

**Response from the Administration to the Issues Raised by Members of the Bills Committee on The Ombudsman (Amendment) Bill 2001 on 16 July 2001**

**Appointment and tenure of office (Clause 3)**

Item 4 : The Administration to re-consider whether the Ombudsman should not be re-appointed beyond a specified period.

Reply : As we have explained at the last Bills Committee meeting, the primary consideration in making appointments is to ensure that a most suitable candidate who is fit to perform the important statutory duties is appointed to be the Ombudsman. In identifying suitable candidates, we have to give due regard to important factors such as experience and competence. We also need to safeguard the continued smooth operation of the Office of the Ombudsman (the Office). We do not consider it necessary or appropriate to impose a restriction on the terms of re-appointment to the office of the Ombudsman.

**Powers of Ombudsman (Clause 8)**

Item 6 : The Administration to explain the scope and restraints of the Ombudsman's powers, and the legal effect to be achieved by the new section 7A.

Reply : The proposed new section 7A is necessary to provide for the powers of the Ombudsman on his becoming a corporation sole. Legal advice is that a statutory corporation does not have any power unless it is expressly or impliedly provided in the legislation. In drafting the first part of new section 7A ("may do all such things as are necessary for, or incidental or conducive to, the better performance of his functions"), reference was made to the provisions on the powers of other incorporated statutory bodies (e.g. the powers of the Equal Opportunities Commission under section 64(2) of the Sex Discrimination Ordinance (Cap. 480), and the Privacy Commissioner for Personal Data under section 8(2) of the Personal Data (Privacy) Ordinance (Cap.486)).

The powers as provided for under the new section 7A are restricted for the purpose of "the better performance of his [the Ombudsman's] functions" only. The provision aims to facilitate the smooth running of the new corporation. Examples of the administrative or supportive powers that may be required by the new corporation under section 7A relate to, for example, the setting up of new administrative and financial

systems.

The second part of the new section 7A provides for those specific powers that the Ombudsman requires to manage its resources and operations effectively. The power to hold property enables the Ombudsman to purchase the office premises and the power to enter into contracts enables the Ombudsman to hire staff, purchase equipment, etc.

We propose to relocate the proposed section 7A to become section 7(1A) for better presentation.

***Fees (Clause 9)***

Item 7 : The Administration to provide a paper on the fees to be charged by the Ombudsman.

Reply : The Ombudsman proposes to follow the existing practice, which is approved by the Finance Bureau, to charge the following fees to recover the costs of administrative services –

- (a) requests for photocopying service in respect of the applicant's personal data under the Personal Data (Privacy) Ordinance. The current rate is \$1.5 per copy for A3 or A4 papers, which follows the rate promulgated by the Director of Accounting Services in Accounting Circular No. 2/2001;
- (b) requests for tape dubbing service for recorded telephone conversation for complaint-related personal data made under the Personal Data (Privacy) Ordinance. In accordance with the Financial Circular No. 10/1999, the fee as approved by the Finance Bureau is \$80 per request; and
- (c) photocopying of office publications in the Resource Centre by members of the public at the rate of \$1.0 per copy, as approved by the Finance Bureau.

The new section 9A is necessary to institute a mechanism whereby the Ombudsman will seek the Director of Administration's approval for the charging of the above fees.

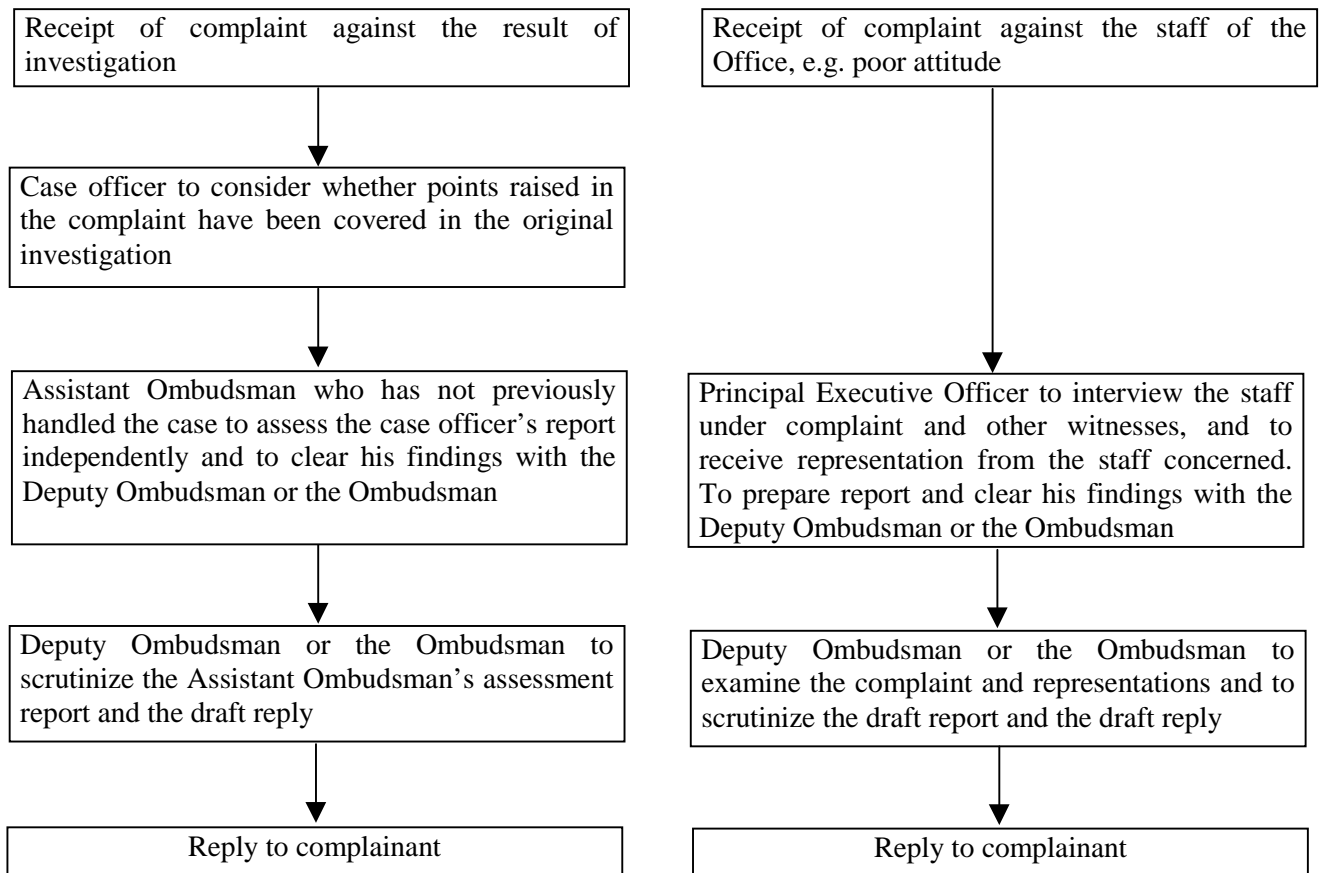
***Review of outcome of an investigation/mediation***

Item 9 : Complaints on the outcome of mediation/investigation should be reviewed by an Assistant Ombudsman who was not involved previously

in the deliberation and decision of the case.

Item 16 : The Administration/Ombudsman to provide a flowchart and explain the procedures for reviewing an investigation.

Reply : The Ombudsman has agreed in principle that a complaint against the result of an investigation will be handled by an Assistant Ombudsman who has not previously handled the case. The procedures for handling a complaint against the investigation outcome or maladministration of office staff is summarized below -



***Dealing with complaints by mediation (Clause 10)***

Item 11 : The Administration to provide a paper on the criteria/considerations/circumstances for determining which complaint could be dealt with by mediation, the number and nature of cases (with examples) which were recommended for mediation in the past 4 years, and the time taken to settle a case.

Item 13 : The Ombudsman to include in its annual report the qualifications of, and training received by its mediators.

Item 15 : The Administration to provide more detailed information on the

questionnaire survey to collect complainants' feedback on the outcome of mediation.

Reply : The Ombudsman will recommend suitable cases for mediation only after an initial assessment and preliminary inquiry. As the mediation service aims to provide an additional service option for effective dispute resolution between relevant parties, the voluntary participation of the complainant and the organization under complaint will be essential throughout the process. In general, to ensure administrative consistency and good practice, the Ombudsman will assess whether the option of mediation may be recommended having regard to such considerations as –

- (a) no significant systemic flaw/public interest is involved;
- (b) the desire of both the complainant and the organization under complaint to resolve the matter more speedily;
- (c) the likelihood of the parties involved reaching a settlement through negotiation; and
- (d) the availability of possible solutions which could lead to a resolution.

Available records indicate that 58 cases were recommended for mediation during the reporting year 2000/2001, of which 29 were successfully mediated whereas the other 29 cases were not accepted for mediation. As the cases recommended for mediation were more straightforward and simple in nature that did not involve systemic flaws or serious maladministration, most of the cases where mediation had not been accepted were eventually concluded through alternative means, such as clarification of policies and practices or upon the taking of remedial measures by the concerned organizations. The Ombudsman does not have figures or records of cases recommended but not accepted for mediation before the year 2000/2001.

Experience suggests that the option of mediation was not accepted by the complainants/organizations for a variety of reasons, including, for example, the unwillingness of the complainants to spare the time for mediation meetings, the complainants' requests subsequently entertained by the concerned organizations, or the complainants considered that mediation would not provide a full solution.

On average, the complaints recommended and accepted for mediation may be concluded within one to three months. Before a mediation session is formally arranged, the Office will spend considerable time in assessing the likelihood of identifying some mutually acceptable solutions between the parties involved, collecting information pertaining

to the full background of the complaint and understanding the respective position of the parties involved. The following is some examples of cases recommended and successfully concluded through mediation –

- Improper handling or delay by an organization in responding to a complaint
- Improper attitude of an organization’s front-line staff or unreasonable outcome in processing of an application for service

Beginning from July 1997, the Office has been collecting feedback from parties to mediation by way of questionnaire to facilitate review and monitoring of the quality of mediation service provided. The overall impression of both the complaints and organizations under complaint as reflected in the questionnaires returned is summarized below, no “unsatisfactory” rating has been received –

	From complainants	From departments
Excellent	7	21
Very good	15	29
Satisfactory	1	2
Unsatisfactory	0	0
Total number of questionnaires returned	23 (out of 61)	52 (out of 74)

The Ombudsman agrees with Members’ suggestion and will include in the annual report the qualification of and training received by the mediators.

**Pay and conditions of service (section 6 of The Ombudsman Ordinance)**

Item 17 : The Administration to consider whether the emoluments and terms of employment of the Ombudsman and his/her staff should be determined by a management committee instead of the CE. The broad principles of administrative arrangements, e.g. the remuneration of its employees should not be better than that of comparable ranks in the civil service, should be specified in the Bill.

Reply : In line with the spirit of the Bill, we accept that the Ombudsman should be given the power to determine the terms and conditions for his staff. Having consulted the relevant bureaux, we propose to amend section 6(2) of The Ombudsman Ordinance to transfer the power of approving the terms and conditions for staff from the CE to the Ombudsman.

The above proposal is premised on the understanding that the

Ombudsman will strictly adhere to the “no better than” principle in determining the remuneration package for staff of the Office in comparison to that received by civil servants of comparable ranks. The Ombudsman will also seek prior consultation with the Director of Administration on any proposed changes to the remuneration package to ensure that there is no deviation from the “no better than” principle. The agreed understanding will be specified in the Memorandum of Administrative Arrangements (MAA) to be entered into between the Ombudsman and the Administration, as in the case of the Equal Opportunities Commission and the Office of the Privacy Commissioner for Personal Data. The Administration will keep track of the Ombudsman’s adherence to the ‘no better than’ principle through some mutually agreed reporting arrangements, also to be specified in the MAA.

The existing section 6(2) is proposed to be amended as follows –

“ Section 6(2) is amended by repealing everything after “shall be” and substituting “determined by the Ombudsman”.

### **Monitoring of the operation and performance of the Ombudsman**

Item 18 : Members considered it necessary to provide checks and balances while maintaining the independence of the Ombudsman. The Administration was requested to provide information on the monitoring/advisory mechanisms to oversee the work/management of Ombudsman’s Offices in overseas countries.

Reply : The existing Ombudsman Ordinance contains adequate and effective monitoring and accountability provisions. For example –

- the Ombudsman is responsible to the CE and the Legislative Council (LegCo) (through LegCo’s role in scrutinizing the Office’s annual estimates, in examining its annual report tabled in LegCo, and in passing a resolution in removing an Ombudsman );
- the Ombudsman meets with the full Council regularly and discusses the Office’s work with Members;
- the Ombudsman is empowered under section 16 to report to the CE if a report has not been adequately acted upon by an organisation or in cases of serious irregularity or injustice. In the latter case, the CE is obliged to table the report at LegCo;
- the Ombudsman is authorised to publish a report on investigation in the public interest under section 16A; and

- the Administration submits to LegCo every year the Government minute setting out the follow up actions by government departments in response to the recommendations made by the Ombudsman in respect of investigated cases.

It is noted, on the basis of information to hand, that the common monitoring measures adopted overseas are the annual reports to the legislature, issue of special reports on injustice sustained, reports on subject organisations failing to act on recommendations, etc. Similar measures are already provided for under The Ombudsman Ordinance. We are not aware of any examples of providing for a statutory 'advisory committee' or 'management committee' in the respective legislation to oversee the work or operation of an Ombudsman in overseas jurisdictions.

### **Annual Report**

- Item 19 : The annual report of the Ombudsman should include the number and nature of complaints received and the outcome of such complaints.
- Reply : The Ombudsman agrees with Members' suggestion and will include the number and nature of complaints against the Ombudsman or his office and the outcome of relevant investigation in the annual report.