



**LAW REFORM COMMISSION'S CONSULTATION PAPER
ARCHIVES LAW**

SUBMISSIONS OF THE LAW SOCIETY OF HONG KONG

On 6 December 2018, the Archives Law Sub-committee of the Law Reform Commission (the "**Sub-Committee**") issued a consultation paper (the "**Consultation Paper**") to invite public views on whether reform of the current public records management regime is needed; and if so, what kind of reform is to be preferred.

The Law Society has reviewed the Consultation Paper and provides the following submissions.

Consultation questions 1

- (i) Should the current placement of Government Records Service (Hong Kong) ("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?

1. Law Society's response:

- (i) We have no objection for the GRS continuing to be a part of the Government, so long as accountability and transparency are not prejudiced or compromised. We also take no view on whether GRS should continue to be placed within the Administration Wing of the

Chief Secretary for Administration's Office, subject to the caveat that its work (such as appraisal, archiving, and disclosure of records) should be free from interference from other Government's departments.

- (ii) N/A.
- (iii) We agree that there should be an advisory body to provide independent advice on public records and archives management matters.
- (iv) Any independent advice given should be considered by GRS Director, and not be binding on the GRS; the role of an advisory body should be only advisory in nature. As to the composition of the advisory board, we do not have any particular views. Nonetheless, to ensure the independence and neutrality of the advisory board, we suggest appointing a majority of non-governmental members with prescribed tenures.

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?

2. Law Society's response:

- (i) We have no comments.
- (ii) N/A.

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?

3. Law Society's response:

- (i) We are not aware of any particular concerns raised in the above regard.
- (ii) N/A.

Consultation questions 4

- (i) Is the GRS' current guidance to Government bureaux and departments (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?

4. Law Society's response:

- (i) To ensure the relevance of the Guideline cum Checklist, we suggest this matter to be brought within the work scope which an independent advisory board may review and advise the GRS on (see our response to Consultation questions 1).
- (ii) N/A.

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?

5. Law Society's response:

- (i) We refer to our submission at paragraph 9(i) below.
- (ii) N/A.
- (iii) We have no comment.
- (iv) N/A.
- (v) We have no comment.
- (vi) N/A.

Consultation question 6

In your view, what other measures should the Government adopt to expedite the implementation of Electronic Record-keeping System (ERKS) and what are the reasons for your suggestions?

6. Law Society's response:

- (i) We have no comment.

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?

7. Law Society's response:

- (i) At present, we do not have strong views on the question. By way of passing remark, nevertheless, we consider that the data protection legislation in Hong Kong is outdated. We urge the Government to review the regime for privacy and data protection as soon as possible and in conjunction with the current proposals of the LRC on Archives Law and on Access to Information.
- (ii) N/A.

Consultation questions 8

After careful deliberation, [the Sub-committee's] provisional view is to follow the approach of the jurisdictions where census information is preserved. To this end, [the Sub-committee] invites 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?

8. Law Society's response:

- (i) Yes
- (ii) Yes. This is self-evident.

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?

9. Law Society's response:

- (i) We consider the 30-year term is too long. However, taking into account the proposed implementation of the electronic record-keeping system (ERKS), we have no strong objection if the 30-year term is to be retained for the time being. A comprehensive review after the full-implementation of the ERKS should be conducted, with a view to shortening the period of closure of public records.

We also comment that, irrespective of the timeframe on the transfer of records, the Government should put in place a disposal alert regime whereby proper public notice must be issued before any intended disposal or destruction of any records. This enhances accountability and governance.

- (ii) N/A.

Consultation questions 10

[The Sub-committee's] 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, [the Sub-committee] observes 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?

10. Law Society's response:

- (i) No.
- (ii) The existing measures are aimed to ensure due compliance. Nevertheless, breaches will only result in a very small chance of disciplinary action. As the statistics highlight, there were 90 cases regarding loss or unauthorised destruction of records between 2015 to 2017; however, only 11 of these cases resulted in disciplinary action against the staff of the relevant B/Ds, representing only approximately 12% of all cases.

To promote accountability of the relevant B/Ds, we agree with introducing strict compliance measures into the proposed archives law. There should be consequences prescribed into legislation, sufficiently severe to act as a deterrent against failure to comply with the public records management regime. Consequences should include civil sanctions for inadvertent non-compliance and criminal sanctions for deliberate breach of the legislation. Such measures should promote a stronger culture of proper records management. Relevant B/Ds should introduce in-depth training to ensure their employees meet their legal obligations.

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, [the Sub-committee's] provisional views are that [the Sub-committee] does 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?

11. Law Society's response:

- (i) We agree with the provisional views to introduce an archives law which will provide statutory backing to the GRS. Currently, the major rules and guidelines on public records management in Hong Kong are dispersed across several circulars, memorandums, guidelines and other publications. Directions given by the Director of Administration have also impacted on the public records management. This is not desirable. The proposed archives law should aim to amalgamate the relevant rules from all different sources. This exercise should increase the government's accountability and transparency.

Practically speaking, and as a matter of legal policy, an archives law should legally oblige effective compliance by the B/Ds.

- (ii) We also note that, in other jurisdictions where there is an archives law, the law is embraced in a single piece of stand-alone legislation. We agree with this approach.

Consultation questions 12

As regards the scope of public bodies to be covered, [the Sub-committee's] 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, [the Sub-committee] consider that a "bespoke" approach is more appropriate.

- (i) Do you agree with [the Sub-committee's] provisional views?
- (ii) If your answer to (i) is in the negative, what are your reasons?

12. Law Society's response:

(i) In our view, all public bodies should be subject to the archives law regime. However, if there are legitimate concerns on resources or the readiness of public bodies, we can see sense in a phased implementation, with priority being given to those public bodies tasked with investigation powers or functions. In any event, all public bodies should be brought within the regime within two years. As to the oversight by archival authority, it seems that the Sub-committee's main concerns are resource related and, as such, we urge the government to provide appropriate resources.

(ii) N/A.

The Law Society of Hong Kong

12 March 2019*

* In the same way that the Consultation Paper does not represent the final views of the Sub-Committee or the Law Reform Commission, the Law Society reserves the right to make further submissions, as and when necessary (for example, with respect to the Final Report).