

THE LAW REFORM COMMISSION OF HONG KONG

ARCHIVES LAW SUB-COMMITTEE

CONSULTATION PAPER

EXECUTIVE SUMMARY

(This executive summary is an outline of the consultation paper issued to elicit public response and comment on the Sub-committee's questions. Those wishing to comment should refer to the full text of the consultation paper which can be obtained from the Secretary, Law Reform Commission, 4th Floor, East Wing, Justice Place, 18 Lower Albert Road, Central, Hong Kong, or downloaded from the Commission's website at: <<http://www.hkreform.gov.hk>>.

*Comments should be submitted to the Archives Law Sub-Committee Secretary by 5 March 2019. **Abbreviations used in this executive summary are the same as those used in the consultation paper.***

Preface

1. Archives record decisions, actions and memories. They are a unique and irreplaceable heritage passed from one generation to another. 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 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

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.

Chapter 1 Overview of the current framework of public records management in Hong Kong

Administrative scheme (paras 1.2 to 1.5)

5. Government records and archives management are currently regulated under an administrative regime under which the GRS is the central records management and service agency. The administrative regime comprises a number of administrative rules, guidelines and best practices promulgated and updated by the Director of Administration and the GRS. Those requirements promulgated through GC09¹ 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.

¹ Such mandatory records management requirements include designation of 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.

Scope of application (para 1.6)

6. While B/Ds are subject to the administrative scheme of records management, public organisations generally are not.² 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.

Roles and functions of the GRS and its offices (paras 1.9 to 1.11)

7. Currently, the GRS is overseen by, and placed under, the Administration Wing of the Chief Secretary for Administration's Office. The GRS' main responsibilities are as follows:³

- (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.

Comments (paras 1.19 to 1.22)

8. The administrative public records management system has been subject to scrutiny in recent years, for example the reports issued by the Civic Exchange in 2007⁴ and 2011⁵, report by the Audit Commission in 2011⁶ and

² With the exception of the Independent Commission Against Corruption and the Hong Kong Monetary Authority.

³ Para 220 of the RMM.

⁴ 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.

report by The Ombudsman in 2014⁷. Comments are also found in news articles and other publications some of which call for an archives law.

Chapter 2 Overview of records management cycle and its related rules, guidelines and publications

9. 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 Consultation Paper.

Summary of records management processes and the corresponding rules, guidelines and publications (paras 2.11 to 2.44)

(a) Establishment of comprehensive records management programme

10. 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.

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

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

11. 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.

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

(e) Content classification

⁵ Christine Loh and Nick Frisch, *The Memory Hole: Why Hong Kong Needs an Archives Law*, Civic Exchange, November 2011.

⁶ 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>.

⁷ 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>.

12. Each B/D should establish and maintain a records classification scheme that builds around its functions and organisation and covers all official records.

(f) Records scheduling and disposal

13. B/Ds are required to properly plan and implement records disposal. 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.

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

14. B/Ds should put in place appropriate arrangements to ensure the safe custody of records. 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.

(h) Vital records protection within B/Ds

15. 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.

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

16. GRS has adopted a set of appraisal guidelines on selection of archival records. Records appraised as having archival value should be transferred to the Public Records Office for permanent retention according to the disposal schedules.

(j) Protection and preservation of archives in GRS

17. 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.

(k) Archives accessioning, description and arrangement

(l) Public access to archival records kept by GRS

18. Access to archival records is managed through the PRAR.⁸

⁸ 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".

Chapter 3 Overview of records and archives management legislation in other jurisdictions

19. In this Consultation 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.

Chapter 4 Governance of GRS

20. 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.

21. In Australia, England,⁹ 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.

22. 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. 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.

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?**

⁹ As discussed in the Consultation Paper, although as a non-ministerial department TNA has a "sponsor minister", it is accountable directly to the Parliament.

- (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

Dissemination of information about GRS' work (paras 5.2 to 5.11)

23. GRS was criticised for lack of transparency. It has since taken various measures to address this issue.¹⁰

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

Consultation Questions 2

- (i) Are the documents and information currently published on the GRS' website sufficient (as set out in paragraph 5.4 of the Consultation Paper)?**
- (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?**

Creation of records (paras 5.12 to 5.29)

25. The Audit Commission's Report observed that GC09, which imposed mandatory requirements on records management, contained no

¹⁰ See para 5.4 of this Consultation Paper for these measures.

provision on records creation.¹¹ 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. Besides, the GMEM was promulgated to help B/Ds identify, create, file and manage e-mail records.

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. 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.

27. 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.

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?**

Review of disposal schedules (paras 5.30 to 5.39)

28. 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. 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. The problem identified by The

¹¹ Para 2.9 of the *Audit Commission's Report*.

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.¹²

29. In March 2015, the GRS issued a new 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. The Guideline cum Checklist sets out a list of 28 questions on eight major aspects that B/Ds should take into account when reviewing their disposal schedules.

30. 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.¹³ In Australia, disposal schedule is in the form of a document called "*records authority*". The NAA advises that government agency's records authorities should be reviewed "*periodically*" to ensure that they remain current for the agency's business.

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?**

Transfer of records to GRS (paras 5.40 to 5.79)

31. 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. The GRS is criticised for lack of effective control or means to

¹² Para 4.19 of *The Ombudsman's Report*.

¹³ 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-status-template/>>.

ensure that records are transferred for disposal or appraisal in an orderly and timely manner.

32. In response to 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 records having archival value or potential archival value and to refrain from seeking deferrals unless absolutely necessary, such as due to on-going legal proceedings. GRS may object to any requested deferral if no good justification is given.

33. Public records appraised to be of archival value have to be transferred to the Public Records Office. 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.

34. The general retention period (or the ultimate time limit for transfer of records to the archival authority) is 15 years in Australia, 20 years in England, 25 years in New Zealand and Singapore and 30 years in Ireland. There are, however, 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.

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?

Professional and staff support for GRS *(paras 5.80 to 5.95)*

35. 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. Having reviewed comprehensively the situation in Hong Kong and the other jurisdictions, the Consultancy Report¹⁴ set out a number of recommendations. In the circumstances, we do not make any recommendation on this matter.

Electronic records *(paras 5.96 to 5.114)*

36. The GRS has since 2001 been working with the OGCIO 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. There were concerns that the progress was slow and the Government had not specified a timetable for B/Ds to develop or adopt ERKS. There have also been concerns about the current "print-and-file" approach mandated by paragraph 7 of GC09.

37. The Government has been implementing ERKS and five B/Ds have implemented ERKS in the first phase.¹⁵ The second phase started in late 2015. Three out of the six B/Ds involved have successfully launched their ERKS by March 2017.¹⁶ The remaining three have been implementing their ERKS progressively from March 2017 to January 2020.¹⁷

¹⁴ 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>.

¹⁵ 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.

¹⁶ The three B/Ds were the Intellectual Property Department, OGCIO and Administration Wing.

¹⁷ They are the Civil Engineering and Development Department, Architectural Services Department and Marine Department.

38. 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.¹⁸ The GRS also promulgated a new publication in March 2016 to provide specific guidance to assist B/Ds in managing both electronic and non-electronic records under a hybrid records management environment.¹⁹ In December 2017, the GRS updated the "*Guideline on the Management of Electronic Mail*" and renamed it as GMEM. The GRS said that it would continue to issue guidelines to ensure proper creation, transfer and preservation of electronic records.

39. We 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. We are aware of other important considerations such as resources, technical, operational and other practical hindrance. 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.

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

40. 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. 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

¹⁸ 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*".

¹⁹ "*Guidelines for Managing Records in a Hybrid Environment*".

Ordinance (Cap 316) ("Census Ordinance") which are specifically mentioned by the Civic Exchange.²⁰

Privacy or data protection legislation (*paras 6.4 to 6.31*)

41. The jurisdictions studied have provisions to resolve the conflict between privacy/data protection law and archives law. 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.

42. 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 (*paras 6.32 to 6.56*)

43. Amongst the census and statistical legislation studied, 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.

²⁰

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

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

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

45. Under the current regime, disposal of records is done in accordance with the relevant disposal schedules. 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). In addition, para 637 of the RMM provides that "*[a]ll government records reaching 30 years old should be [transferred to and] appraised by the P[ublic] R[ecords] O[ffice] to determine whether or not they possess archival value for permanent preservation.*"

46. 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.

47. 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.

48. There are some benefits as well as disadvantages of shortening the current 30-year timeframe on transfer of records to the GRS. All in all, this is about striking a proper balance.

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

49. 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.

Regulating compliance under an administrative framework (paras 8.2 to 8.33)

50. 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.²¹

51. 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.

Power to inspect records and audit records management practices (paras 8.34 to 8.51)

52. 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.²² 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".²³ In response, GRS has underscored the following three remarks:²⁴

53. *Departmental records management reviews* 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 information was refused.²⁵

54. *Self-assessment by B/Ds* 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

²¹ Para 5 of the PAC Information Note available at:
<http://www.grs.gov.hk/pdf/Information_note_E.pdf>.

²² Para 2.6 of *The Ombudsman's Report*.

²³ Para 2.12 of *The Ombudsman's Report*.

²⁴ See para 8.37 of this Consultation Paper for more details.

²⁵ 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.

November 2011. The GRS has also reviewed the scope of self-assessment and identified in GC12 the various aspects required to be covered.²⁶

55. *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; (b) B/Ds submit the disposal requests for time-expired records according to GARDS or approved disposal schedules; or (c) GRS appraises B/Ds' records which have reached 30 years old.

56. 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.

57. 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.

Handling of loss or unauthorised destruction of records (paras 8.52 to 8.76)

58. Although B/Ds are required to report to the GRS Director immediately any loss or unauthorised destruction of records, 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.²⁷

59. GC09 has imposed various requirements to guard against loss or unauthorised destruction of records.²⁸ Moreover, the GRS conducts departmental records management reviews to evaluate B/Ds' compliance with records management requirements and practices. If any incident of loss or

²⁶ 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).

²⁷ Para 6.6 of *The Ombudsman's Report*.

²⁸ See para 8.55 of this Consultation Paper for more details.

unauthorised destruction of records is found, the B/D concerned will be required to follow up.

60. Whilst sanction may deter non-compliance, training and education can be more effective in fostering a stronger culture of compliance. The GRS 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.

61. The archives law in Australia, Ireland, New Zealand and Singapore outlaws unauthorised destruction of records (and other similarly serious conducts).²⁹ 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". In all five jurisdictions studied, the archival authorities also provide training, guidance, or advice on records and archives management.

62. **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.**

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?

63. As discussed in this chapter, 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**

²⁹ 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.

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.

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

64. 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.

65. The Sub-committee's study 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. The extent of oversight by archival authorities over the records management of public bodies also varies between jurisdictions.

66. The Sub-committee observes that 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. In any event, the current lack of qualified professional archivists in Hong Kong may pose a particular challenge.

67. **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?**