

To Archives Law Sub-committee Secretary, Law Reform Commission
4/F, East Wing, Justice Place, 18 Lower Albert Road, Central, Hong Kong, or to
hklrc@hkreform.gov.hk, re Public Consultation on Archives Law

In response to the Consultation Paper issued by the Archives Law Sub-committee on 5 Dec 2018,

I/we, _____, submit the following comments:

Chapter 4 - Consultation questions 1

(i) *Should the current placement of GRS within the Government continue?*

Ans: **No.**

(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?*

Ans: **The placement of GRS within the Office of the Chief Secretary for Administration provides no effective control of the management of public records; nor is the current placement appropriate for exercising control over recordkeeping by public bodies. GRS should be replaced by an independent Archives and Records Authority with clearly defined statutory powers and responsibilities.**

(iii) *Is there a need for the appointment of an advisory body to provide advice on public records and archives management matters?*

Ans: **Yes.**

(iv) *If the answer to (iii) is in the affirmative, what should the role, composition and functions of the advisory body be?*

Ans: **There should be an Archives Council empowered to perform not only an advisory but also a monitoring role to the Archives and Records Authority and to oversee an appeal mechanism against withholding archival records from public access. The Council must be widely representative of the community comprising members from the executive government, the Judiciary, the Legislative Council, the legal, archives and information technology professions, the media and academia.**

Chapter 5 - Consultation questions 2

(i) *Are the documents and information currently published on the GRS' website sufficient (paragraph 5.4)?*

Ans: **No.**

(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?*

Ans: **GRS fails to provide adequate transparency regarding its operations and information for users that is expected of a government archives. GRS should publish documents and information including its plans, policies, strategies and budgets; reports of records management studies; disposal schedules of program records; details of the destroyed records and recently acquired records; and finding aids to the full list of all open and closed archival records, regardless of their security classification.**

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?*

Ans: **No.**

(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?*

Ans: **The current administrative arrangements do not provide a clear and effective obligation on Bureaux/Departments (B/Ds) to create and maintain complete, accurate, accessible and usable records as is evidenced by many incidents, including the recent Wang Chau public housing development case and lead contamination in tap water of public housing estates. A clear legal duty to create records should be provided in the archives law backed by sanctions for non-compliance.**

Chapter 5 - Consultation questions 4

(i) *Is the GRS' current guidance to B/Ds on review of records disposal schedules sufficient?*

Ans: **No.**

(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?*

Ans: **A good archives law provides for preparation of records disposal schedules and implicitly covers regular reviews to cater for changing operational needs and legal requirements. Lack of professional expertise in their formulation may account for the difficulties encountered by B/Ds in the review and updating of these schedules. If public input is genuinely sought, the criteria for drawing up the schedules and the schedules themselves should be publicly available to help identify the problems.**

Chapter 5 - Consultation questions 5

(i) *Is the current mechanism for transfer of government records to the Public Records Office for appraisal appropriate?*

Ans: **No.**

(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?*

Ans: **Delays in records transfer pose a risk of loss of and damage to valuable archival records, with electronic records being particularly vulnerable. Appraisal of records for retention as archives should be performed by qualified and experienced professionals; transfer of archival records within a specified period and access to them should be made mandatory under an archives law. This needs to be supported by a reduction in the outdated 30-year rule for transfer of records.**

(iii) *Is the current arrangement for deferral of transfer of records by B/Ds appropriate?*

Ans: **No.**

(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?*

Ans: **The appraisal and transfer of public records within a specified period should be made a statutory requirement, with deferral allowed only in accordance with exemptions provided for under the archives law. Without clear and transparent criteria for the deferral of records transfers and a statutory obligation to transfer records within a set timeframe, backed by sanctions for non-compliance, B/Ds will continue to procrastinate and withhold records.**

(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?*

Ans: **No.**

(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?*

Ans: **Clear and transparent criteria for the consideration and determination of access status to archival records should be contained in the archives law, assisting public understanding of the process. B/Ds rely broadly on the excess exemptions listed in the Code on Access to Information, which was established primarily to provide access to information in active records, not archives. This practice is undesirable. Independent oversight of the process and a mechanism for dealing with disagreements between B/Ds and the archival authority should be established by the archives law.**

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?

Ans: **Asking members of the public to comment on this highly technical issue of slow-moving implementation of the electronic recordkeeping systems (ERKS) is inappropriate, particularly when the Consultation Paper provides insufficient detail to allow useful comments and suggestions. That said professional leadership, appropriate expertise and a clear allocation of authority and responsibilities are critical issues for the government to reflect and consider.**

Chapter 6 - Consultation questions 7

(i) *Has the current PDPO struck the right balance between the preservation of archives and protection of personal data?*

Ans: **No. As most people are not sure how PDPO applies to accessing archival records, they tend to discourage access to and use of records containing personal data.**

(ii) *If the answer to (i) is in the negative,*

(a) *what in your view is the right balance?*

Ans: **For clarity and legal certainty, there should be provisions in the archives law to allow the transfer and preservation of archival records containing personal data and specify the conditions under which such records may be made available. While personal data should be adequately protected, it should not impede proper management of public records and archives and their lawful access.**

(b) *what other measures can be adopted to achieve this balance? and*

Ans: **Apart from addressing the issue in the archives law as stated above, regular training and publicity materials should be made available to educate government B/Ds and respective agencies and to inform members of the public to promote proper understanding and application of PD(P)O and the archives law for legal compliance.**

(c) *what are the reasons for your suggestions?*

Ans: **Well drafted statutory provisions in the archives law provide clarity and certainty. It will redress the balance between the needs of public records management, the preservation of government archives and public access to them, and protection of personal data.**

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?*

Ans: **Yes. Census records are a valuable resource for research into different aspects of social, political and economic history. Biographical research, genealogy and family history would be much impaired if the raw data captured by the census schedules were not preserved and, in the fullness of time, made available for public access and use.**

(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?*

Ans: **No. Allowing individuals such a choice will result in significant quantities of census records being destroyed, which would seriously mitigate against the value of census records, both as a basis for statistical analysis and an historical source. The closure of census records (normally for 100 years) under a statutory provision should offer individuals assurance with respect to confidentiality of personal data.**

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?*

Ans: **No.**

(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?*

Ans: **(a) Archival records, regardless of their physical format, are at risk of loss and damage if not promptly transferred for proper preservation. To minimise this risk, B/Ds should be required to transfer records within as short a timeframe as practicable.**

(b) Given that this timeframe is linked to the release of archival records for public access and that the 30-year rule on access is now regarded as outdated by many jurisdictions, an appropriate timeframe for the transfer of records would be 20 years, which is in line with international best practice.

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?*

Ans: **No.**

(ii) *If your answer to (i) is in the negative, what additional measures would you suggest and what are the reasons for your suggestions?*

Ans: **Sanctions be included in the archives law to deter non-compliance. This principle is well established and is found in existing legislation such as the Companies Ordinance and the Land Registration Ordinance. Reliance by the government on administrative measures to develop a stronger culture and promote greater awareness of proper records management has demonstrably failed to prevent the non-creation and arbitrary destruction of records, delays in records transfers for appraisal and public access, and loss of valuable archival records.**

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?

Ans: **Yes and a good archives law should be enacted as soon as possible. As evidenced by the reports of the Ombudsman and others cited in the Consultation Paper, administrative arrangements for the management of public records and archives in Hong Kong, by themselves, are inadequate to address the many problems and deficiencies. Moreover, most countries and in fact all the jurisdictions studied in the Consultation Paper have an archives law. There is no reason to delay introducing a good archives law to Hong Kong any further.**

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, i.e. 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?*

Ans: **Yes, the archives law must apply to public bodies that are substantially funded by public money and to those organizations which perform major public services. They are accountable to the public and should have the obligation to properly manage their records for public access. Objective criteria are required to define which public bodies and organizations would be covered by the archives law and a progressive implementation timetable should also be provided.**

(ii) *If your answer to (i) is in the negative, what are your reasons?*

Ans: **N/A**

I/We wish/do not wish to disclose the Commission's acknowledgment of the above comments by name.

(Signature/Stamp)

(Date)

Contact Details