatory Provident Fund Schemes Authority and various universities.⁴ The official website of the Home Affairs Bureau also contains a list of advisory and statutory bodies giving advice to the Government or performing public functions which would otherwise be performed by government departments in Hong Kong. There are about 490 bodies on the list.⁵

10.4 For the avoidance of confusion, the term "public body" (or "public bodies") is used in this chapter whenever reference is made to a body, other than B/Ds, which performs public functions. This chapter will first review the relevant comments and the Government's response, to be followed by the law and practices in other jurisdictions. Finally, we will bring up some key considerations and then put forward our provisional views and some relevant questions for public consultation.

Coverage of the existing administrative regime

10.5 The coverage of the Government's existing administrative regime can be discerned from the RMM, which provides guidance and instructions for the management of government records. The term "*government records*" is defined to mean, *inter alia*, "*records created or received by any government agencies or government officers in the course of official business, and subsequently kept as evidence of such business*".⁶ By this definition, records held by non-government bodies, whether of a public or private nature, are not government records. The effect is that the GRS has essentially no direct control over records management of public bodies at present although advice, training and assistance are provided where necessary.

(f) any board, commission, committee or other body specified in **Schedule 1**...." (emphasis added)

³ S 2 of The Ombudsman Ordinance (Cap 397) defines "organization" as an organisation in Schedule 1. While most of such organisations in Schedule 1 are government departments, there are other various bodies, including those in Schedule 1 to the Prevention of Bribery Ordinance (Cap 201).

⁴ The universities are The Chinese University of Hong Kong, The Hong Kong Polytechnic University, University of Hong Kong, Hong Kong Baptist University, City University of Hong Kong, The Hong Kong University of Science and Technology, The Open University of Hong Kong, Lingnan University, and The Education University of Hong Kong.

⁵ <http://www.hab.gov.hk/en/policy_responsibilities/District_Community_and_Public_Relations/advisory.htm>.

⁶ Para. 1.3.1(b) of RMP1.

10.6 The PRAR, which governs access to archival records, contains a relatively wide definition of the term "public records" but that relates only to records kept by the Public Records Office of the GRS:-

*"all record materials of any kind, nature or description which have been made, received or acquired in the course of **legislative, judicial or executive transactions**, together with all exhibits and other material evidence which form part of or are annexed to or are otherwise related to **any record, which may be transferred to or be acquired by the Public Records Office of the Government Records Service**" (emphasis added).*

Comments on the existing regime

10.7 There have been comments that the coverage of the existing records management regime is too limited. Other than B/Ds, at present only two public bodies in Hong Kong, namely, the Independent Commission Against Corruption and Hong Kong Monetary Authority have followed the mandatory records management requirements promulgated by the Government.⁷ There are, however, some 470 other public bodies (such as the Hospital Authority, Hong Kong Housing Authority, and the Airport Authority) that perform vital public functions. The Ombudsman has found this unsatisfactory, in that:-

*"[while] some of these bodies may be subject to specific laws or stipulations which require them to manage and preserve specific types of their business records for specific periods of time, they are not required to create or manage their records according to GRS' requirements, nor are they required to transfer their records to GRS for appraisal and preservation."*⁸

10.8 Voicing a similar concern over the current regime's lack of reach to most public bodies, the Civic Exchange commented:-

*"This omission is detrimental to accountability and transparency. The activities carried out by the statutory bodies, in most cases, have a significant impact on society and, therefore, they should be subject to public scrutiny. Such scrutiny is not possible unless adequate records are created and properly maintained."*⁹

⁷ The Hong Kong Monetary Authority has all along been observing the Government's administrative requirements on records management. The Independent Commission Against Corruption used to have its own records management policy and procedures. In view of the recommendations in the Audit Commission's Report, the Independent Commission Against Corruption has followed the Government's mandatory records management requirements since 2011.

⁸ Paras 2.13 to 2.14 of *The Ombudsman's Report*.

⁹ Para 4.4 of the 2007 Civic Exchange Report.

10.9 The Ombudsman recommended that:-

"... [The] Government should, therefore, subject public organisations to its records management guidelines and requirements to ensure that their records are duly created, managed and preserved. If this necessitates legislation, Government should consider making such a move.

*... Pending the introduction of long-term measures such as legislation, we consider that GRS should, as a matter of priority, strengthen its efforts to urge public organisations to follow its requirements and standards on records management. Government should also further promote donation of records with archival value from public organisations."*¹⁰

Government's stance and response

10.10 Various measures have been taken by the GRS to address the foregoing concerns. Amongst these were the publication of "*Good Records Management Practices*" for some public bodies in 2011, and the organisation of seminars on records management. The Government has said that, as an on-going effort, it would continue to provide advice and assistance to such bodies.¹¹

10.11 In October 2014, the Director of Administration issued a letter to Permanent Secretaries and Heads of Departments, urging them to encourage public bodies under their purviews to consider making reference to or adopting the Government's practices in managing their records, and donating records with archival value to the GRS.

10.12 In November 2017, the GRS conducted its fifth consecutive annual seminar and extended its invitation to 86 public bodies (as compared to 49 in 2013), attracting over 270 participants to attend. The GRS has said that it would continue to organise more seminars for such bodies.

10.13 At the invitations of three public organisations, the GRS held "Train-the-trainer" programme and records management seminars for their staff. Furthermore, the GRS shared their training materials on records management standards and practices as well as information relating to electronic records management with seven public organisations upon their

¹⁰ Paras 2.19 to 2.20 of *The Ombudsman's Report*.

¹¹ The Government's Minute in Response to the Annual Report of The Ombudsman 2014 (December 2014), paras 1311(b) & (c), available at: <http://www.admwing.gov.hk/pdf/GM_2014_e.pdf>.

requests. The GRS has also been providing advice on records management, archives administration and setting up of an ERKS to public bodies.¹²

Other jurisdictions

Australia

(i) Scope of public bodies covered

10.14 The 1983 Act imposes record-keeping obligations in respect of "Commonwealth records" which is defined as:-

- "(a) a record that is the property of the Commonwealth or of a **Commonwealth institution**; or*
- (b) a record that is to be deemed to be a Commonwealth record by virtue of a regulation under subsection (6) or by virtue of section 22;*

but does not include a record that is exempt material or is a register or guide maintained in accordance with Part VIII" (emphasis added).

10.15 "Commonwealth institution" is defined as:

- "(a) the official establishment of the Governor-General;*
 - (b) the Executive Council;*
 - (c) the Senate;*
 - (d) the House of Representatives;*
 - (e) a Department;*
 - (f) a Federal court or a court of a Territory other than the Northern Territory or Norfolk Island;*
 - (g) **an authority of the Commonwealth**; or*
 - (h) the Administration of an external Territory."*
- (emphasis added)*

10.16 An "authority of the Commonwealth" means:

- "(a) an authority, body, tribunal or organization, whether incorporated or unincorporated, established for a public purpose:*
- (i) by, or in accordance with the provisions of, an Act, regulations made under an Act or a law of a Territory other than the Northern Territory;*

¹² Representatives from two public bodies attended demonstration sessions of GRS' ERKS in June 2014. Upon their request, the GRS met with two public bodies in March 2015 to share with them GRS' experience of implementing an ERKS, with a demonstration of GRS' ERKS. The GRS also provides advice on electronic records management upon request to public bodies from time to time.

- (ii) *by the Governor-General; or*
- (iii) *by, or with the approval of, a Minister;*
- (b) *the holder of a prescribed office under the Commonwealth;*
or
- (c) **a Commonwealth-controlled company or a Commonwealth-controlled association;**

but does not include:

- (d) *a court;*
- (e) *the Australian Capital Territory;*
- (f) *a body established by or under an enactment within the meaning of the Australian Capital Territory (Self-Government) Act 1988;*
- (g) *the Northern Territory; or*
- (h) *the Administration of an external Territory."*
(emphasis added)

10.17 "Department" means:-

- "(a) *a Department of the Australian Public Service that corresponds to a Department of State of the Commonwealth; or*
- (b) *a Parliamentary Department."*

10.18 A Commonwealth-controlled company (or association) means an incorporated company (or association) over which the Commonwealth is in a position to exercise control, but does not include a company (or an association) that is declared by the regulations not to be a Commonwealth-controlled company (or association).¹³

(ii) *Extent of oversight by archival authority*

10.19 Generally speaking, the NAA oversees Commonwealth institutions' records management¹⁴ in various ways, including, appraising their records,¹⁵ working with them to develop "records authority",¹⁶ approving or disapproving their practices in dealings with records¹⁷ and training of their staff

¹³ S 3 of the 1983 Act.

¹⁴ See ss 18 and 19 of the 1983 Act for records for Parliament and court.

¹⁵ S 6(1)(b) of the 1983 Act.

¹⁶ S 6(1)(h) of the 1983 Act. A "records authority" specifies the minimum retention periods and disposal requirements for information as agreed between the NAA and the institution concerned. See NAA's website at:
<<http://www.naa.gov.au/information-management/records-authorities/>>.

¹⁷ Reg 10 of the Archives Regulations 2018. In cases of prominent or controversial issues, events or judicial proceedings, the NAA may issue a records disposal freeze or retention notice to stop institutions from destroying records. See NAA's website at:

members.¹⁸ If a public body falls within the above definition of "Commonwealth institution", it appears that the discussion on Australia in other chapters would by and large also apply to such body, subject to some exceptions.¹⁹ It is, however, useful to highlight some special features below.

10.20 The 1983 Act gives the NAA the right to, subject to exemptions, seek "*full and free access, at all reasonable times, to all Commonwealth records in the custody of a Commonwealth institution other than the Archives*".²⁰ Based on the NAA's website, however, it does not appear to be a usual practice of the NAA to freely access Commonwealth records in carrying out its duty to oversee Commonwealth institution's records management.

England

(i) Scope of public bodies covered

10.21 Under the First Schedule to the 1958 Act, "*public records*",²¹ subject to specific exceptions, are:-

"(1) ... *administrative and departmental records belonging to Her Majesty, whether in the United Kingdom or elsewhere, in right of Her Majesty's Government in the United Kingdom and, in particular,—*

(a) *records of, or held in, any department of Her Majesty's Government in the United Kingdom, or*

(b) *records of any office, commission or other body or establishment whatsoever under Her Majesty's Government in the United Kingdom,"*²²

10.22 Paragraph 3 of the First Schedule further provides:

"(1) *Without prejudice to the generality of sub-paragraph (1) of [paragraph two of the First Schedule], the administrative and departmental records of bodies and establishments*

<<http://www.naa.gov.au/information-management/managing-information-and-records/disposal/freezes/index.aspx>>.

¹⁸ S 6(1)(j) of the 1983 Act.

¹⁹ See, for example, ss 18 and 19 of the 1983 Act.

²⁰ S 28 of the 1983 Act.

²¹ S 10(2) of the 1958 Act provides that where records created at different dates are for administrative purposes kept together in one file or other assembly, all the records in such file or assembly shall be treated as having been created when the latest of those records was created.

²² Para 2 of the First Schedule to the 1958 Act.

*set out in the **Table** at the end of this paragraph shall be public records, whether or not they are records belonging to Her Majesty ... "*
(emphasis added)

10.23 The Table in paragraph 3 of the First Schedule refers to bodies and establishments under government departments, as well as other establishments and organisations, such as the British Coal Corporation, British Council, Consumer Council for Water, Legal Services Consultative Panel and Olympic Lottery Distributor.

10.24 Moreover, subject to the relevant provisions, records of various courts and tribunals are included as "*public records*" for the purposes of the 1958 Act.²³ Her Majesty may by Order in Council direct that any other description of records shall be treated as public records for the purposes of the Act if a draft of the Order has been laid before Parliament and approved by resolution of each House of Parliament.²⁴

(ii) *Extent of oversight by archival authority*

10.25 The 1958 Act imposes a duty upon every person responsible for public records to make arrangements for the selection of records for permanent preservation and for their safe-keeping *under the guidance* of the Keeper (ie Keeper of Public Records).²⁵ Apparently, if a public body falls within the "bodies and establishments" in the First Schedule to the 1958 Act, provisions of the Act relating to "public records" discussed in other chapters would apply also to the records of such body.

10.26 In addition, TNA has been running the Information Management Assessment programme since 2008 to assess how well participating public bodies are in fulfilling their duties under the 1958 Act.²⁶ The Information Management Self-Assessment Tool has been developed as part of the programme to assist such bodies in self-assessing the effectiveness of their approach to records management.²⁷ The outcome of the programme is a report by TNA published on its website that highlights what is working well in the body concerned, together with recommendations to be taken forward in an

²³ Paras 4 and 5 of the First Schedule to the 1958 Act.

²⁴ Para 7(1) of the First Schedule to the 1958 Act.

²⁵ S 3 of the 1958 Act.

²⁶ <<http://www.nationalarchives.gov.uk/information-management/manage-information/ima/>>.

²⁷ <<http://www.nationalarchives.gov.uk/information-management/manage-information/ima/information-management-self-assessment-tool/>>.

action plan.²⁸ TNA conducts progress reviews of the implementation of the action plan a year after the publication of the said report.²⁹

Ireland

(i) Scope of public bodies covered

10.27 Under the 1986 Act, "*archives*" includes departmental records transferred to and accepted for preservation by the NAI. "*Departmental records*" means records and material in different forms made or received, and held in the course of its business, by a *Department of State* or any body which is a committee, commission or tribunal of enquiry appointed by the Government or the Attorney General (subject to some limited exceptions).

10.28 References to a "*Department of State*" include, where appropriate, references to a court and a "*scheduled body*", ie a body, institution, office, commission or committee referred to in the Schedule to the 1986 Act. This Schedule sets out a list of various bodies, councils, commissions, boards, including the Censorship of Publications Board, National Prices Commission, Office of the Director of Consumer Affairs, National Consumer Advisory Council and Motor Insurance Advisory Board.³⁰

10.29 In addition, the Taoiseach may, at the request of a public service organisation, declare the records or documents of that organisation to be "*Departmental records*".³¹

(ii) Extent of oversight by archival authority

10.30 Different bodies are subject to different degrees of control under the 1986 Act. Departments of State, which by definition includes courts and scheduled bodies as outlined above, are the institutions that are most regulated by the NAI. It appears that, if a public body falls within the above definition of "*Departments of State*", the discussion on "*Departmental records*" in Ireland in other chapters would also apply to such body. Public service organisations, on the other hand, are subject to a lesser degree of control.³²

²⁸ <<http://www.nationalarchives.gov.uk/information-management/manage-information/ima/benefits-ima/>>.

²⁹ See the "*IMA reports and resources*" section on TNA's website at:
<<http://www.nationalarchives.gov.uk/information-management/manage-information/ima/ima-reports-action-plans/>>.

³⁰ Ss 1(2) and 2(2) of the 1986 Act and the Schedule thereto.

³¹ S 13(1) of the 1986 Act. "*Public service organisation*" is defined under s 1 of the 1986 Act to include a local authority, a health board or a body established by or financed by the Government.

³² See generally at:
<<http://www.nationalarchives.ie/about-us/national-archives%E2%80%99-responsibility-for-archives/responsibility-for-departmental-records/>>.

The role played by the NAI is apparently smaller in relation to public service organisations, and is mainly to give advice on the management, preservation and reproduction of records under the latter's control.³³

New Zealand

(i) Scope of public bodies covered

10.31 The 2005 Act defines "*public record*" as a record or a class of records, in any form, in whole or in part, created or received by a public office in the conduct of its affairs. The definition of "*public office*" is as follows:

- "(a) *means the legislative, executive, and judicial branches of the Government of New Zealand; and*
- (b) *means the agencies or instruments of those branches of government; and*
- (c) *includes ...*
 - (xi) *any person or class of persons declared by an Order in Council made under section 5(1)(a)(i) to be a public office for the purposes of this Act.*"³⁴

10.32 Apart from listing various public offices currently subject to the 2005 Act,³⁵ the ANZ has developed a policy document³⁶ setting out a number of factors³⁷ for assessing the nature and degree of control that the executive government (eg by a Minister or Ministers of the Crown) could lawfully exercise over a particular body, which are relevant to deciding whether the body is a public office and therefore subject to the 2005 Act.

10.33 Examples of these factors include whether the Minister(s) can direct the organisation in respect of its substantial decisions, whether the organisation is fundamentally a commercial business, whether the Minister can comment on the organisation's statement of interest or review the

³³ S 4(1)(e) of the 1986 Act.

³⁴ S 4 of the 2005 Act.

³⁵ The list is available at: <<https://records.archives.govt.nz/regulatory-framework/>>.

³⁶ The policy document, entitled "*Policy for deciding public office and local authority status*", is an internal document of the ANZ used to guide the process for deciding whether an organisation is a "*public office*" (and "*local authority office*") covered by the 2005 Act. See the brief introduction on ANZ's website: <<https://records.archives.govt.nz/regulatory-framework/>>.

³⁷ These factors are relevant to the control test in *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) which needs to be undertaken in deciding whether an organisation is an agency or instrument of the executive government and therefore a "*public office*".

organisation's operations and performance, and whether the organisation is audited by the Auditor General or not.

(ii) *Extent of oversight by archival authority*

10.34 If a public body falls within the above definition of "*public office*", it appears that the discussion on New Zealand in other chapters would also apply to such body. It is, however, useful to highlight some special features below.

10.35 The Chief Archivist may inspect records under the control of a public office or local authority, and view their recordkeeping system and the storage conditions. However, he is not permitted to inspect records that carry security classifications or are restricted by other legislation without consent of the controlling public offices or local authorities.³⁸

10.36 Public offices are responsible for measuring and monitoring the performance of their own records management. In cases of non-compliant or ineffective records management, the ANZ may follow up with them. Non-compliant public offices may be required to report on their self-monitoring activities and respective corrective actions.³⁹

10.37 As discussed in chapter 8, wilful or negligent damage, disposal or destruction of public record otherwise than in accordance with the 2005 Act or contravention of any provision of the 2005 Act is a criminal offence.⁴⁰

Singapore

(i) *Scope of public bodies covered*

10.38 "*Public records*" is defined under the NLBA to mean, *inter alia*, papers, documents, records, films, sound recordings and other form of records of any kind whatsoever that are produced or received by any public office in the transaction of official business, or by any officer in the course of his official duties, and includes public archives.

10.39 The definition of "*public office*" is rather open-ended. It means, *inter alia*, any department, office, board, or statutory body or any other office of the Government, as well as any other body that *the President may, by*

³⁸ S 29 of the 2005 Act.

³⁹ The ANZ has framed its regulatory approach in a "Regulatory Statement" published on its website. As outlined, the ANZ recognises best practice, detects and assesses non-compliance and enforces sanctions against the worst cases. See ANZ's records toolkit website at: <<https://records.archives.govt.nz/resources-and-guides/regulatory-statement/>>.

⁴⁰ Ss 61 and 62 of the 2005 Act.

*notification in the Gazette, declare to be a public office.*⁴¹ All officers from public offices are obliged to comply with the recordkeeping obligations under the NLBA.

(ii) *Extent of oversight by archival authority*

10.40 The NLB, established under the NLBA, has a wide power to oversee public offices' records management by identifying archives, regulating and providing guidance. For example, it has the duty to examine the public records in any public office and advise that office as to their care and custody. If a public body falls within the definition of "public office" in NLBA, it appears that the discussion on "public records" in Singapore in other chapters would also apply to such body.

Public bodies' readiness and willingness for coverage

10.41 Apart from the difficulty in deciding the scope of "public bodies" to be covered, the fact that there is a lack of reliable information about the record management systems and practices of public bodies in Hong Kong also obscures the matter, with the result that it is unclear how many public bodies have adopted the GRS' rules and guidelines and the extent (for those who have done so) of their adoption. More importantly, it is not easy to gauge how ready and willing public bodies are to abide by a set of mandatory records management requirements, and hence how feasible it is to extend the public records management regime to them.

Survey

10.42 In view of this obscurity, this Sub-committee conducted two rounds of survey (in June 2016 ("1st round survey") and February 2017 ("2nd round survey")) to (a) obtain information about the records management system and practices of public bodies in Hong Kong; and (b) assess their willingness and readiness to adopt a set of mandatory records and archives management requirements.⁴² A brief summary of the survey results is in **Annex III**.

10.43 The 1st round survey covered the 71 public bodies which had been invited to seminars organised by the GRS on records management, archives administration and the setting up of electronic recordkeeping systems between 2013 and 2015.

10.44 The survey results show that while the majority of the bodies which responded have established a records management programme in line

⁴¹ S 2 of the NLBA.

⁴² Whether under the existing administrative regime or the archives law that may be introduced.

with the GRMP,⁴³ most of them either have extended it to only part of their records (or only to some departments), or have only covered certain aspects of their records management. Over half of these bodies have also identified problems or needs for improvement in their records management, mainly in relation to resources, expertise, technical and training support, as well as staff awareness and incentive.

10.45 Most of the bodies which responded considered that their recordkeeping systems were capable of managing both electronic and non-electronic records. However, when six more sizeable and resourceful ones amongst these bodies were invited for the 2nd round survey, the results show that for the five which responded, none of their systems possess all the necessary features and functionality found in a typical ERKS as described in the GRMP.

10.46 Some of those bodies which did not consider that their systems could handle both electronic and non-electronic records were also selected for the 2nd round survey. The majority of those responded considered that their current records management practices worked well for their practical circumstances, and hence did not see the need of applying a mandatory records management system to them.

Our consideration

(i) Scope of public bodies covered

10.47 The above discussion of the overseas jurisdictions shows that there is no universal approach on the definition of public bodies. Similarly, no underlying rationale or criteria can be readily discerned except that a list of factors has been drawn up for deciding whether a body is a "public office" in New Zealand. These observations largely accord with the views expressed in the RAMP study:

"Current legislation tends to define public records/archives by reference

- (i) to the origin of the records/archives, [(]for example, records which have been created in, or received by, any public office), or*
- (ii) to ownership/custody (for example, records/archives which are the property of the State or of government).*

In legislation of both types, public bodies are either

- (a) generally defined, with or without examples, or*

⁴³

Amongst these 71 public bodies, some are statutory boards with secretariat support by government servants, and are thus required to follow the Government's records management rules and guidelines.

- (b) *generally defined with a provision for application of the general definition to specific institutions, or*
- (c) *enumerated."*⁴⁴

10.48 The nature, functions, structure, powers, sizes and resources of the "public bodies" in Hong Kong are very diverse. It may be suggested that a possible way to define "public body" is to cover all those bodies which use public funding.⁴⁵ However, it is noted that some bodies only receive government support in the form of "benefits in kind". As pointed out by the Hong Kong Institute of Certified Public Accountants:-

"Terms such as 'public sector organisations' or 'public sector bodies' can encompass a diverse range of entities including 'quasi-profit-orientated', largely or fully self-funding and subvented bodies.

*In addition, there are other entities, which may serve a public purpose, eg the promotion of recreation or art, that are in receipt of 'benefits in kind', such as concessionary land or nominal rentals. While there is a public interest element in the functions they perform, and for this reason they receive government support, they cannot be properly regarded as public sector organisations ... "*⁴⁶

10.49 Instead of trying to devise a definition of "public body" that could capture the broad and diverse range of bodies, it may be more advisable to follow the approach in England, Ireland, New Zealand and Singapore, ie enumerating from time to time specific bodies that should be subject to the public records management regime.

(ii) Oversight by archival authority

10.50 The above discussion of the overseas jurisdictions also shows that the extent of oversight by archival authorities over the records management of public bodies varies between jurisdictions.

⁴⁴ Para 26 at p 13 of the *RAMP Study*.

⁴⁵ For public bodies or institutions that are within the governance system of Hong Kong, namely the LegCo, Judiciary and District Councils, different records management practices are currently in place. For instance, the LegCo has its own archives and does not send its records to the GRS for preservation. The Judiciary Administrator passes court files to the GRS for disposal. As to District Councils, since their Secretariats are served by government servants, Councils' documents are passed to the GRS for disposal through the Home Affairs Department.

⁴⁶ Hong Kong Institute of Certified Public Accountants, "*Corporate Governance for Public Bodies – A Basic Framework*", May 2004 at paras 15 to 16, accessible at: [http://www.hkicpa.org.hk/file/media/section4_cpd/Continuing%20Professinoal%20Development%20Programme%20\(CPD\)/eframework_guide.pdf](http://www.hkicpa.org.hk/file/media/section4_cpd/Continuing%20Professinoal%20Development%20Programme%20(CPD)/eframework_guide.pdf).

10.51 Besides, the foregoing survey findings cast real doubts, at least for now, on whether public bodies in Hong Kong are generally ready and willing to be covered by a uniform mandatory records management regime as suggested by The Ombudsman. Especially in the light of the diverse nature, functions, structure, powers, sizes and resources of public bodies, their individual circumstances must be carefully considered (with prior consultation or dialogue if need be), before imposing on them any uniform mandatory records management regime, whether under the current administrative regime or by way of legislation. Such consideration of individual circumstances of public bodies should entail, for example, ascertaining if the existing obligations under their governing legislation (in the case of statutory bodies) would be incompatible with any records-related obligations sought to be imposed. For any reform to succeed, the understanding and co-operation of the relevant stakeholders are vital. Therefore, public bodies that may be brought within the regime must be apprised of the possible oversight to which they may be subjected.

10.52 In any event, the current lack of qualified professional archivists in Hong Kong may pose a particular challenge. A functional archives needs to be manned by a team of information management professionals, including but not limited to professional archivists and records managers to undertake all the highly specialised tasks involved. At present, apart from HKU SPACE which provides a Master of Information Studies programme (in collaboration with the Charles Sturt University in Australia),⁴⁷ there does not appear to be any local post-secondary institution that offers degree programmes in archival science, although an archives and records management stream in the Master of Science in Library and Information Management, a programme offered by the Faculty of Education at the University of Hong Kong,⁴⁸ has been available for three years. This tends to limit the supply of the much-needed professional archivists who are trained to appraise the historical value of the relevant records should public bodies be brought within a uniform records management regime in Hong Kong.⁴⁹

10.53 Professional support aside, public bodies will surely need time to catch up with the standards and requirements to be imposed by the regime. Likewise, the archival authority would also require time to build up its capacity to process the additional work brought by the influx of such new bodies. Additional training, manpower, resources and technological support would clearly be needed. All in all and realistically, the expansion of the regime to cover public bodies, cannot take place overnight.

10.54 If it is decided to cover a particular public body under the public records management regime, the next question is the archival authority's

⁴⁷ See HKU SPACE's website at: <<https://hkuspace.hku.hk/prog/master-of-info-studies>>.

⁴⁸ See: <<http://web.edu.hku.hk/programme/mlim/overview>>.

⁴⁹ See above, Patrick Lo, *Preserving Local Documentary Heritage, Conversations with Special Library Managers and Archivists in Hong Kong* (City University of Hong Kong Press, 2015), at 24 - 26.

extent of oversight. We reiterate that a careful consideration of the individual circumstances of that body is called for, in the light of its nature, functions, structure, powers, size and resources. A blanket expansion would only be inapt, counter-productive, resource-demanding and cost-ineffective.

10.55 This "bespoke" approach finds certain echo in Ireland, where Departments of States and public service organisations are respectively subjected to greater and lesser control. We therefore consider that a "bespoke" approach is more appropriate.

10.56 With all these in mind, we are acutely aware that many public bodies indeed perform important public functions and the community has a legitimate expectation for them to be accountable, including their records management practices.⁵⁰ Laudable though the suggestion of extending public records management regime to public bodies is, it may not bear fruit if various considerations underscored above are not heeded.

Our provisional views

10.57 **As regards the scope of public bodies to be covered, our provisional views are that it is more advisable to follow the approach in England, Ireland, New Zealand and Singapore, ie enumerating from time to time specific bodies that should be subject to the public records management regime. In respect of the extent of oversight by the archival authority, we consider that a "bespoke" approach is more appropriate.**

Consultation Questions 12

- (i) Do you agree with our provisional views?**
- (ii) If your answer to (i) is in the negative, what are your reasons?**

⁵⁰

Paras 2.1 to 2.20 of *The Ombudsman's Report*.

Chapter 11

List of consultation questions

Chapter 4 - Consultation questions 1

- (i) Should the current placement of GRS within the Government continue?
- (ii) If the answer to (i) is in the negative, in what way should the GRS' placement be changed, and what are the reasons for your suggestions?
- (iii) Is there a need for the appointment of an advisory body to provide advice on public records and archives management matters?
- (iv) If the answer to (iii) is in the affirmative, what should the role, composition and functions of the advisory body be?

Chapter 5 - Consultation questions 2

- (i) Are the documents and information currently published on the GRS' website sufficient (paragraph 5.4)?
- (ii) If the answer to (i) is in the negative, what other documents and information should the GRS disseminate and what are the reasons for your suggestions?

Chapter 5 - Consultation questions 3

- (i) Is the current obligation for the creation of public records, which is subject to the civil service general regulations in conjunction with the guidelines on creation and collection, adequate in ensuring the proper creation of records?
- (ii) If the answer to (i) is in the negative, in what way can the current obligation be improved and what are the reasons for your suggestions?

Chapter 5 - Consultation questions 4

- (i) Is the GRS' current guidance to B/Ds on review of records disposal schedules sufficient?

- (ii) If the answer to (i) is in the negative, what other assistance should be provided to enable B/Ds to properly review their records disposal schedules and what are the reasons for your suggestions?

Chapter 5 - Consultation questions 5

- (i) Is the current mechanism for transfer of government records to the Public Records Office for appraisal appropriate?
- (ii) If the answer to (i) is in the negative, in what way should the current mechanism be improved, and what are the reasons for your suggestions?
- (iii) Is the current arrangement for deferral of transfer of records by B/Ds appropriate?
- (iv) If the answer to (iii) is in the negative, in what way should the current arrangement be improved, and what are the reasons for your suggestions?
- (v) Is the current mechanism on review and determination by B/Ds of the access status of records before their transfer to the Public Records Office for preservation and public access appropriate?
- (vi) If the answer to (v) is in the negative, in what way should the current mechanism be improved, and what are the reasons for your suggestions?

Chapter 5 - Consultation question 6

In your view, what other measures should the Government adopt to expedite the implementation of ERKS and what are the reasons for your suggestions?

Chapter 6 - Consultation questions 7

- (i) Has the current PDPO struck the right balance between the preservation of archives and protection of personal data?
- (ii) If the answer to (i) is in the negative,
 - (a) what in your view is the right balance?
 - (b) what other measures can be adopted to achieve this balance?
and
 - (c) what are the reasons for your suggestions?

Chapter 6 - Consultation questions 8

After careful deliberation, **our provisional view is to follow the approach of the jurisdictions where census information is preserved.** To this end, we invite views from the public specifically on some relevant questions.

- (i) Should census schedules be preserved as archives after a census exercise?
- (ii) If the answer to (i) is in the affirmative, should the subject individual's consent be required as a precondition for preserving his census schedule and what are your reasons?

Chapter 7 - Consultation questions 9

- (i) Should the current 30-year timeframe on the transfer of records by B/Ds to the GRS be retained?
- (ii) If the answer to (i) is in the negative, (a) what are your reasons, and (b) what in your view is the appropriate timeframe and why?

Chapter 8 - Consultation questions 10

Our provisional views are that a good public records management regime must include adequate and effective measures to ensure due compliance. These measures may take the more stringent form of laws or mandatory requirements. However, we observe that equally important are other measures which seek to develop a stronger culture and promote higher awareness of proper records management.

- (i) Are the existing measures sufficient in ensuring B/Ds' compliance with their records management obligations?
- (ii) If your answer to (i) is in the negative, what additional measures would you suggest and what are the reasons for your suggestions?

Chapter 9 - Consultation question 11

There are considerations in favour of the enactment of an archives law in Hong Kong, but there are also practical concerns over its implementation. On balance, **our provisional views are that we do see a case for the introduction of an archives law to further strengthen the management, protection and preservation of public records and archives in Hong Kong.**

Do you think there is a case for introducing an archives law to strengthen the current public records and archives management framework and what are your reasons?

Chapter 10 - Consultation questions 12

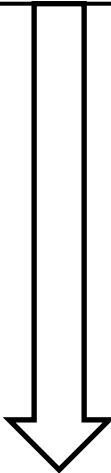
As regards the scope of public bodies to be covered, our provisional views are that it is more advisable to follow the approach in England, Ireland, New Zealand and Singapore, ie enumerating from time to time specific bodies that should be subject to the public records management regime. In respect of the extent of oversight by the archival authority, we consider that a "bespoke" approach is more appropriate.

- (i) Do you agree with our provisional views?
- (ii) If your answer to (i) is in the negative, what are your reasons?

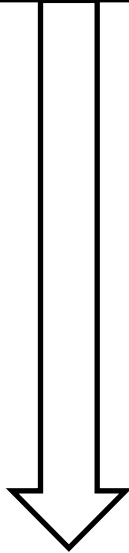
**Major government records management processes
and applicable rules and guidelines**

The Table below depicts the major government records management processes involved in a record's life cycle and the applicable administrative rules and guidelines. Although the processes are presented in a sequence, some of them, however, may take place simultaneously. For example, records creation and classification are often carried out as an integrated series of actions. Mandatory requirements set out in GC09 applicable to the relevant processes are underlined in this Table. Abbreviations used in this Table are the same as those in the List of Abbreviations and the List of Major Rules and Guidelines on Public Records Management in Hong Kong. Information in this Annex is supplied by the GRS.

A. Creation

<u>Major Processes</u>	<u>Applicable General Circulars / Circular Memoranda / Guidelines</u>
Capture of records into the designated departmental recordkeeping system and registration 	• GCCR (on creation and collection of records): ✧ Records should be created or collected to meet operational, policy, legal and financial purposes; and document accurately and adequately government functions, policies, procedures, decisions and transactions to serve as reliable evidence. ✧ As a systematic approach, B/Ds should develop business rules to document decisions as to what records are to be created and kept. • <u>GC09 (on print-and-file):</u> Unless otherwise agreed by GRS, e-mail correspondence should be "printed-and-filed" for record purposes. • <u>GC09 (on records inventory):</u> B/Ds should prepare and maintain an accurate records inventory. • EDRMP: A record is registered when it is captured into the recordkeeping system, providing evidence that it has been created/collected.

Organisation of records according to classification



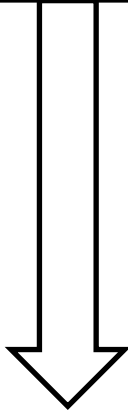
- **GC09 (on records classification):**
 - ✧ Records should be systematically organised according to a records classification scheme.
 - ✧ New classification schemes for a B/D should be approved by its DRM (ie Departmental Records Manager).
 - ✧ B/Ds are required to adopt the standard classification scheme for all their administrative records not later than April 2012. B/Ds should make reference to the procedures set out in RMP3 (ie Records Management Publication No 3 - Subject Filing) to develop its own classification scheme for programme records.
 - ✧ DRM is required to review the records classification schemes every two to three years.
- **Other References on Creation**
 - ✧ RMM (ie Records Management Manual)
 - ✧ RMP2 (ie Records Management Publication No 2 - Managing Active Records: File Management)
 - ✧ GFP (ie Guidelines on Filing Practices)
 - ✧ GISCSAR (ie Guidelines on the Implementation of the Standard Classification Scheme for Administrative Records)
 - ✧ GMEM (ie Guideline on the Management of Electronic Messages)
 - ✧ GMRHE (ie Guidelines for Managing Records in a Hybrid Environment)
 - ✧ Handbook 2015 (ie A Handbook on Records Management Practices and Guidelines for an Electronic Recordkeeping System)

B. Active and inactive records – storage, access, tracking and scheduling

<u>Major Processes</u>	<u>Applicable General Circulars / Circular Memoranda / Guidelines</u>
Proper custody and storage of records	• <u>GC09 (on custody and storage): B/Ds should put in place appropriate arrangements to ensure the safe custody of records. Records should be stored in proper facilities (eg filing cabinets, filing racks) in a clean and dry environment.</u>
Access control	• <u>GC09 (on access): Records should be stored in such a manner so as to facilitate user access and protected from unauthorised access, use, disclosure, removal, deterioration, loss or destruction.</u>
Tracking of the movement of records (including monitoring bulk relocation of records)	• <u>GC09 (on bulk relocation): To minimise the risk of losing records during bulk relocation of files, appropriate arrangement should be made during the process. These include: designating an officer not below the rank of Executive Officer II or equivalent to oversee the task; taking stock before the relocation exercise; conducting a file inventory check after relocation; documenting the inventory check and updating the new storage location immediately afterwards.</u> • <u>GC09 (on handling loss cases): Any loss of records should be immediately reported to the DRM and a copy of such report sent to GRS simultaneously. Upon receipt of such report, the DRM should (a) ascertain the facts and identify the circumstances leading to the loss; (b) reconstruct the records where necessary; (c) take steps to prevent recurrence; (d) consider whether any disciplinary action or other administrative action is necessary; and (e) report his findings and actions on (a) to (d) above to GRS within three months.</u>

Major Processes

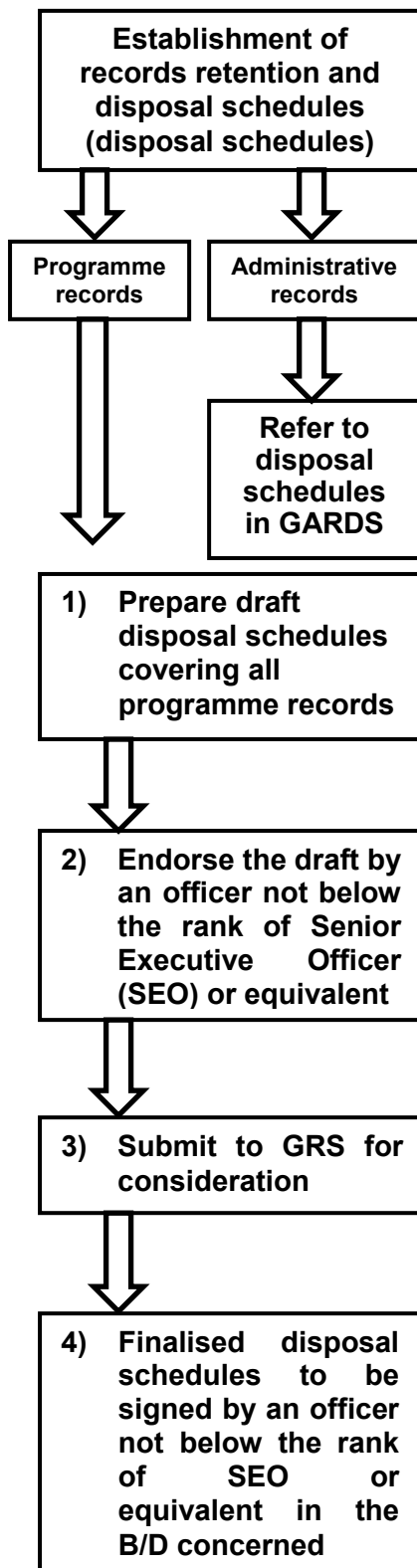
Records scheduling



Applicable General Circulars / Circular Memoranda / Guidelines

- **GC09 (on keeping the records for the right length of time according to the disposal schedules)**: It is important to establish disposal schedules to ensure systematic planning and orderly implementation of records disposal after records have been kept the right length of time to meet the purposes they are created and in compliance with legal or statutory requirements. This will facilitate subsequent transfer of inactive records to GRS' records centres for intermediate storage, transfer of archival records to the Public Records Office of GRS for permanent retention or destruction of unwanted records.
- **GC09 (on establishing disposal schedules)**: Records scheduling should be conducted to establish disposal schedules within two years of creation of new series of programme records.

Major Processes



Applicable General Circulars / Circular Memoranda / Guidelines

- **GC09 (on establishing disposal schedules)**: To establish disposal schedules to ensure systematic planning and orderly implementation of records disposal.
- **GC09 (on administrative records)**: To dispose of administrative records, B/Ds should adopt the set of disposal schedules developed by GRS and detailed in RMP4 (ie Records Management Publication No 4 - General Administrative Records Disposal Schedules (GARDS)).
- **GC09 (on programme records)**:
 - ✧ B/Ds are required to prepare and forward to GRS draft disposal schedules covering all their programme records not later than April 2012. For new series of programme records created after April 2012, B/Ds should forward draft disposal schedules to GRS within a period of two years.
 - ✧ These draft disposal schedules should be endorsed by an officer not below the rank of Senior Executive Officer (SEO) or equivalent.
 - ✧ GRS will consider the draft disposal schedules and discuss with the B/D concerned with a view to finalising the disposal schedules.

Note: Subsequently, the Director of Administration issued a letter to all B/Ds in March 2014 and stating that B/Ds would, upon request by GRS, make ready files for appraisal within a reasonable period of time, say three months.
- **GC09 (Finalised disposal schedules)**: Finalised disposal schedules should be signed by an officer not below the rank of SEO or equivalent in the B/D concerned.

Major Processes

Applicable General Circulars / Circular Memoranda / Guidelines

**Review of disposal
schedules regularly by
B/Ds**

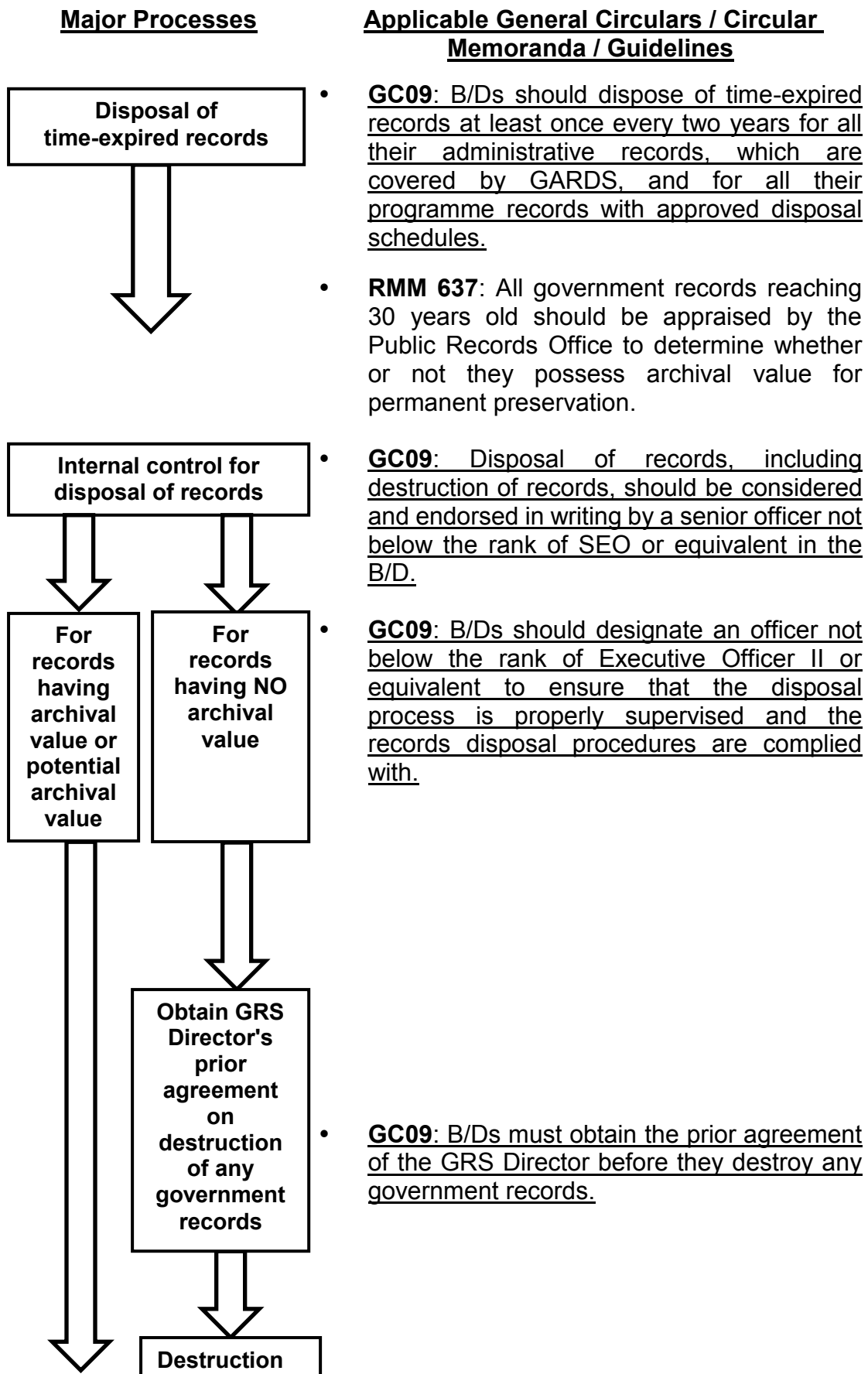
- **RMM 617:** All records retention and disposal schedules should be reviewed at least every five years to determine whether amendments are required.

Note: Guideline cum Checklist (ie Guideline cum Checklist for Review of Records Retention and Disposal Schedules) has been developed to facilitate the review.

Vital records protection

- **GC09 (on protection of vital records):** B/Ds should identify and protect their vital records and draw up an action plan not later than April 2012 to establish and implement a vital records protection programme.
- **Other References on Managing Active and Inactive Records**
 - ✧ RMM
 - ✧ RMP1 (ie Records Management Publication No 1 - A Practical Guide to Records Scheduling and Disposal)
 - ✧ RMP4
 - ✧ RMP6 (ie Records Management Publication No 6 – Manual on Vital Records Protection)
 - ✧ GFP
 - ✧ GBR (ie Guidelines on Bulk Relocation of Government Records)
 - ✧ DOR (ie Disposal of Original Records (for records that have been digitised and stored in a digital form))
 - ✧ HPER (ie A Handbook on Preservation of Electronic Records)
 - ✧ GMRHE
 - ✧ Handbook 2015

C. Disposal – transfer for appraisal and preservation, and destruction



Major Processes

Applicable General Circulars / Circular Memoranda / Guidelines

Transfer records having archival value or potential archival value (as appraised by Public Records Office and indicated in the approved disposal schedules) to the Public Records Office

- **GC09:** B/Ds should transfer their records having archival value to the Public Records Office of GRS according to the respective disposal schedules.

Note: Subsequently, the Director of Administration issued a letter to all B/Ds in March 2014, urging B/Ds to transfer time-expired records having archival value/potential archival value to the GRS on time.

Deferred transfer of time-expired records having archival value or potential archival value

- **GC09:** If there are valid reasons to defer the transfer of time-expired records having archival value or potential archival value to the Public Records Office of GRS for retention or appraisal by more than two years, they should be set out in writing for agreement by a directorate officer in the concerned B/D. Such cases have to be brought up to the directorate officer for direction during the next disposal exercise.
- **Note:** Subsequently, the Director of Administration issued a letter to all B/Ds in March 2014 and tightened the requirement. For deferrals for more than two years, B/Ds are required to obtain the written agreement of a directorate officer in the concerned B/D at the level of deputy secretary/deputy head of department and consult GRS in advance.

Handling of cases of unauthorised destruction

- **GC09:** Any unauthorised destruction of records should be immediately reported to the DRM and a copy of such report sent to GRS simultaneously. Upon receipt of such report, the DRM should (a) ascertain the facts and identify the circumstances leading to the unauthorised destruction; (b) reconstruct the records where necessary; (c) take steps to prevent recurrence; (d) consider whether any disciplinary action or other administrative action is necessary; and (e) report his findings and actions on (a) to (d) above to GRS within three months.

Major Processes

**Transfer of government
records to
non-government
bodies**

Applicable General Circulars / Circular Memoranda / Guidelines

- **GC09:** The DRM should send a list of records pending transfer to the GRS Director for prior agreement so that appropriate arrangements can be made for records having archival value. No government records should be transferred outside the Government unless with the prior agreement of the GRS Director.
- **Other References on Disposal**
 - ✧ RMM
 - ✧ RMP1
 - ✧ RMP2
 - ✧ RMP4
 - ✧ GTRPA (ie Guidelines for Transferring Records to Public Records Office of GRS for Appraisal)
 - ✧ DOR
 - ✧ GMRHE

Summary of steps involved in the transfer of time-expired records (for both paper and non-paper) process¹

(1) Records disposal

1.1 B/Ds should dispose of time-expired records at least once every two years. Disposal of administrative records is covered by the GARDS whereas that for programme records is covered by disposal schedules approved by the GRS.

1.2 The ways of disposal include destruction, intermediate storage at records centres and then destruction, microfilming and then destruction, and permanent retention, having regard to the administrative, operational, fiscal and legal requirements and archival value of the records.

(2) Transfer of records having potential archival value to the Public Records Office for appraisal

2.1 B/Ds are required to transfer time-expired records the disposal action of which as set out in the corresponding disposal schedule is "Review by Public Records Office" to the Public Records Office for appraisal. B/Ds should also transfer their records reaching 30 years old to the Public Records Office for appraisal.

2.2 Appraisal process is a combination of functional analysis, content analysis, and assessment of the preservation needs and accessibility relating to the records. The Public Records Office adopts a two-stage approach in conducting appraisal of records. "Paper appraisal" is based on the examination of the file list of records pending appraisal, taking into account the administrative and disposal history of the B/D as well as other documentation research. If necessary, "physical appraisal" of the records will be conducted to examine in detail the content of each document in order to determine the archival value. Appraisal can take place during the discussion of drafting the disposal schedule or upon the expiry of the retention period.

2.3 If the records are appraised as having archival value, B/Ds are required to transfer them to the Public Records Office for permanent retention (see also paragraph 3.1 below).

2.4 If the records are appraised as having no archival value, the GRS Director will approve their destruction.

¹ Information in this Annex is supplied by the GRS.

(3) Transfer of records having archival value to Public Records Office for permanent retention

3.1 B/Ds are also required to transfer time-expired records the disposal action of which as set out in the corresponding disposal schedule is "Permanent Retention by Public Records Office" as well as those appraised as having archival value (see paragraph 2.3 above) to the Public Records Office for permanent retention.

3.2 Before the transfer, B/Ds will review the records and determine their access status when reaching 30 years. In carrying out the review, B/Ds broadly adopt the parameters set by the exemptions listed in Part 2 of the CAI (ie Code on Access to Information).

3.3 Unless specified by B/Ds, archival records transferred to the Public Records Office will be open for public access when reaching 30 years old. The Public Records Office will prepare for the accessioning and arrangement, description and uploading of the relevant information of such records to the Integrated Information Access System for public searching. The Integrated Information Access System is a web-based system which provides an integrated interface for public users to access the finding aids to the archival records through GRS' website or the workstations provided in GRS' Search Room.

(4) Deferred transfer of time-expired records having archival or potential archival value

4.1 If B/Ds need to defer the transfer of time-expired records having archival or potential archival value to the Public Records Office for retention or appraisal by more than two years, they should set out the reasons in writing for agreement by a directorate officer in the B/D concerned.

4.2 Since March 2014, the requirement has been tightened. B/Ds are required to obtain the written agreement of a directorate officer at the level of deputy secretary/deputy head of department and consult the GRS in advance. B/Ds have to provide well-justified and specific reasons with details to support their deferral requests.

4.3 On receipt of a B/D's request, the Public Records Office will appraise the records concerned. If the records have no archival value, the GRS will have no objection to the B/D retaining them. The B/D will be required to seek the agreement of the GRS Director for future destruction of the records.

4.4 If the records concerned have archival value, the GRS will examine the reasons put forth by the B/D for the deferral request. Simple reasons such as "operational need" or "for reference" will not be accepted. The GRS will object to a deferral request if no good justification is given. If

the reasons put forth by the B/D are considered justifiable, the GRS will give agreement to the deferral request for a period of up to two years.

(5) GRS' work after transfer of archival records

5.1 Records that are appraised to be of archival value will ultimately be transferred to the GRS for permanent preservation and public access subject to exemptions. To this end, the GRS has to provide a chain of services in respect of records transferred to it, including:

- (i) *Accessioning and arrangement* - Accessioning consists of, inter alia, preliminary sorting of records, registering the essential information about the records and creators in the register. Records are then arranged and grouped into different record series based on certain criteria such as their functions, subject matters, filing systems and physical format.
- (ii) *Records description* - Records description is a process of creating a finding aid or other access tools that will facilitate users in identifying the records from the voluminous archival holdings.
- (iii) *Providing Access* - The public can access archival records at the GRS which also organises visits, seminars, workshops, thematic film shows, exhibitions and other educational activities, and prepares different kinds of online thematic resources portal.
- (iv) *Preservation and conservation* - Preservation is provided to all archival records once they are transferred to the GRS. To retard the deterioration of archival records caused by ultraviolet light and dust attack, holdings in the GRS are kept inside acid free containers. Conservation preparation and treatment are conducted to preserve and repair the deteriorated archives.

(6) Access to archival records kept by GRS

6.1 Access to archival records kept by the GRS is managed through the PRAR (ie Public Records (Access) Rules 1996). Subject to the provisions of the PRAR and the laws of Hong Kong, public records

- (i) which have been in existence for not less than thirty years; or
- (ii) the contents of which have at any time been published or otherwise wholly disclosed to the public,

shall be available for public inspection.²

² Rule 3 of the PRAR.

6.2 The GRS Director may, in his discretion and in accordance with general instructions given to him by the Chief Secretary for Administration, permit any person to inspect closed records held in the GRS.

6.3 For access to closed records, members of the public may apply in writing to the GRS. The GRS will seek the views of the records originating or transferring B/Ds on whether access to the records can be granted.

6.4 If B/Ds consider that the whole or a certain part of the records is not suitable for public inspection, they are required to provide reasons with reference to Part 2 of the CAI.

6.5 The GRS will have regard to the views of the B/Ds concerned, any statutory or administrative requirements related to the protection of personal data and the provisions of the CAI in accordance with the instructions issued by the Chief Secretary for Administration before informing the applicants of the results.

6.6 If an access application is refused, the GRS will provide the reasons for refusal by quoting the relevant provisions in Part 2 of the CAI. The GRS has set an internal target to give the applicant a reply within 20 working days from the date of receipt of the application.

6.7 The public may seek an appeal to the Director of Administration on a decision on access request for closed records and/or lodge a complaint with The Ombudsman if they are not satisfied with the handling of the access application.

(7) Classified records review exercise

7.1 The Governor in Council decided in 1993 to relax the policy to allow public access to classified records older than 30 years. Since then the GRS has been liaising with B/Ds on an annual basis to ascertain the access status of those classified archival records in its custody which are reaching 30 years old and records due for further review for public access.

7.2 For those records transferred prior to 1993, the GRS identifies the records reaching 30 years old in advance and requests the B/Ds concerned to review the access status in the 29th year, so as to enable timely opening of the records in the 30th year if the B/Ds agree.

7.3 B/Ds broadly adopt the parameters set by the exemptions listed in Part 2 of the CAI to review their classified records. If B/Ds do not agree to open their records in the interim, they must provide a relevant justification.

7.4 As a record should not be closed indefinitely, the GRS will require the B/Ds to review the records again every five years until the records are eventually opened.

7.5 For classified records transferred to the GRS in and after 1993, B/Ds should have reviewed them and determined their access status when reaching 30 years old before the transfer (see also paragraph 3.2 above).

Brief summary of survey results

1. The Sub-committee conducted two rounds of survey (in June 2016 ("1st round survey") and February 2017 ("2nd round survey")) for the following purposes:-

- (i) to obtain information about the records management system and practices of public bodies in Hong Kong;
- (ii) to assess public bodies' willingness and readiness to adopt a set of mandatory records and archives management requirements, if introduced.¹

1st round survey

2. The 1st round survey was conducted by way of a questionnaire sent to the 71 public bodies which had been invited to seminars organised by the GRS on records management, archives administration and the setting up of electronic recordkeeping systems (ERKSs) between 2013 and 2015. They comprised well-developed public bodies of a diverse nature, serving a broad range of different public purposes (including education, medical and health, financial, arts and sports) and have been informed of, or given training on, the advice and guidance provided in the GRMP promulgated by the GRS.

3. The questionnaire aimed to ascertain whether or not the subject bodies have put in place a records management programme for managing their records, and if affirmative, the details of such programme. Questions were also posed to see if there are problems or areas that require improvement or assistance in the bodies' records management, and to seek their views as to the possible coverage of a mandatory records management regime, if any, and the types of records that should be exempted from the mandatory requirements, if any.

4. Thus far, 55 out of the 71 public bodies have returned their completed questionnaires, giving a response rate of 77.5%. A large majority (89.1%) of the public bodies ("**Respondents**") indicated that they had put in place a records management programme in their bodies, although it did not cover all records or all units or departments in the bodies, or all aspects of their records management.

¹ Whether under the Government's existing administrative regime or as stipulated under any archival legislation that may be introduced.

5. Of these Respondents, 80% have, whether fully or partially, issued guidelines on creation of records, updated records inventory, established retention and disposal schedules, implemented procedures for destruction of records and/or kept proper storage of records. They have also designated a senior officer to oversee records management, developed records classification schemes, implemented vital records protection measures, conducted regular reviews of records management policy or guidelines, conducted continuous monitoring of compliance and/or implemented standardised procedures to facilitate timely access/retrieval of records by authorised person.²

6. Over 70% of the Respondents have implemented procedures for handling loss or unauthorised destruction of records, although for some of such 70%, the procedures are applicable to electronic information system or mishandling of personal data only. Equally, 70% of the Respondents have adopted the GRMP published by the GRS, although some of such 70% have chosen to adhere to global standards, or statutory requirements in keeping their accounting records, and others have applied the GRMP in some but not all practices, systems, areas or aspects of their records management.

7. Over 60% of the Respondents have transferred their archival records to designated archives for permanent retention,³ and the majority of such 60% have provided for public access to their archival records.⁴

8. Over half of the Respondents indicated that they had problems in complying with established records management guidelines and procedures. In addition, over half have identified areas in their records management which require improvement or assistance, including resources and storage supply, expert advice and technical knowhow support, training, the need for updated guidelines, and regular monitoring of compliance.

9. 67% of the Respondents involved in the 1st round survey opined that certain types of their records should be exempted from the mandatory records management requirements, if any. The main types are as follows:

- (i) information subject to legislative or regulatory restriction on disclosure;

² Some of the Respondents stated that those measures were only partially implemented, in that the measures did not apply to all aspects of their records management, or to all units or departments, or to all records in their bodies. Some simply followed previous practices without having detailed procedures or a documented policy in place, and others have relied on each individual unit or department of their bodies to make its own arrangement.

³ Amongst these Respondents, some of them stated that they did not have designated archives, and had therefore stored their archival records in their central administration, or document management system or in digital format for permanent retention.

⁴ Those Respondents which do not allow public access to their archival records explained that they were restricted from doing so due to secrecy provisions in their governing legislation or other legislation, or because the body itself had not been in existence for over 30 years.

- (ii) sensitive internal records relating to the body's policies, operational and internal management, including commercially sensitive documents and records of internal meetings;
- (iii) documents subject to confidentiality agreements or obligations;
- (iv) sensitive research data, human resources and accounting records and working documents;
- (v) records protected by legal professional privilege; and
- (vi) records relating to law enforcement and legal proceedings.

10. Five of the Respondents supported the application of the proposed mandatory requirements to all of their records without exceptions.

11. Eight other bodies have expressed concerns about the appropriateness of applying a uniform set of mandatory records and archives requirements to public bodies of different nature, sizes and resources, holding records of different nature some of which are subject to secrecy provisions in their governing legislation. It was considered more cost effective and desirable to enforce good practices of records management through their internal guidelines, rather than the enactment of legislation.

2nd round survey

12. The Sub-committee noted that 79.6% of the Respondents indicated in the first survey that their recordkeeping systems were capable of managing both electronic and non-electronic records in accordance with the GRMP. A 2nd round survey was conducted in February 2017 to ascertain (i) the extent to which these Respondents' systems possess the features of a typical ERKS as described in the GRMP,⁵ and (ii) how electronically ready they are for full implementation of ERKS if a mandatory records management scheme is to be introduced. Six selected public bodies in this group, which are relatively sizeable and resourceful bodies serving different essential public functions in Hong Kong, including education, medical and health, housing and trade, were involved in the 2nd round survey.

13. The survey was conducted by way of a questionnaire containing questions regarding the kind and functionality of the electronic means adopted by the subject body to manage their electronic records for recordkeeping purposes.

14. A description of the features of a typical ERKS, as distinguished from other Electronic Document Management System (EDMS), as well as the

⁵ Chapter 8 of the GRMP.

definitions of other related terms had been stated in the questionnaire for reference purpose.⁶

15. Five out of the six bodies involved have responded, giving a response rate of 83.3%. An analysis of their responses shows that none of the five bodies has currently adopted a typical ERKS to store their electronic records for recordkeeping purposes. Four of them stated, for various reasons, that they have no intention to implement ERKS in the near future.

16. As for the Respondents which indicated, in the 1st round survey, that they did not have in place a recordkeeping system which is capable of managing both electronic and non-electronic records, the Sub-committee also sent a letter to five of them on 16 February 2017, seeking their initial indication as to how willing and ready they were to comply with a set of standardised recordkeeping procedures or protocols, if introduced.

17. Three out of five of these bodies have responded, giving a response rate of 60%. Two of them opined that their current records management practices were both appropriate and effective for their unique practical circumstances. They therefore did not support the application of a mandatory records and archives management system to their bodies. The remaining one stated that they had in place a framework for the creation and management of records in line with the GRMP in their body, but would be willing to assess their readiness to adhere to a mandatory recordkeeping system when details of the relevant requirements are known.

⁶ In brief, an ERKS is distinguishable from an EDMS (which is a software programme that manages the creation, storage and control of electronic documents), or other information technology systems in that: (i) an ERKS does not allow users to modify the content of the electronic records or delete electronic records stored therein; and (ii) an ERKS should possess functionality for users to assign retention and disposal schedules to facilitate future disposal of records.