

# THE ARCHIVES ACTION GROUP

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## ARCHIVES ACTION GROUP'S RESPONSE TO THE CONSULTATION PAPER OF THE LAW REFORM COMMISSION'S SUB-COMMITTEE ON ARCHIVES LAW

### Introduction

1. The Archives Law Sub-committee ("the Sub-committee"), which was established by the Law Reform Commission in 2013, is tasked with examining the current regime of public records and archives management, considering if reform is needed and to make such recommendations as appropriate. A public Consultation Paper prepared by the Sub-committee was issued on 6 December 2018.
2. We, the Archives Action Group (AAG), have been actively advocating the enactment of archives legislation for Hong Kong since 2009. Our members, including lawyers, professional archivists, academics, researchers and former civil servants, have done in-depth research on the topic and drafted a Public Records Bill for Hong Kong. The draft Bill was provided to the Sub-committee for consideration and is available on AAG Website for public comments. A copy of the draft Bill is given in the Appendix.
3. AAG welcomes the opportunity to respond to the Consultation Paper on Archives Law but deeply regrets that the Sub-committee has made no reference to our draft Bill, which is relevant to both the Sub-committee's study and the current consultation. With that said, AAG's response to the Consultation Paper is in two parts: general comments on the Consultation Paper followed by specific responses to the 12 questions posed by the Sub-committee.

### General Comments

4. The Consultation Paper, to a large extent, comprises a repetition of various comments and findings of a number of official reports and studies of civic groups. It endorses the related government responses and incorporates selected provisions from the archives laws of five jurisdictions that it believes are in line with the existing practices and work culture of the government for public consultation.
5. While acknowledging that "the detailed workings and the intricacies [in records and archives management] are probably too technical for the general public" (*see* Preface, para. 8, p.8), of the 12 consultation questions raised (comprising 30 sub-questions), 9 of them request comments from the public on "technical" aspects in improving the operation of the Government Records Service (GRS).
6. After studying and deliberating on the issue of archives legislation for over 5 years, the Sub-committee, in our view, fails to provide an informative analysis of the relevant problems and issues affecting the management of public records and archives in Hong Kong and the role that legislation has in addressing them properly. The references concerning archives law used by the Sub-committee are mostly outdated except for the Public Records Act of New

Zealand of which the Sub-committee seems to be most critical. The Sub-committee has ignored the recent trends and development in newer archives laws such as those enacted by different states of Australia and the US and provinces of Canada that promote proper records creation, recordkeeping and timely transfer of archival records for preservation and maximum public access being essential to good governance, accountability and protection of rights, identity and heritage.

7. We are particularly disappointed that the Sub-committee does not provide recommendations on the provisions of a good Archives Law for Hong Kong that would help address the inherent records problems and deficiencies of the government in terms of: continuous failure in creating complete and accurate records for good governance, efficiency, transparency and accountability; delayed transfers of records identified of archival value to the Public Records Office (PRO) for prompt processing and public access; increasing cases of loss and unauthorized destruction of records by Bureaux and Departments(B/Ds); lack of transparency in records disposal; inadequate professional capacity in leading the efficient implementation of electronic recordkeeping systems (ERKS); and effective appraisal of electronic records and their long-term preservation.

## **RESPONSE TO QUESTIONS**

### ***Consultation questions 1 (Chapter 4)***

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

#### **AAG's Response**

8. 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?*

#### **AAG's Response**

9. Despite the current placement of GRS at the center of the government within the Administration Wing of the Office of the Chief Secretary for Administration, where one would expect it to have control and influence over the management of public records and the implementation of relevant rules and directives in this area across the B/Ds, the management of public records in Hong Kong is lamentable. There is ample evidence of mismanagement of public records and archives in reports by the Ombudsman and Director of Audit mentioned in the Consultation Paper.

10. By way of example, according to paragraph 8.57 of the Consultation Paper, the number of reported cases of loss and unauthorized destruction of records between 2011 and 2017 that GRS was able to identify when conducting records appraisal or records management studies (4 records management studies are conducted each year) has more than doubled from 16 to 33 cases. These may well prove to be the tip of the iceberg of a much larger problem of unreported incidents.

11. The current placement of GRS within the Government Secretariat is also inappropriate for an organization that is required to advise and exercise control over public bodies, as contemplated in Chapter 10 of the Consultation Paper.



12. What is required is a dedicated and independent Archives and Records Authority, established by statute that sets out clearly defined powers and responsibilities to address the inherent problems and deficiencies in the management of public records and archives in Hong Kong, and provides sanctions to deter non-compliance. For details please refer to Sections 3, 6, 23 and 24 of AAG's draft Public Records Bill.

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

#### **AAG's Response**

13. Yes.

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

#### **AAG's Response**

14. There is a need for an Archives Council that has not just an advisory role but also performs a monitoring function. The Archives Council should have the power, defined by law, to monitor the performance of the Archives and Records Authority and to determine appeals against withholding records from public access and suspend records disposal in the event of a prominent or controversial matter pending or during investigation. The Council should be independent and widely representative of the community of Hong Kong, comprising members from the executive government, the judiciary, the Legislative Council, the law profession, the archives profession and from related disciplines such as academia, audit and information technology. For details, please refer to Section 12 of AAG's draft Public Records Bill.

#### ***Consultation questions 2 (Chapter 5)***

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

#### **AAG's Response**

15. 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?*

#### **AAG's Response**

16. The documents and information on GRS Website are far from sufficient. The Website fails to provide adequate transparency to GRS' operation with regard to archives and records management, nor does it provide sufficient information to potential users of public archives that one would expect a government archives to make available.

17. The information provided by GRS' annual reports and the answers given to questions by the Legislative Council concerning GRS that are posted on the Website are generally sketchy and repetitive, with merely a few updated figures.

18. The Website should include such documents and information as the following:

- plans, strategies, new initiatives and budgets of the GRS
- reports of records management studies conducted by GRS
- reports, including progress reports, of the Electronic Recordkeeping System (ERKS)
- lists of closed confidential archival records transferred to the Public Records Office for which researchers may apply for access
- disposal schedules for the programme records of government B/Ds and public bodies.
- details of records destroyed, and those newly acquired by the Public Records Office and those newly released for public access.

19 Most of the above are made publicly available by archival institutions of good standing operating under an archives law.

### ***Consultation questions 3 (Chapter 5)***

*(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?*

#### **AAG's Response**

20. 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 suggestion?*

#### **AAG's Response**

21. The administrative arrangements currently in place do not provide a clear and effective obligation on government agencies and public bodies to create and maintain complete, accurate, accessible and usable records. The mandatory records management requirements promulgated under GC09 do not include records creation and, despite the Guidelines on Creation and Collection of Records that were issued under GCCR in 2012, there are examples of government officials subsequently failing to create proper records, as in the case of the 'soft lobbying' in relation to the Wang Chau development plan and the official meetings on excessive lead found in drinking water in public housing estates, both of which are matters of public interest. The recent incidents of missing or late submission of a huge quantity of quality inspection forms by contractors in the construction of the Shatin-Central Link rail project and the Hong Kong link road of the Hong Kong-Zhuhai-Macao Bridge are of particular concern as they have great impact on human lives, public safety and use of public money.

22. According to the Consultation Paper, B/Ds had established over 33,500 business rules by the end of 2015 to cover their business functions and activities as required by the GCCR (Consultation Paper, paragraph 5.17). These, however, do not necessarily mean that proper records were or will be created. The rules, whatever the number, mean little and are toothless if no clear legal duty and responsibility are placed on government agencies and public bodies to create and maintain complete, accurate, accessible and usable records and there are no qualified professionals to advise and monitor their performance. Only through the enactment of an archives law containing such a provision, as well imposing



proportionate sanctions for compliance purposes, can that obligation be made effective. For details, please refer to Sections 13-16 and 23 of AAG's draft Public Records Bill.

#### **Consultation questions 4 (Chapter 5)**

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

#### **AAG's Response**

23. 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?*

24. The requirement to prepare records retention and disposal schedules is to be found in well formulated archives legislation and implicitly covers the regular review of schedules to cater for changing operational needs and legal requirements. This is a common practice, and usually the same criteria for establishing the schedules are used in the review process.

25. The problems faced by B/Ds and the GRS are likely owed to the fact that their schedules were not properly formulated in the first place to allow for systematic, well planned and trustworthy disposal actions and effective updating. This could be a consequence of lack of professional expertise in the area.

26. If the government is genuinely asking for public input to improve the guidance given to B/Ds, the disposal schedules for program records and the existing criteria used in their development should be made publicly available so that the problems may be more precisely identified. It is the general practice of government archives of good standing that operate under an archives law to give public access to the disposal schedules of program records in the interest of transparency and gauging public views for improvement<sup>1</sup>.

#### **Consultation questions 5 (Chapter 5)**

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

#### **AAG's Response**

27. 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?*

28. The percentage of records selected for preservation as archives by PRO is less than 1%. This is far below the common international norm of 3-10%. Minimal quantities of policy records from bureaux and records concerning prominent or controversial issues and those of great public interest are to be found among the archival holdings of PRO and made known to

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<sup>1</sup> This question is not relevant to a public consultation on the issue of an archives law. If the B/Ds and GRS are unable to resolve this issue themselves, then the matter should better be referred to professional records management and archives consultants.

the public on GRS Website. There are also great risks of loss of and damage to invaluable archival records which are retained by B/Ds, with electronic records being particularly vulnerable, owing to procrastination in their appraisal and transfer to PRO for preservation and public access.

29. Although the B/Ds should have created, maintained and subsequently transferred archival records to PRO, this appears not to be the case, and almost certainly accounts for why GRS needs to continuously buy copies of records from the National Archives of the UK that the Hong Kong Government itself should have kept.

30. This may indicate that many important historical public records are either not transferred to PRO for appraisal, or PRO does not have adequate capacity to properly identify records of enduring value for preservation, and, if the records have been transferred and are preserved by PRO, they are not made known to the public.

31. To address these problems, the appraisal of records for retention as archives should be undertaken by qualified and experienced professionals. Moreover the transfer of and access to archival records should be mandated within a specified period by an archives law.

32. The 30-year rule for the transfer of records should be reduced as it is outdated and, except for Ireland, is not adopted by the jurisdictions studied. The implications for electronic records, which are easily altered and may become increasingly inaccessible owing to technological obsolescence, are particularly alarming, a situation not helped by the apparent slow progress in implementing the electronic recordkeeping systems in the B/Ds. Also of concern is that whether appraisal and preservation of electronic records are being undertaken by GRS and/or the B/Ds and how effective they may be remains unknown.

33. For details of enforcing proper transfer of records and management of electronic records, please refer to Sections 9 and 14-16 of AAG's draft Public Records Bill.

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

#### **AAG's Response**

34. 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?*

35. There should be a statutory requirement for public records to be appraised and transferred within a specified period with deferral allowed in accordance with exemptions under archives legislation. The failure of current administrative arrangements is evident from the Ombudsman's comment cited at paragraphs 5.42-5.45 of the Consultation Paper.

36. In the interests of transparency, members of the public should be informed of what the criteria for deferral of records transfer are and how they are justified and implemented. In addition, there should be an independent body able to monitor implementation of the archives law and to adjudicate in the case of a disagreement between the Government Archivist and the relevant government agency or public body. This is a role for the Archives Council. For details, please refer to Section 12 of AAG's draft Public Records Bill.



*(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?*

#### **AAG's Response**

37. 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?*

38. There are no clear criteria for the consideration and determination of access status to archival records retained by B/Ds. The current procedure requires B/Ds to determine access status of records not transferred to PRO in accordance with the exemptions listed in the Code on Access to Information (Consultation Paper, Annex II, 3.2), which was established primarily to assess requests for access to information in active records. However as sensitivity of records usually diminishes with the passage of time, access to archival records, which are basically records retired from current usage, should be dealt with more liberally and with far fewer restrictions as in most jurisdictions.

39. Principled guidance on access criteria should be contained in archives legislation, which, additionally, should contain provisions relating to the mechanism for determining when and how access should or should not be granted. These criteria should be available to the public to provide certainty, clarity and understanding of the process. An independent body with the power and capacity to monitor the mechanism and deal with disagreements and appeals should also be established by the archives law. For details, please refer to Sections 17-22 and 12 of AAG's draft Public Records Bill.

#### ***Consultation question 6 (Chapter 5)***

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

40. This is not a question to ask members of the public as it is a highly technical issue and the Consultation Paper provides insufficient detail to allow useful comments and suggestions. That said, efficiency and effectiveness in implementing an ERKS relies on leadership and commitment by key stakeholders, appropriate levels of expertise and funding, and a clear distribution of authority and responsibilities. The government needs to review its difficulties in the light of these aspects and provide a transparent and feasible strategy for public comment.

#### ***Consultation questions 7 (Chapter 6)***

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

#### **AAG's Response**

41. No.

*(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?*

42. In the absence of an archives law, the PD(P)O is used by many B/Ds to deny the release of public records despite the fact that there are various exemptions available under that Ordinance. Clear provisions need to be made in the archives law for the transfer and preservation of archival records containing personal data and the conditions under which those records may be made available. In short the proper management of public records and archives and access to them should not be impeded by another law owing to lack of statutory authority and support. The restriction on access to records containing personal data is critical when there is a requirement to publish historical records containing non-sensitive personal data but there is no practical way to obtain the consent of the data subjects. This can only be resolved through appropriate provisions in the archives law. The archives law should specify that personal data in records identified for archival preservation should not be redacted or deleted prior to transfer and that, in meeting requests for the correction of personal data, the information in and the integrity of archival records are protected. For details, please refer to Section 30 of AAG's draft Public Records Bill.

43. To help ensure that the right balance between the preservation of archives and protection of personal data is maintained in practice, appropriate guidance and training should be given to all B/Ds in dealing with records transfers and public requests for records access.

44. Apart from the PD(P)O, there is a need to examine the issue of copyright in relation to archival records as there is a general requirement for an archives to make copies of archival records for conservation and educational purposes. Also, the archives may have a genuine interest in publishing orphan works, the authorship of which cannot be identified. Currently, there are no provisions in the Copyright Ordinance to address these issues. For details, please refer to Section 29 of AAG's draft Public Records Bill.

### ***Consultation questions 8 (Chapter 6)***

*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?*

### **AAG's Response**

45. Yes. Census records are of great historical interest and importance. It would be difficult to carry out research into many aspects of social, political or economic history without census-based statistics. Equally, biographical research, genealogy and family history would be much impaired if data captured by the census schedules were not preserved and, in the fullness of time, made available for public access. The preservation of census records also ensures that individuals, such as immigrants, the illiterate and the poor, who otherwise might leave behind little in the way of historical records are represented in the historical record of the society in which they lived, thereby providing a more complete and balanced picture of history.

*(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?*

#### **AAG's Response**

46. No. If, as is common practice, the census records are 'closed' prior to transfer to the archives and only released for public access after 100 years. Any sensitivity in relation to their content would diminish over time as a consequence of changes in society's attitudes towards certain personal information and the passing of individuals referred to in the census record.

47. Allowing the subject individual to opt out of having his census record preserved would result in significant quantities of census records being destroyed, which would seriously mitigate against the value of census records series, both as a basis for statistical analysis and an historical source.

48. If the closure and later release of an individual's census record is governed by a statutory provision, it should offer the individual the needed assurance regarding the confidentiality of one's personal data. At times it is necessary to strike a balance in favour of wider and long-term benefits to society as a whole as opposed to those – real or perceived – of an individual. For details, please refer to Section 31 of AAG's draft Public Records Bill

#### ***Consultation questions 9 (Chapter 7)***

*(i) Should the current 30-year timeframe on the transfer of records by B/Ds to the GRS be retained?*

#### **AAG's Response**

49. 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?*

50. As mentioned in answer to question 5 (ii) above, archival records, regardless of their physical format, are at risk of loss and damage if not promptly transferred for preservation. To minimize this risk, it is essential that B/Ds and public bodies be required to transfer records to PRO, either for appraisal or for permanent preservation if already so appraised, within as short a timeframe as practicable after they cease to be active records in meeting operational and business needs, and certainly within an absolute period of time.

51. This time limit is directly and necessarily linked to the period for the release of archival records for public access, which is currently set at 30 years. However, in the interests of good governance and transparency, the international trend for the release of archives to the public is towards adopting a shorter period. The 30-year rule on access is now regarded as outdated by many jurisdictions, including the majority of those studied by the Subcommittee on Archives Law, and the best practice is now the adoption of a 20-year rule or for an even shorter period as the Ombudsman has also suggested (Consultation Paper paragraph 5.44). It is our view that 20 years would be an appropriate, if not the minimum, timeframe for requiring the transfer of records to PRO for preservation and access. For details, please refer to Sections 17-22 of AAG's draft Public Records Bill.

### **Consultation questions 10 (Chapter 8)**

***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?*

#### **AAG's Response**

52. 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?*

#### **AAG's Response**

53. The enactment of an archives law imposing specific obligations and responsibilities on government agencies and public bodies will undoubtedly promote a greater awareness of proper records and archives management and encourage a stronger records culture. This is generally a consequence of legislation, not a substitute for it.

54. In view of the seriousness and significant implications of non-compliance with the provisions of a well-formulated archives law, it is essential that sanctions be put in place to deter non-compliance. This principle is well established and examples are to be found in existing Hong Kong laws, such as the Companies Ordinance (Cap.622) and the Land Registration Ordinance (Cap.128), both of which contain penalties ranging from fines to imprisonment for offences against records, including their unauthorized destruction, erasure, alteration and removal. For details, please refer to Sections 24 of AAG's draft Public Records Bill.

### **Consultation question 11 (Chapter 9)**

*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?*

#### **AAG's Response**

55. Yes. An archives law is urgently needed and is long overdue. There is sufficient evidence from the reports of the Ombudsman and others cited in the Consultation Paper to show that the present administrative arrangements for the management of public records and archives in Hong Kong are inadequate, and that a legal framework is required.



56. Throughout the world most jurisdictions have enacted archives legislation. One might ask why but surely the answer is not merely to have another law on the statute books, but rather for some meaningful purpose. Archives laws enacted in advanced societies, including those studied by the Sub-committee, serve to provide a legal framework for the proper and 'trusted' management of public records and archives. For details, please refer to Section 3 of AAG's draft Bill.

57. Most of the archives laws studied by the Sub-committee were passed decades ago and have not been updated to take account of changes in societies' rising expectations of good governance, accountability and maximum access to public records. However, laws enacted more recently, such as the one in New Zealand and those in the states and provinces of Australia, Canada and the US, reflect the evolving and modern trends in addressing these issues. Hong Kong now has an opportunity to take the lead in this area and enact an archives law that could, and should, prove a model for others to follow.

58. In drafting the Public Records Bill AAG took into consideration the latest archives legislation and international best practices at the time and the requirements of Hong Kong. We look forward to explaining our draft Bill and assisting the Sub-committee and the government in drafting the future archives law for Hong Kong. In short, AAG advocates that an archives law should include the following:

1. The establishment of an independent Records and Archives Authority with a clear mandate.
2. The creation of the position of Government Archivist as the professional head of the authority with appropriate powers in respect of records management, including audit, inspection, appraisal, disposal and records transfer, and of archives administration, preservation and access. In exercising these powers the Government Archivist should be independent.
3. The establishment of an Archives and Records Council with wide community representation to advise on and monitor the implementation of the archives legislation and determine appeals.
4. The imposition of obligations and responsibilities on government agencies and public bodies in respect of recordkeeping and records management, including electronic records, the creation and maintenance of records, their disposal and transfer as public archives.
5. The application of the law to public bodies receiving substantial funding from government.
6. A right of public access to archives under a 20-year rule and mechanism for appeals against denial of access.<sup>2</sup>
7. Exemptions from the 20-year rule.

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<sup>2</sup> While it may be desirable to include exemptions to public access within an Access to Information law it is essential that a *right of public access* should form an integral part of an archives law.

8. Sanctions for non-compliance with recordkeeping and records management requirements and unauthorized alteration to and removal and destruction of public records.
9. Regulatory arrangements relating to legal validity of public records and archives, copyright, personal data and census and statistical records.
10. Publication of annual reports by the Authority and by the Council.

**Consultation questions 12 (Chapter 10)**

***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?*

**AAG's Response**

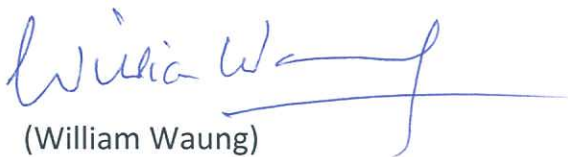
59. Yes, with regard to the implied principle that public bodies should be covered by the archives law and objective criteria are required to define which public bodies would be included.

60. As no details of the 'bespoke' approach are given in the Consultation Paper, it is difficult to comment on it. It may be practical to allow some public bodies, for an initial period of say 2-3 years, to be exempted from selected provisions of the archives legislation and to provide exemptions for certain categories of records. All these should be well thought-through, with clearly defined criteria and a transparent mechanism for their review and amendment.

61. For details, please refer to Sections 2, 22 and 35 of AAG's draft Public Records Bill.

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

62. No comment required. See paragraphs 60 and 61 above.



(William Waung)

Chairman

Archives Action Group

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