

**Response from the Administration to the Issues Raised by Members of
the Bills Committee on The Ombudsman (Amendment) Bill 2001
on 28 June 2001**

1. Appointment and tenure of office (Clause 3 of the Bill) (Points 1 to 3 of the checklist)

Reply: The Administration's intention is to provide by law that the office of the Ombudsman is a corporation sole and that a person shall be appointed to hold such office. In view of Members' concern, we propose to redraft section 3 as follows -

- “(1) For the purposes of this Ordinance, there shall be a corporation sole known as “The Ombudsman”.*
- (2) The Ombudsman shall have perpetual succession and -*
- (a) may sue and be sued in that corporate name; and*
- (b) shall have an official seal.*
- (3) The Chief Executive shall in writing under his hand appoint a person to be the Ombudsman.*
- (3A) A person appointed to be the Ombudsman shall, subject to subsection (4), hold office for a period of 5 years and shall be eligible for reappointment.”*

Consequential amendment to the definition of “Ombudsman” in section 2(1) by making reference to section 3(1) will also be made.

After considering similar arrangements in most other statutory bodies, we cannot identify any policy or operational grounds to restrict the terms of reappointment. Therefore, we propose no change to the existing arrangement as provided for under the Ordinance.

2. Pay and Conditions of Service (Section 6 of The Ombudsman Ordinance) (Point 4 of the checklist)

Reply: At the Bills Committee meeting on 28 June, Members expressed the view that in line with a primary objective of the Bill which is to allow flexibility for the Ombudsman so that he can decide and make his own administrative and financial arrangements to facilitate his effective operations, and also to reinforce public perception of the independence of the Ombudsman, we were asked to consider :

- (a) empowering the Ombudsman to determine the terms and conditions of his staff; and
- (b) identifying a suitable arrangement to set out the 'no better than' principle which the Ombudsman should observe in deciding on the remuneration package of his staff as in the case of other publicly funded organisations.

We share Members' concern about the continued requirement for the Ombudsman to have to obtain the Government's approval in an essential staffing matter, i.e. the emoluments and terms of his staff, and are consulting relevant bureaux on (a) and (b) above. Nevertheless, we do not agree to the new suggestion for a management committee to take over the proposed power for the Ombudsman to determine the terms and conditions of his staff.

3. Advisers (Clause 6 of the Bill) (Point 5 of the checklist)

Reply: In view of Members' comment, we propose to make clear in the Bill that the advisers are expected to provide professional or technical advice as distinct from the carrying out of duties by staff of the Ombudsman.

4. Dealing with complaints by mediation (Clause 10 of the Bill) (Points 6 to 8 of the checklist)

Reply: *Background*

To assist Members' examination of the proposed new section 11B, it may be useful to set out the background to the introduction of mediation service by the Ombudsman, the objectives it is intended to achieve and general feedback.

At his meeting with LegCo Members in early 1997, the then Ombudsman briefed Members on the planned introduction of a new Mediation Programme in April 1997. As specified in the

information note submitted to LegCo then (relevant extract at Annex A), “mediation is a means of conflict resolution through a neutral third party and is fast gaining ground among ombudsman institutions because it enables complaints to be dealt with in a timely manner and results in greater satisfaction among complaints and organizations concerned.”

The objectives of the Mediation Programme are :

- (a) to provide another option for complaints to be resolved other than by formal investigation, allowing both the complainant and the organization concerned a chance to hear each side’s story and to resolve their differences;
- (b) to provide speedy redress to complainants within the legal and policy framework and resource capability of the organisation; and
- (c) to allow a greater range of solutions to be explored by all parties in dispute.

With LegCo Members’ support, the Mediation Programme was introduced in April 1997 and has been operating along the following arrangements :

- (a) mediation is a confidential and voluntary process by both parties who can withdraw at any time; and
- (b) in case a particular mediation comes to no avail, the Ombudsman will conduct investigation into the complaint and ensure that the previous mediation would not affect the effective conduct of investigation.

LegCo Members were briefed on the operation of the new mediation service at its meeting with the Ombudsman in November 1997. Thereafter, the provision of mediation service has been regularly reported by the Ombudsman to LegCo particularly through its Annual Reports tabled in LegCo since 1998. Since the introduction of mediation service in April 1997, the number of cases concluded through mediation is 16, 19, 10 and 29 in the last four years (the total number of complaints concluded is 3, 010, 3, 828, 3, 411 and 3, 476 respectively). An extract of the Ombudsman’s Annual Report for year 2000/01 is at the Annex B.

At present, 21 of the 33 investigation officers have received training on mediation. In addition to the undertaking that the same officer

cannot participate in both the mediation and investigation for the same complaint, the Ombudsman is considering the feasibility of setting aside a core team of two to three officers to undertake mediation service only, i.e. they will not undertake investigation duties. The size of the core team may vary according to observed fluctuation in caseloads for the team.

Objective of proposed new section 11B

Against this background, the purpose of the proposed new section 11B is to formalize an existing service provided by the Ombudsman and the safeguards built in the service to ensure that the interest of complainants will not be prejudiced and that the impartiality of any subsequent investigation is also protected. As such, the legal provisions do not seek to introduce major changes to the functions of the Ombudsman. The proposed section 11B(4), (6), (7) and (8) will ensure that :

- (a) participation by all parties in mediation is entirely voluntary,
- (b) either party may decide to withdraw from the mediation at any stage;
- (c) the mediator will not act as the investigator should the same complaint become a subject of subsequent investigation; and
- (d) without the consent of the relevant party, any information or document produced in the course of mediation will not be used in subsequent investigation.

Responding specifically to the issues raised by Members at the last Bills Committee meeting, our view is that :

- (a) The Ombudsman not to act as mediator (Point 6 of the checklist)
 - The Administration agrees that to avoid any possible or perceived conflict of interest, clause 11B(2)(a) may be deleted to ensure that the incumbent of the office of the Ombudsman will not act as a mediator personally.
- (b) Criteria for determining which compliant should be dealt with by mediation (Point 7 of the checklist)

- As Members also noted at the last Bills Committee meeting, it may not be desirable or feasible to specify in law the criteria for dealing with a certain type of complaint by mediation. The primary purpose of including the mediation provision in the Ordinance is to provide complainants with an additional service option to have their complaints resolved more effectively, subject to the voluntary participation of parties concerned. Indeed, it is only when both the complainant and the organization involved see a possible prospect of dispute resolution would they agree to go through the conciliation process. Including a list of criteria in the Bill could in effect be imposing restrictions on the choice of complainant in opting for the alternative and additional service.
- (c) Specify the qualifications of mediators in the Bill (Point 8 of the checklist)
- We would like to point out that the mediation service by the Ombudsman's office is no more than an endeavour to, by way of conciliation, seek to facilitate a settlement through the voluntary participation of the parties involved. Indeed, the very nature of the complaints renders that the service is conducted in an administrative and social rather than formal business setting. Therefore, the Ombudsman's service is not intended to be, nor is it commensurate with, formal arbitration or commercial mediation. Notwithstanding this, the Ombudsman has taken the initiative to ensure that relevant training is provided to officers who provide the service.
 - At present, 21 investigation officers were trained by the Accord Group, Australia in association with the Hong Kong Mediation Council. The course was a 40-hr training programme aiming at providing trainees with adequate understanding of formal mediation process and practical mediation skill through participation in simulated cases. The course was recognized by the Accreditation Committee of the Hong Kong International Arbitration Centre.
 - Given the nature of mediation service provided by the Ombudsman, we do not consider it necessary or appropriate to specify in the Bill the qualifications of the staff providing the service.

5. Information on the current mechanism (together with past year's statistics) in dealing with appeals and complaints on the outcome of mediation/investigation conducted by staff of the Ombudsman. (Point 9 of the checklist).

Reply: The number of such complaints received by the Ombudsman's in year 2000/01 is classified into the following categories -

- (a) Complaints against mediation service : 0
- (b) Complaints against investigation outcome : 243
- (c) Complaints against maladministration (among complaints of (b)) : 9

As regards (b), all complaints will be reviewed by a senior officer at the Assistant Ombudsman level in the first instance. The Assistant Ombudsman will consider all representations made and review all actions and deliberations leading to the original findings by the frontline investigation officers. The decisions and recommendations of the Assistant Ombudsman are further examined by the Deputy Ombudsman before they are considered personally by the Ombudsman.

The office randomly selected 60 such complaint cases in the year 2000/01 for analysis. Of these, 40 cases were found to have yielded no fresh evidence or information that justify further pursuance of the complaint; and only 6 provided fresh evidence or points of substance. Following further review, the conclusions of 3 cases were revised or reversed.

In respect of (c), each of the complaint is investigated independently by the Principal Executive Officer, head of the Administration and Development Division as distinct from the investigation officers or the operational division. A report will then be submitted to the Ombudsman for her personal scrutiny before conclusion. Of the nine complaints received, none was found to be substantiated.

**Proposed Amendment to The Ombudsman (Amendment) Bill 2001
by the Administration**

1. The proposed section 20 provides for the transitional arrangement for the person currently holding office as the Ombudsman. To ensure that the change in legal status of the Ombudsman to a corporation sole will not affect the validity of any employment contracts currently in force or lead to uncertainty in the rights and obligations of the Ombudsman, we propose that the saving provision in the proposed section 20 should be expanded to consist of the following -

“20. Interpretation

In this Part, unless the context otherwise requires -

“amended Ordinance” (經修訂條例) means The Ombudsman Ordinance as amendment by Part II;

“appointed day” (指定日期) means the day on which Part II comes into operation;

“former Ombudsman” (前專員) means The Ombudsman within the meaning of The Ombudsman Ordinance;

“new Ombudsman” (新專員) means The Ombudsman within the meaning of the amended Ordinance;

“The Ombudsman Ordinance” (《申訴專員條例》) means The Ombudsman Ordinance (Cap. 397) that is in force immediately before the appointed day.

20A. Vesting of property, rights and liabilities

- (1) All property, rights and liabilities of the former Ombudsman shall be vested in the new Ombudsman as from the appointed day by virtue of this section.*
- (2) Nothing in this Ordinance affects the validity of anything lawfully done by or in relation to the former Ombudsman before the appointed day.*
- (3) Anything that immediately before the appointed day is in the process of being done by or in relation to the former Ombudsman may be continued by or in relation to the new Ombudsman to the extent that it is consistent with this Ordinance.*

20B. Continuance of appointment

- (1) *Subject to subsection (2), the person holding office as The Ombudsman under The Ombudsman Ordinance immediately before the appointed day is taken as from that day to have been appointed as The Ombudsman under section 3(3) of the amended Ordinance with the same terms and conditions as those which were applicable to the person immediately before that day.*
- (2) *The person taken to have been appointed as The Ombudsman under subsection (1) holds that office only for the unexpired term under his previous appointment, but is eligible for reappointment under section 3(3A) of the amended Ordinance.*
- (3) *Subject to subsection (4), a person who has been appointed by the former Ombudsman under section 6 of The Ombudsman Ordinance and who holds office immediately before the appointed day is taken as from that day to have been appointed by the new Ombudsman under section 6 of the amended Ordinance to the same office with the same terms and conditions as those which were applicable to the person immediately before that day.*
- (4) *The person taken to have been appointed by the new Ombudsman under subsection (3) holds his office only for the unexpired term under his previous appointment under section 6 of The Ombudsman Ordinance.*
- (5) *The effect of subsection (3) in relation to any employment contract with the former Ombudsman that is in force immediately before the appointed day is to modify that contract as from that day by substituting the new Ombudsman for the former Ombudsman and, accordingly and notwithstanding any other law, employment with the former Ombudsman and the new Ombudsman under an employment contract to which that subsection applies is taken to be a single continuing employment with a single employer.”.*

Part II refers to clauses 2 to 19 of the Bill. Other consequential amendments, e.g. the addition of part headings will be made.

**Extracts of Information Note submitted to LegCo by The Ombudsman
(for meeting dated 20.1.1997)**

4. The Ombudsman intends to add to the existing list of alternative dispute resolution (ADR) methods viz Mediation Programme following the success of the INCH Programme introduced in January 1996. The INCH Programme affords an opportunity for organizations concerned to speedily address/resolve simple and personal complaints and is generally well accepted by both complainants and complainee organizations. The number of complaints concluded after referral under the INCH Programme increased from 57 in the first half of 1996 to 259 in the latter half of the year (or 20% of total cases concluded).

Mediation is a means of conflict resolution through a neutral third party and is fast gaining ground among ombudsman institutions because it enables complaints to be dealt with timely and results in greater satisfaction among complainants and organizations concerned. This is in line with the ombudsman concept in striving for a resolution to a problem rather than a finding of fault. The aim of mediation is to foster a “win-win” situation, i.e. both the complainant and the organization concerned should not necessarily have a feeling of loss at the end of the process. Our objectives of the Mediation Programme are -

- (a) to give an option for investigable complaints to be resolved other than by formal investigation allowing both the complainant and the organization concerned a chance to hear each side’s story and to resolve their differences;
- (b) to provide speedy redress to complainant’s within the legal and policy framework and resource capability of the organization; and
- (c) to allow a greater range of solutions to be explored by all parties in dispute.

Mediation is a confidential and voluntary process by both parties who can withdraw from mediation at any time. The failure of a particular mediation would not necessarily bring about nor preclude subsequent investigation of the whole or any part of a complaint. The matter would be re-assessed on its merits. Preparatory work is in hand with a view to launching the Mediation Programme in April 1997.

Extracts of The Ombudsman's Annual Report for year 2000/01***Office of The Ombudsman***

(c) Mediation Service

In April 1997, this Office introduced mediation as another ADR method. This is a voluntary and confidential process through which the complainant meets with representatives from the organisation complained against. The two parties discuss the issues of complaint and explore possible solutions, with investigators from this Office acting as neutral facilitators, not offering opinions or making decisions. They simply provide neutral grounds for the concerned parties to meet to discuss their differences and to find mutually acceptable solutions.

Mediation enables complaints to be dealt with more speedily and more amicably. In cases where practical solutions can be negotiated, mediation can result in greater satisfaction for both complainants and the organisations concerned. The objective of mediation is in line with The Ombudsman's concept of striving for a solution to problems instead of finding guilt.

We have set up a panel of mediators which allows staff to take turn as facilitators and/or co-facilitators. 24 officers of my Office and I have completed a course on mediation which is accredited with the Hong Kong Mediation Council as well as a number of professional institutions.

During the reporting year, we mediated 29 complaints involving 15 scheduled organisations as compared to ten and six respectively in the previous year. Both complainants and organisations concerned are asked to provide feedback on the handling of their case by completing questionnaires. The response suggests that in the majority of cases, mediation is considered an effective, efficient and more amicable means of resolving their complaints.

~~4.22 We recognise that at the primary level, our role is to seek redress for individual citizens aggrieved by official action. Ultimately, we hope to bring about systemic improvements in public administration by tackling the root of problems under complaint and preventing their recurrence. In the event of a complaint being substantiated, every effort will be made by my Office, in consultation with the organisation concerned, to introduce systemic~~
