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**Paper for the House Committee meeting
on 2 November 2001**

**Report of the Bills Committee on
The Ombudsman (Amendment) Bill 2001**

Purpose

This paper reports on the deliberations of the Bills Committee on The Ombudsman (Amendment) Bill 2001.

Background

2. The Ombudsman Ordinance, Cap. 397 (the Ordinance), provides for the appointment, powers and functions of The Ombudsman to investigate administrative actions taken by or on behalf of the Government or public authorities. While The Ombudsman has been delivering its functions independently, it has been closely linked with the Government and operates by and large like a government department. For example, 74 out of its existing 90 permanent posts are filled by general grades officers seconded from the civil service; its operating expenses are governed by the government resource allocation and accounting systems; it also receives administrative support services from other departments.

3. Members of the Legislative Council (LegCo) have repeatedly expressed concern that the independence of The Ombudsman may be compromised by the secondment of civil servants who are subject to redeployment back to the civil service. Moreover, the current staff secondment arrangement does not provide The Ombudsman with much flexibility in the choice or retention of

staff, and in adjusting its staffing quickly enough in response to changing or unexpected workload.

4. Against this background, it is proposed that The Ombudsman should be "delinked" formally from the Government, and that separate administrative and financial management systems should be established. The Ombudsman will also gradually replace the civil servants on secondment by contract staff.

5. To formalise the "delinking" exercise, new provisions are required under the Ordinance to establish The Ombudsman as a corporation sole.

The Bill

6. The main purpose of the Bill is to amend the Ordinance to make The Ombudsman a corporation sole to enable it to operate in a mode independent of the Administration. As a corporation sole, The Ombudsman will have the capacity to sue and be sued, to acquire and hold property for accommodation of The Ombudsman and his staff, to dispose of property, to enter into contracts and to charge fees for services provided. The Bill also proposes to confer immunity on persons who act in good faith in the performance of functions or in the exercise of powers under the Ordinance.

7. The Bill adds a new Schedule 1A to the Ordinance requiring The Ombudsman to be subject to certain accounting and auditing requirements. The Ombudsman is required to furnish its report, accounts and auditor's report to the Chief Executive (CE) who shall cause them to be tabled in the Council. The Director of Audit is empowered to examine the economy, efficiency and effectiveness with which The Ombudsman has expended his resources, but such examination shall not entitle the Director of Audit to question the merits of the policy objectives of The Ombudsman. The Director of Audit may report to the President of LegCo the results of such an examination.

8. Apart from the provisions for the "delinking", the Bill also proposes other amendments to provide statutory basis for certain functions being performed by The Ombudsman. These include provisions for preliminary inquiries, dealing with complaints by mediation, and appointment of advisers.

9. In addition, with the agreement of the Equal Opportunities Commission (EOC) and the Privacy Commissioner for Personal Data (PCO), the Bill also includes EOC and PCO under the jurisdiction of The Ombudsman.

10. A consequential amendment is also made to the Prevention of Bribery Ordinance, Cap. 201, to include The Ombudsman in Part I of Schedule 1 to Cap. 201.

The Bills Committee

11. Members agreed at the House Committee meeting on 1 June 2001 to form a Bills Committee to study the Bill. Chaired by Hon Margaret NG, the Bills Committee has held four meetings to discuss with the Administration and The Ombudsman, and also considered a submission from the Law Society of Hong Kong.

12. The membership list of the Bills Committee is in **Appendix I**.

Deliberations of the Bills Committee

13. The Bills Committee supports conferring an independent status on The Ombudsman and to make it a corporation sole. Members of the Bills Committee have examined the provisions in detail, particularly the appointment and tenure of office, powers and functions of The Ombudsman, monitoring of the performance of The Ombudsman, dealing with complaints by mediation and the staffing arrangements after the "delinking". The deliberations of the Bills Committee are summarised below.

Appointment and tenure of office (clause 3)

14. The Bills Committee has found it confusing that both "the Ombudsman" and "The Ombudsman" are used in the Bill and the existing provisions in the Ordinance. Members have suggested that clause 3 should clearly distinguish the post-holder from the corporation sole, to enable better understanding of their respective powers and functions.

15. The Administration has explained that "The Ombudsman" is now the title of The Ombudsman as a public officer and will, upon enactment of the Bill, be the name of The Ombudsman as a corporation sole. Under the existing definition in section 2 of the Ordinance, "Ombudsman" means The Ombudsman appointed under section 3. Upon enactment of the Bill, The Ombudsman will be made a corporation sole in section 3(1), and the definition in section 2 will be amended accordingly to mean The Ombudsman referred to in section 3(1). To distinguish the post-holder from the corporation sole, the former will be referred to as 'the person appointed to be The Ombudsman" in the Ordinance.

16. Some members of the Bills Committee have queried the rationale that a person may be appointed as The Ombudsman for an indefinite number of terms. They have pointed out that under the Ordinance, a person once appointed as The Ombudsman can only be removed under very exceptional circumstances such as inability to discharge the functions of his office or misbehaviour. These members consider that an important post such as The Ombudsman who is vested with the responsibility of investigating complaints of injustice and maladministration should not be occupied by a person for an indefinite period, in order to avoid complacency and corruption. These members propose to restrict the re-appointment of the same person as The Ombudsman to not more than one further term of five years, as in the case of PCO.

17. The Administration did not agree to such restriction as it renders the term of re-appointment of The Ombudsman the overriding consideration in making the appointment. The Administration has advised that the primary consideration is to ensure that the most suitable candidate who is fit to perform the important statutory duties is appointed to be the Ombudsman. In identifying suitable candidates, the Administration will give due regard to important factors such as experience and competence, and the need to safeguard the continued smooth operation of The Ombudsman. The Administration has further advised that it cannot identify any policy or operational grounds to restrict the terms of appointment. Notwithstanding the unique example of PCO, no other statutory bodies or authorities are made subject to the same restriction.

18. As the Administration has maintained the position that it does not consider it necessary or appropriate to impose a restriction on the number of

terms of re-appointment of the Ombudsman, the Bills Committee decided at its meeting on 26 September 2001 that the Chairman of the Bills Committee should move a CSA to restrict the re-appointment of the Ombudsman to not more than one further period of five years. Four members were present at the discussion and three were in favour of moving the CSAs while Mr TSANG Yok-sing indicated that he had no strong views on the proposal.

Staff of Ombudsman

19. Members of the Bills Committee have noted that section 6 of the Ordinance provides that the salaries of staff of The Ombudsman and their terms and conditions of appointment are approved by CE. In line with the spirit of the Bill which is to provide flexibility for The Ombudsman to make its own administrative and financial arrangements, members have requested the Administration to consider empowering The Ombudsman to determine the terms and conditions of his staff. Members have also suggested that the Administration should identify an arrangement to set out the "no better than" principle which The Ombudsman should observe in deciding the remuneration package of his staff as in the case of other public-funded organisations.

20. The Administration has accepted members' views and agreed to amend section 6(2) of the Ordinance to transfer the power of approving the terms and conditions for staff from CE to The Ombudsman. The Administration has advised that the amendment is premised on the understanding that The Ombudsman will strictly adhere to the "no better than" principle in determining the remuneration package for his staff in comparison to that received by civil servants of comparable ranks. Any proposed deviation from this principle will require prior consultation with the Director of Administration. Such understanding will be specified in the Memorandum of Administrative Arrangements to be entered into between The Ombudsman and the Administration, and the Memorandum will also include certain reporting arrangements by The Ombudsman.

21. The Bills Committee has expressed concern about the staffing arrangements after The Ombudsman is "delinked" from the Government. In this connection, The Ombudsman has assured members that no staff member will be rendered redundant after the "delinking", as most existing staff members are general grades officers seconded from the Government and they

will return to the Government for re-posting. The Ombudsman is in the process of recruiting its own staff.

22. The Bills Committee has requested The Ombudsman to report the staffing arrangements to LegCo after the enactment of the Bill, in order to ensure that the "delinking" arrangement will not lead to any staff redundancy problems. The Ombudsman, Ms Alice TAI, has undertaken to report the progress to LegCo around mid-December 2001, through a meeting to be arranged by the Complaints Division. The Bills Committee also recommends that the matter should be referred to the Panel on Manpower for follow-up, should Members wish to pursue the matter after receiving the report around mid-December 2001.

Appointment of advisers (clause 6)

23. In response to the Bills Committee's comments, the Administration has agreed to spell out clearly in clause 6 of the Bill that the advisers are to provide professional or technical advice, as distinct from the carrying out of duties by staff of The Ombudsman.

Monitoring the operation and performance of The Ombudsman

24. Some members of the Bills Committee are of the view that there should be sufficient checks and balances to monitor the work of The Ombudsman while maintaining its independence. Given the important statutory functions performed by The Ombudsman, these members consider that the management and operation of The Ombudsman should be subject to monitoring by LegCo or a statutory advisory or management committee. These members have requested the Administration to make reference to other public-funded organisations and overseas experience, and consider whether there should be an advisory or monitoring body to oversee the work and management of The Ombudsman.

25. The Administration has advised that The Ombudsman is responsible to CE and LegCo, and that the existing Ordinance already contains adequate and effective monitoring and accountability provisions. For example, the Ombudsman may be removed from office by CE with the approval by resolution of LegCo under section 3(4)(b), while section 6(3) provides that the

salary or benefit of staff of The Ombudsman shall be paid out of moneys appropriated for that purpose by LegCo. Moreover, section 22 of the Ordinance requires The Ombudsman to make an annual report to CE who will table it at LegCo. Under section 16 of the Ordinance, The Ombudsman is empowered to report to 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. It is also the practice that The Ombudsman meets with LegCo Members once or twice a year to discuss his work.

26. The Administration stresses that The Ombudsman is also subject to monitoring by the Director of Audit and the public. The Administration believes that there are sufficient checks and balances and does not see the need to establish a standing monitoring body to oversee the operation or performance of The Ombudsman. The Administration also advises that in overseas countries, the common monitoring measures adopted are annual reports to the Legislature, special reports on injustice sustained and reports on organisations which failed to act on recommendations. The Administration is not aware of any examples of providing a statutory advisory or management committee to oversee the work or operation of an Ombudsman in overseas countries.

Fees (clause 9)

27. Members note that a new section 9A has been added to empower The Ombudsman to charge reasonable fees in respect of services provided. The Administration has explained that the new section 9A is to institute a mechanism whereby The Ombudsman will seek the approval of the Director of Administration for the charging of these fees. The Ombudsman will follow the existing practice and charge fees for photocopying service and tape dubbing services in accordance with the mechanism approved by the Finance Bureau.

Dealing with complaints by mediation (clause 10)

28. Members of the Bills Committee have sought clarification from the Administration on the background of introducing the new section 11B, and the underlying principles and criteria for determining which cases can be dealt

with by mediation. Members are concerned that the legislation and The Ombudsman should avoid giving the public and the complainants an impression that they may be compelled to accept mediation in lieu of investigation, especially if the subject matter of the complaint involves injustice or serious maladministration.

29. The Administration and The Ombudsman have explained that the new section 11B is only to formalise an existing service provided by The Ombudsman. The section has included safeguards to protect the interest of the complainants and the impartiality of any subsequent investigation. For example, the new sections 11B(4), (6), (7) and (8) ensure that -

- (a) participation in the mediation by the complainant and the organisation affected is voluntary and any party may withdraw at any time;
- (b) the mediator will not act as the investigator should the same complaint become a subject of subsequent investigation; and
- (c) any information or document produced in the course of mediation will not be used in subsequent investigation without the consent of the relevant party.

30. The Bills Committee notes that the mediation service is to provide a positive option for complaints of a minor and straightforward nature to be resolved through measures other than formal investigations. Members also note that The Ombudsman has adopted a Mediation Programme since April 1997 and the number of cases concluded through mediation was 16, 19, 10 and 29 in the last four years, which represented less than 1% of the complaints received.

31. As regards the types of complaints to be dealt with by mediation, the Administration and The Ombudsman have advised that only those minor and straightforward cases will be dealt with by mediation. The Ombudsman will recommend suitable cases for mediation only after an initial assessment and preliminary inquiry. In making the assessment, The Ombudsman will have regard to factors such as the cases do not involve systemic flaw or public interest, both parties have a desire to resolve the matter more speedily and the

likelihood of reaching a settlement through negotiation. According to The Ombudsman, the complaints recommended and accepted for mediation may be concluded in one to three months. So far, the feedback from parties who have participated in the Mediation Programme is generally very good.

32. Members of the Bills Committee consider that the Bill should as far as practicable set out objective standards for cases which may be recommended for mediation. The Administration has advised that it is not feasible to specify in the law the criteria for dealing with a certain type of complaint by mediation. To address members' concern, the Administration has agreed to amend the new section 11B as suggested by the Bills Committee to specify that only those cases which involve "no or only minor maladministration" can be dealt with by mediation.

33. The Bills Committee also shares the concern expressed by the Law Society of Hong Kong that the Ombudsman should not personally conduct a mediation, because if the mediation fails, the complaint may then be subject to a formal investigation. As the Ombudsman will assume overall supervision of all investigations conducted by his staff, the Bills Committee considers that there should be an explicit provision in the Bill that the Ombudsman should not act as a mediator to avoid any conflict of interest. The Administration has accepted the views of the Bills Committee and will amend the proposed section 11B to ensure that the person appointed to be The Ombudsman will not act as a mediator personally.

34. The Bills Committee also notes that the Law Society has suggested that persons appointed to conduct mediations should be mediators accredited by recognised bodies. The Bills Committee has asked the Administration to consider specifying in the Bill the qualifications of the officers providing mediation service. The Administration has explained that the mediation service provided by The Ombudsman is no more than an endeavour to facilitate a settlement through voluntary participation of the parties concerned by way of conciliation. It is not intended to be, nor is it commensurate with, formal arbitration or commercial mediation. Given the nature of the mediation service provided by The Ombudsman, the Administration does not consider it necessary or appropriate to specify in the Bill the qualifications of the staff providing mediation service. Nevertheless, The Ombudsman has arranged relevant training for officers providing mediation service. At

present, 21 investigation officers have received training which is recognised by the Accreditation Committee of the Hong Kong International Arbitration Centre.

Mechanism to deal with appeals and complaints against the outcome of mediation or investigation

35. The Bills Committee has also sought clarification on how The Ombudsman deals with complaints or appeals where the complainants are dissatisfied with the outcome of the mediation or investigation. The Bills Committee notes that all such complaints are reviewed by the Deputy Ombudsman. To ensure impartiality in the review process, the Deputy Ombudsman normally assigns an Assistant Ombudsman who has not participated in the processing of the case to review these cases. The latter's recommendations or decisions are further examined by the Deputy Ombudsman before they are considered personally by the Ombudsman.

Publication of investigation reports and annual reports (clauses 13 and 19)

36. The Bills Committee notes that section 16(1) of the Ordinance stipulates that The Ombudsman may issue an investigation report on his findings, which will include the reasons for the findings and any recommendation or suggestion for remedy. Members note that in practice, apart from issuing to the head of the organisation concerned, the investigation report is also issued to the complainant.

37. The Bills Committee also notes that section 16 of the Ordinance provides that The Ombudsman may report to CE under certain circumstances, including where The Ombudsman thinks fit, where the organisation has not adequately acted upon his recommendations, or where there is a serious irregularity or injustice. In addition, section 16A also empowers The Ombudsman to publish an investigation report in the public interest. Such publication must preserve the anonymity of the identity of the aggrieved, the complainant, the person who is subject of the investigation or any person involved in the investigation.

38. To enable LegCo to better understand and monitor the activities of The Ombudsman, members of the Bills Committee have suggested that the annual

report of The Ombudsman to be tabled in LegCo should include the number of complaints against the outcome of investigation and the outcome of such complaints. This will also enhance the accountability of The Ombudsman to LegCo and to the public. The Ombudsman has agreed to the Bills Committee's suggestion.

Immunity (clause 15)

39. Members note that under clause 15, a new section 18A is added to provide that "no person acting in good faith shall be personally liable for any civil liability or claim" in the performance of functions or in the exercise of powers under the Ordinance. The Law Society is of the view that the new section 18A is very wide and prevents an aggrieved complainant from instituting proceedings in cases of negligence by The Ombudsman.

40. The Bills Committee notes that the provision is modelled on a similar provision for EOC. The legal adviser to the Bills Committee has advised that while the immunity provision protects individual staff members of The Ombudsman, it does not preclude the right of any aggrieved person to institute legal proceedings against The Ombudsman as a corporation sole.

Committee Stage amendments (CSAs)

41. The Administration has proposed amendments to address most of the concerns raised by the Bills Committee. The Administration has also introduced other amendments for greater clarity and better presentation after discussion with the legal adviser to the Bills Committee. A full set of the Administration's proposed CSAs is in **Appendix II**.

42. The Bills Committee has proposed CSAs to limit the re-appointment of a person as The Ombudsman to no more than one further period of five years. The draft CSAs to be moved by the Chairman of the Bills Committee are in **Appendix III**.

Recommendation

43. The Bills Committee supports the resumption of the Second Reading debate on the Bill.

Advice sought

44. Members are invited to support the recommendation of the Bills Committee in paragraph 43.

Legislative Council Secretariat

2 November 2001

**Bills Committee on
The Ombudsman (Amendment) Bill 2001**

Membership list

Chairman Hon Margaret NG

Members Hon Jasper TSANG Yok-sing, JP
Hon Ambrose LAU Hon-chuen, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon CHOY So-yuk
Hon Andrew CHENG Kar-foo
Hon Audrey EU Yuet-mee, SC, JP

(Total : 7 Members)

Clerk Mrs Constance LI

Legal Adviser Mr LEE Yu-sung

Date 3 July 2001