

*The Jurisdiction of Ombudsman Systems
in Selected Places*

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Executive Summary

1. In the United Kingdom (UK), there is a wide range of ombudsman schemes. The Parliamentary Commissioner for Administration deals with complaints about government departments; the Health Service Commissioner handles complaints about health services and the Commissioners for Local Administration deal with complaints about local authorities. In recent years, devolution has led to the establishment of a single integrated public services ombudsman in both Scotland and Wales.
2. In New Zealand, the Ombudsman is an Officer of Parliament to inquire into complaints raised against central, regional and local government organizations and agencies. The Ombudsman of the Province of British Columbia in Canada (BC) is an officer of the provincial legislature dealing with complaints concerning provincial government ministries and local organizations.
3. In Australia, there is a Commonwealth Ombudsman that deals with complaints against decisions of the federal government and an Ombudsman in each state and the Northern Territory to deal with local matters. The Commonwealth Ombudsman also holds the offices of Defence Force Ombudsman, Immigration Ombudsman, Postal Industry Ombudsman and Taxation Ombudsman.
4. Among the selected places, there are different arrangements regarding the relationship between the Ombudsmen and the police. In the UK, New Zealand and BC, the police are not within the jurisdiction of their Ombudsmen. However, these three places all have independent statutory bodies for overseeing the system for handling complaints made against the police forces. Both the Independent Police Complaints Commission of the UK and the Police Complaints Authority of New Zealand have power to conduct independent investigations into serious complaints. The BC Police Complaint Commissioner is an officer of the provincial legislature.
5. In Australia, the Ombudsmen generally exercise a re-investigatory role with respect to complaints against the police. Although in some jurisdictions, a complaint may be made either directly to the Ombudsman or to the police, the initial investigation is usually conducted by the police. The Ombudsman's role is to monitor the internal investigations and ensure that they are conducted properly. The Ombudsman can investigate only if he is not satisfied with the outcome of the internal investigations. The exception is New South Wales (NSW). The NSW Ombudsman has power of direct investigation over the use of police powers and supervisory jurisdiction over primary investigations conducted by the police.
6. Among the places studied, their Ombudsman schemes are not used for handling complaints concerning human rights and children's rights. Both New Zealand and Australia have their own human rights commissions. The UK is on its way to establish a Commission for Equality and Human Rights. In BC, human rights complaints are dealt with by the BC Human Rights Tribunal.

7. For protection of children's rights, independent commissioners for children and young people are set up in various jurisdictions of the UK and New Zealand. In BC, there is an Officer for Children and Youth. BC is considering setting up a new Representative for Children and Youth. In Australia, protection of children's rights falls within the jurisdiction of the national human rights commission and the children's commissioners in some Australian states. In NSW, the Ombudsman has been given jurisdiction to investigate cases involving alleged child abuse.
8. In addition to their traditional role of investigating complaints of maladministration, the public sector ombudsmen in the selected places are given new functions of investigating complaints caused by service failure, performing a supervisory role in the freedom of information and protected disclosure areas, and ensuring the quality of service to the public by government contractors.
9. In the UK, New Zealand and BC, bodies within the jurisdiction of the Ombudsmen are listed in their enabling legislation. New bodies must be brought specifically within the jurisdiction of the Ombudsmen before complaints against them can be considered. In Australia, bodies within the jurisdiction of the Commonwealth Ombudsman are specified in a more generic term as "government departments or prescribed authorities".
10. Among the selected places, matters that are excluded from investigation by their respective Ombudsmen are very similar. They include actions affecting foreign affairs, investigation of crime, protection of state security and conduct of civil or criminal proceedings. Most of the Ombudsmen in the UK are prohibited from investigating matters relating to personnel administration in the civil service and commercial transactions of a listed body, while the Ombudsmen in New Zealand, and BC do not have such restrictions. In Queensland and Victoria of Australia, the Ombudsmen can also handle matters relating to personnel matters for the civil service.

The Jurisdiction of Ombudsman Systems in Selected Places

Chapter 1 – Introduction

1.1 Background

1.1.1 At its meeting on 15 December 2005, the Panel on Administration of Justice and Legal Services of the Legislative Council (LegCo) requested the Research and Library Services Division to conduct a research on the jurisdiction of the ombudsman systems in selected places.

1.2 Scope of research

1.2.1 The research investigates the jurisdiction of the ombudsman systems in selected places, focusing on the following aspects:

- (a) the arrangement of ombudsman services;
- (b) the organizations covered; and
- (c) investigation powers and purview.

1.2.2 The research studies the experiences in the United Kingdom (UK), New Zealand, the Province of British Columbia in Canada (BC) and Australia. For the purpose of this research, only major public ombudsman services in the selected places are discussed.

1.2.3 The UK and Australia are chosen because both of them have a wide variety of ombudsman systems, installing different ombudsmen in specific policy areas. There is also an ongoing review on public sector ombudsman services in England of the UK. New Zealand is selected because it is the first common law jurisdiction to establish an ombudsman. In addition, the jurisdiction of the ombudsman in New Zealand has in recent years extended into the freedom of information and protected disclosure areas. BC is selected because it serves as a useful reference in the regional context.

1.3 Methodology

1.3.1 Information for this report is obtained from the Internet, government reports and relevant reference materials. Enquiries were also sent to the relevant authorities in the selected places.

Chapter 2 – The United Kingdom

2.1 Basic arrangement

2.1.1 There is a wide range of ombudsman schemes in the UK. Some are concerned with the public sector, while others deal with the private sector. There are statutory as well as non-statutory ombudsman set-ups.¹

2.1.2 Ombudsmen were introduced into the public sector in the UK in the 1960s and 1970s. The Parliamentary Commissioner for Administration (PCA), i.e. the Parliamentary Ombudsman, was established in 1967. In the 1980s and 1990s, the use of the ombudsman schemes was extended to the private sector. The first private sector scheme, the Insurance Ombudsman's Bureau, was set up in 1981.

2.1.3 Three major public sector ombudsman schemes exist in the UK: the parliamentary commissioners for administration deal with complaints about government departments; the health service commissioners handle complaints about health services and the local government commissioners deal with complaints about local authorities. In recent years, devolution has led to the establishment of a single integrated public services ombudsman in both Scotland and Wales.

2.1.4 The term "Ombudsman" has not been adopted in the statutory title of the public sector ombudsmen in the UK, except those established recently². The term "Commissioner" is used instead. Nevertheless, there is no legal restriction on using the title "Ombudsman".

2.1.5 In the UK, there are public bodies other than the ombudsmen that deal with complaints relating to human rights. The UK Parliament is currently considering the Equality Bill, which provides for the establishment of the Commission for Equality and Human Rights (CEHR).³ CEHR will be a single integrated body to replace the three existing equality commissions (the Commission for Race Equality, the Equal Opportunities Commission and the Disability Rights Commission). CEHR will have the power to conduct inquiries and investigations. CEHR will cover England, Wales and Scotland. At present, there is a human rights commission in Northern Ireland.

¹ For a list of ombudsman schemes in the UK, see http://www.adrnw.org.uk/go/SubPage_35.html.

² For example, the word "Ombudsman" is used in the legislation establishing the Legal Services Ombudsman and the Financial Services Ombudsman.

³ For further information, see <http://www.commonleader.gov.uk/output/Page962.asp>.

2.1.6 With respect to the protection of children's rights, there are independent commissioners for children and young people in England, Scotland, Wales and Northern Ireland. The Children's Commission in England (CCE) is a relatively new independent organization created by the *Children Act 2004*. CCE's remit is to look after the interests of children and young people as a whole. CCE is not an ombudsman and does not have the powers to consider individual cases. On the other hand, the Children's Commissioner for Wales has review and investigative powers and can call for information (people and papers) backed up by contempt of court powers.

2.1.7 In the UK, complaints in relation to the police service are dealt with by specialized mechanisms.⁴ The Independent Police Complaints Commission is a non-departmental public body established under the *Police Reform Act 2002*. The Commission, in existence since 1 April 2004, is responsible for overseeing the system for handling complaints made against the police forces⁵ in England and Wales. The Commission has its own independent investigators, giving it the choice of supervising police investigations or conducting independent investigation itself for serious complaints.⁶ The Commission is not within PCA's jurisdiction.

2.1.8 The oversight of the police complaints system in Northern Ireland is the responsibility of the Police Ombudsman for Northern Ireland, and is the responsibility of the Procurator Fiscal⁷ in Scotland.

2.2 Jurisdiction and investigation power

The Parliamentary Commissioner for Administration

2.2.1 PCA was established by the *Parliamentary Commissioner Act 1967 (PC Act)*.⁸ From the outset, PCA has worked in co-operation with a Select Committee of the House of Commons, which has been the Select Committee of Public Administration since 1997.

⁴ For further discussion, see Seneviratne (2002) chapter 8.

⁵ The police forces of the UK are generally organised at the level of administrative districts. Certain departments of the Metropolitan Police operate throughout the country, including the Anti-Terrorist Branch, the Royalty and Diplomatic Protection Department, and certain units of the Special Branch.

⁶ In the majority of cases, the police will handle the complaint, and the Independent Police Complaints Commission will supervise the investigation, or the police alone will deal with the case. For less serious cases, the Commission will manage the police investigation. In more serious cases (such as allegations of assault or cases involving serious injury), the Commission may conduct a completely independent investigation.

⁷ The Procurator Fiscal is part of the Crown Office and Procurator Fiscal Service, which is responsible for the prosecution of crime, the investigation of sudden or suspicious deaths and complaints against the police in Scotland.

⁸ For a detailed history of PCA, see Gregory & Giddings (2002) part II.

2.2.2 Under the *PC Act*, PCA is appointed by the Crown. PCA is an Officer of the House of Commons and holds office "during good behaviour" until he attains the age of 65. PCA may be relieved of office by the Crown at his own request, or removed from office following a resolution from both Houses of Parliament.

2.2.3 In practice, the appointment of PCA is made by the Queen on the advice of the Prime Minister after consultation with the Leader of the Opposition and the Chairman of the Select Committee on Public Administration.⁹

Jurisdiction

2.2.4 Under section 5(1) of the *PC Act*, PCA may investigate any action taken by or on behalf of a government department or other authority to which the *PC Act* applies where a member of the public claims to have sustained injustice in consequence of maladministration in connection with the action so taken.

2.2.5 The term "maladministration" is not defined in the *PC Act*. When the Act was being taken through Parliament, Mr. Crossman, the then Leader of the House of Commons, gave the following examples of maladministration: bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude and arbitrariness. This list of examples is known as the "Crossman Catalogue".¹⁰ When a matter falls within PCA's jurisdiction, he has wide discretion as to whether or not to accept the complaint.¹¹

2.2.6 The authorities subject to investigation by PCA are listed in Schedule 2 to the *PC Act*¹². As amended by the *Parliamentary and Health Service Commissioners Act 1987*, some 50 non-departmental public bodies were added under PCA's jurisdiction. Since PCA is authorized to investigate actions taken by or on behalf of an authority listed in the Schedule, the executive agencies that act on behalf of a government department are also subject to the jurisdiction of PCA.

2.2.7 Under sections 4(3), (4) and (5) of the *PC Act*, a public body may only be listed if (i) it is a government department or acts on behalf of the Crown; (ii) at least half of its revenues is provided by Parliament or statutory fees or charges; and (iii) it is wholly or partly appointed by the Crown or a government department. Bodies involved in education or non-industrial training, professional qualifications and conduct, or the investigation of complaints should not be listed.

⁹ Gregory & Giddings (2000) p. 23.

¹⁰ For further information, see Senevirantne (2002) pp. 40-53.

¹¹ Section 5(5) of the *PC Act* provides that "[i]n determining whether to initiate, continue or discontinue an investigation under this Act, the Commissioner shall, subject to the foregoing provisions of this section, act in accordance with his own discretion; and any question whether a complaint is duly made under this act shall be determined by the Commissioner." For discussion, see Senevirantne (2002) pp. 113-5.

¹² Originally, the authorities listed in Schedule 2 were mainly departments of the central government.

2.2.8 At present, about 350 government departments and public bodies which are subject to PCA's jurisdiction are listed on his website, including government departments, the Electoral Commission, advisory committees and various cultural authorities. PCA's jurisdiction can be amended and/or updated by way of Orders in Council or by other legislative means.

2.2.9 The *Courts and Legal Services Act 1990* extended PCA's jurisdiction to administrative functions exercisable by administrative court and tribunal staff. Subsequently, in 1996, some 37 tribunals were added to PCA's jurisdiction, with the matters to be investigated being confined to the administrative functions of the administrative staff of the tribunal concerned.

2.2.10 Under his current jurisdiction, the departments and matters which PCA is precluded from investigating remain wide-ranging. For instance, the police¹³, nationalized industries, the Joint Intelligence Organisation, the Prime Minister's Office and the Bank of England are all excluded. Schedule 3 to the *PC Act* sets out the excluded matters, which are summarized as follows:

- (a) actions affecting foreign affairs;
- (b) actions taken outside the UK (except actions by consular officers);
- (c) actions taken in connection with overseas territories;
- (d) extradition of fugitive offenders;
- (e) investigation of crime;
- (f) protection of state security (including passport matters);
- (g) legal proceedings before any court of law in the UK or any international court or tribunal, and all disciplinary proceedings in the armed forces;
- (h) prerogative of mercy and reference of questions to certain courts;
- (i) hospital services;
- (j) contractual and commercial transactions, other than the acquisition of land compulsorily or by agreement and the disposal of surplus land so acquired;
- (k) all personnel matters (including pay, discipline and removal) in the civil service and the armed forces, or where the government has power to take, determine or approve action;

¹³ See paragraph 2.1.7 of this research report.

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- (l) grant by the Crown of honours, awards, privileges or charters; and
 - (m) actions taken by the administrative staff of a court or tribunal on the direction or on the authority, express or implied, of a judge or a member of the tribunal.

2.2.11 Two controversial items in PCA's list of exclusions are personnel administration in the civil service, and contractual and commercial transactions. The UK Parliament has made repeated attempts to bring these exclusions into PCA's jurisdiction, but so far without success.¹⁴ At present, there are other mechanisms dealing with certain complaints about personnel matters in the civil service. For example, complaints relating to superannuation matters can be handled by the Pensions Ombudsman. Issues in relation to the appointment process may be dealt with by the Commission for Public Appointments¹⁵.

2.2.12 The official justification given for the exclusion of contractual and commercial transactions is that PCA's remit should be limited to complaints against the government by an aggrieved citizen, rather than by an aggrieved supplier of goods and services. However, there are views that PCA should be able to investigate complaints where a government department has been improperly influenced in deciding eligible tenders for contracts or where decisions have been made in arbitrary manner.¹⁶

Investigation power

2.2.13 PCA is not allowed to perform investigation on his own initiative. All complaints to PCA must be channelled through a Member of Parliament (MP), with the process being known as the MP filter. Under the *PC Act*, PCA can accept complaints, referred by MPs, from individuals, companies, partnerships, trustees, amenity groups or interest groups. The aggrieved person must make the complaint himself. If he is unable to act for himself, a representative can make the complaint on his behalf.¹⁷

2.2.14 Where PCA proposes to conduct an investigation into a complaint, section 7(1) of the *PC Act* requires that he must afford to the principal officer of the department or authority concerned and to any person who is alleged in the complaint to have taken or authorized the action complained of, an opportunity to comment on any allegations contained in the complaint.

¹⁴ See Seneviratne (2002) pp. 105-10.

¹⁵ The Commission is responsible for regulating and monitoring the recruitment of personnel to the civil service and public service organizations.

¹⁶ See Seneviratne (1994) pp. 23-4.

¹⁷ Section 6(2) of the *PC Act* provides for a complaint to be made by the personal representative of a deceased, or by the member of the family or other suitable representative where a person is for any reason unable to act for himself.

2.2.15 All investigations must be conducted in private.¹⁸ PCA is empowered to determine the procedure for conducting an investigation he considers appropriate in the circumstances of the case.¹⁹ In particular, PCA may require any Minister, officer or member of the department or authority concerned or any other person relevant to the investigation to furnish any information or produce any document.²⁰

2.2.16 Witnesses can be compelled to give evidence, and PCA is empowered to administer oaths. Crown privilege may not be used to withhold evidence.²¹ However, no person is required or authorized to furnish any information or answer any question relating to proceedings of the Cabinet or any committee of the Cabinet or to produce any document relating to such proceedings. The Secretary of the Cabinet, with the approval of the Prime Minister, can certify any information, question, document or part of a document relating to the Cabinet, and the certificate issued is conclusive.²²

2.2.17 PCA may certify an offence to the court where a person without lawful excuse obstructs him or any of his officers in the performance of his functions or is guilty of any act or omission in relation to an investigation which, if that were a proceeding in court, would constitute contempt of court.²³

The Health Service Commissioner for England

2.2.18 The UK health service ombudsman system was established in 1973.²⁴ Until recently, PCA also held the offices of Health Service Commissioner for England, Wales and Scotland. Devolution in Scotland and Wales has led to the establishment of the Scottish Public Services Ombudsman and the Public Services Ombudsman for Wales. These new offices undertake the health service commissioner's role in their respective regions.

2.2.19 At present, PCA holds the office of Health Service Commissioner for England (HSC). However, there is no formal requirement for the office to be taken by PCA. HSC is appointed by the Crown and holds office until he attains the age of 65. HSC may only be removed from office by the Crown if incapacitated, or following a resolution from both Houses of Parliament.²⁵

¹⁸ The *PC Act*, section 7(2).

¹⁹ *Ibid.*

²⁰ The *PC Act*, section 8(1).

²¹ The *PC Act*, sections 8(1), (2) and (3).

²² The *PC Act*, sections 8(4).

²³ The *PC Act*, section 9(1).

²⁴ See Gregory & Giddings (2002) pp. 493-516.

²⁵ The *Health Service Commissioner Act 1993*, Schedule 1.

Jurisdiction

2.2.20 HSC operates under the provisions of the *Health Service Commissioner Act 1993 (HSC Act)* as amended²⁶. Section 2 of the *HSC Act* provides that the following bodies are subject to investigation by HSC:

- (a) strategic and special health authorities²⁷;
- (b) National Health Service Trusts;
- (c) Primary Care Trusts²⁸;
- (d) NHS Foundation Trusts²⁹; and
- (e) the Dental Practice Board.

2.2.21 HSC may investigate a complaint which involves injustice or hardship in consequence of:

- "(a) a failure in a service provided by a health service body,*
- (b) a failure of such a body to provide a service which it was a function of the body to provide, or*
- (c) maladministration connected with any other action taken by or on behalf of such a body." ³⁰*

2.2.22 HSC's jurisdiction is much broader than maladministration. HSC may investigate complaints about hardship or injustice caused by the failure of the National Health Service (NHS) or a related body to provide a service, by a failure in service or by maladministration.

²⁶ As amended by the *Health Service Commissioners (Amendment) Acts 1996* and 2000.

²⁷ Authorities and trusts are two different types of organizations that run the National Health Service at the local level. The whole of England is split into 28 strategic health authorities.

²⁸ Primary Care Trusts are used for managing primary care to patients. They may involve services provided by a doctor, a dentist, an optician or a pharmacist.

²⁹ NHS Foundation Trusts are a new type of NHS organizations, established as independent, not-for-profit public benefit corporations with accountability to their local communities rather than under central government control.

³⁰ The *HSC Act*, section 3(1).

2.2.23 Three major changes to HSC's jurisdiction were made under the *Health Service Commissioners (Amendment) Acts 1996*.³¹ The first change has extended HSC's jurisdiction to include the providers of general medical, dental, ophthalmic and pharmaceutical services and people in the independent sector who provide services to NHS patients. The second change has removed the exclusion of matters of clinical judgment from HSC's remit. HSC is permitted to investigate matters of clinical judgment, including the merits of clinical decisions.

2.2.24 The third change has involved the establishment of a two-stage complaint procedure within NHS. The first stage ("local resolution") requires the service provider to attempt to resolve a complaint. If the complaint cannot be resolved by local resolution, the complainant may request the Healthcare Commission³² to review the case, i.e. the second stage. HSC cannot accept cases for investigation until he is satisfied that the earlier stages of the complaint procedures have been invoked and exhausted, unless he believes that in the particular circumstances it would not be reasonable to do so.

2.2.25 Certain matters are excluded from investigation by HSC, in particular:

- (a) matters in relation to which the aggrieved person has or had a right of appeal, reference or review to a tribunal, or a remedy by proceedings in a court of law – unless HSC is satisfied that in the particular circumstances it is not reasonable to expect that the aggrieved person should use these alternatives;
- (b) an action which is the subject of a special statutory inquiry; and
- (c) an action which is covered by the protective functions of the Mental Welfare Commission for Scotland.³³

2.2.26 HSC has no power to investigate matters relating to employment, pay, discipline or other personnel matters.³⁴ Contractual or other commercial transactions are also excluded, except:

- (a) NHS contracts for community care; and
- (b) matters arising from arrangements by NHS bodies with a non-NHS body to provide services for patients.³⁵

³¹ For further discussion, see Giddings (2004).

³² The Healthcare Commission is an independent body set up to promote improvement in the quality of health care and public health. One of the Commission's statutory duties is to consider complaints about NHS organizations that the organizations themselves have not resolved.

³³ The *HSC Act*, section 4(1)-(3).

³⁴ The *HSC Act*, section 7(1).

³⁵ The *HSC Act*, section 7(2).

Investigation power

2.2.27 The public has the right of direct access to HSC. Where HSC proposes to conduct an investigation into a complaint, section 11(1) of the *HSC Act* requires that he must afford to the health service body concerned and to any person who is alleged in the complaint to have taken or authorized the action complained of, an opportunity to comment on any allegations contained in the complaint.³⁶

2.2.28 All investigations must be conducted in private.³⁷ HSC is empowered to determine the procedure for conducting an investigation he considers appropriate in the circumstances of the case.³⁸ In particular, HSC may obtain information from such persons and in such manner, and may make such inquiries, as he thinks fit. He may also determine if any person is legally represented.³⁹

2.2.29 HSC may certify an offence to the court where a person without lawful excuse obstructs him or any of his officers in the performance of his functions or is guilty of any act or omission in relation to an investigation which, if that were a proceeding in court, would constitute contempt of court.⁴⁰

The Commissioners for Local Administration in England

2.2.30 There are three Commissioners for Local Administration (CLAs) in England, with a division of labour based on geographical locations. One deals with complaints against authorities in the north of England and part of central England. Another handles complaints about authorities in north London, Buckinghamshire, Berkshire, Hertfordshire, Essex, Kent, Surrey, Sussex, Suffolk and Coventry City. The third CLA deals with complaints about authorities in south London and the rest of England.

2.2.31 CLAs are appointed by the Crown on the recommendation of the Secretary of State. CLAs hold office "during good behaviour" until they attain the age of 65. CLAs may be relieved of office by the Crown at their own request, or removed on the grounds of incapacity.

³⁶ For a more detailed discussion, see Giddings (2000).

³⁷ The *HSC Act*, section 11(2).

³⁸ The *HSC Act*, section 11(3).

³⁹ Ibid.

⁴⁰ The *HSC Act*, section 13(1).

Jurisdiction

2.2.32 CLAs operate under the provisions of the *Local Government Act 1974* as amended. CLAs have jurisdiction to investigate any complaint of injustice arising from maladministration by local authorities and a number of other public bodies. The authorities subject to investigation include local councils, local police authorities⁴¹, development corporations and water boards.⁴²

2.2.33 CLAs can investigate complaints about most of the local council matters, including housing, planning, education, social services, highways, consumer protection, drainage and local taxation. CLAs can also investigate complaints about the operation of a local council, but cannot question the merits of a council's decision in the absence of fault.

2.2.34 Schedule 5 to the *Local Government Act 1974* excludes certain matters that CLAs can investigate, such as matters relating to the internal regulation of schools, personnel matters, actions concerning the commencement of legal proceedings and criminal investigations, and commercial and contractual matters.

Investigation power

2.2.35 The public has the right of direct access to CLAs. The powers of investigation conferred to CLAs are similar to those of HSC. CLAs may obtain information from such persons and in such manner, and may make such inquiries, as they think fit. They may also determine if any person is legally represented.⁴³ All investigations must be conducted in private. In addition, CLAs have the power to certify that obstructions, acts or omissions would constitute a contempt of court if the proceedings were taking place in court.⁴⁴

Reform of public sector ombudsmen in England

2.2.36 In October 1998, CLAs and the Parliamentary and Health Service Ombudsman⁴⁵ jointly submitted a paper to the UK government, proposing a comprehensive review of the public sector ombudsman system in England. The paper suggested the creation of a commission providing a single gateway for complaints. In 1999, the government set up the Cabinet Office Review of Public Sector Ombudsman. A review report was published in April 2000⁴⁶ and subsequently a consultation document on the review was issued⁴⁷.

⁴¹ The administrative activities of police authorities are within CLAs' jurisdiction, but not the conduct of individual police officers.

⁴² The *Local Government Act 1974*, section 25(1).

⁴³ The *Local Government Act 1974*, section 28(2).

⁴⁴ The *Local Government Act 1974*, section 28(8).

⁴⁵ PCA also held the office of Health Service Commissioner then.

⁴⁶ The purpose of the review was to consider the arrangements for the Ombudsmen against the background of more integrated public services. Collcutt & Hourihan (2000).

⁴⁷ Cabinet Office (2000).

2.2.37 In August 2000, the Public Administration Select Committee of the UK Parliament published a report: "Review of the Public Sector Ombudsmen in England", which supported the creation of a single commission. The UK government, responding by way of a parliamentary question in July 2001, agreed with the review recommendations and announced that detailed proposals would be published in due course. However, the government, so far, has not implemented the proposals.

2.2.38 In August 2005, the Cabinet Office published another consultation paper, entitled "Consultation Paper on the Reform of Public Sector Ombudsmen Services in England".⁴⁸ The reforms proposed in the paper aim at enabling various public sector ombudsmen to work collaboratively, including consulting each other and sharing information, and enabling them to undertake joint investigations and produce joint reports; to issue guidance and advice; and to seek alternative methods of resolving complaints. The paper suggests that the proposed changes are to be implemented in 2006.

The Scottish Public Services Ombudsman

2.2.39 The Scottish Public Services Ombudsman (SPSO) was established by the *Scottish Public Services Ombudsman Act 2002 (SPSO Act)*. This position replaces three previous offices – the Scottish Parliamentary and Health Service Ombudsman, the Local Government Ombudsman for Scotland and the Housing Association Ombudsman for Scotland. The persons and organizations covered by the *SPSO Act* are listed in Schedule 2 to the Act, and include the Scottish Parliament, the Scottish Executive, the Scottish public authorities, health service organizations and local authorities.

2.2.40 Apart from the merger of the offices, the arrangements for SPSO are primarily modelled on those for PCA with the following major exceptions:

- (a) SPSO and the Deputy Ombudsmen are appointed by the Crown on the nomination of the Scottish Parliament.⁴⁹ SPSO and the Deputy Ombudsmen are prohibited from holding certain public appointments or paid offices during their appointment. They are also disqualified from certain public appointments or paid offices for three years after completing their appointment.⁵⁰

⁴⁸ Cabinet Office (2005).

⁴⁹ The *SPSO Act*, sections 1(1) and (2). SPSO and the Deputy Ombudsmen are appointed for a period to be determined by the Scottish Parliamentary Corporate Body, which must not exceed five years. They are eligible for re-appointment for a second term. A third term is allowed only if it is desirable in the public interest under special circumstances.

⁵⁰ The *SPSO Act*, paragraph 3 of Schedule 1. It provides that during the three-year period after a person has ceased to hold office as the Ombudsman or the Deputy Ombudsman, he is disqualified from (a) appointment or election as a member or staff of a listed authority or (b) appointment to any paid office by a listed authority.

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- (b) The scope of investigation has been extended to include not only actions taken by an authority, but also any 'service failure', i.e. any failure in a service provided or failure to provide a service.⁵¹
 - (c) Complaints to SPSO are not subject to any Member of Scottish Parliament filter and may be made whenever a member of the public claims to have sustained injustice or hardship in consequence of maladministration, service failure or other actions as appropriate. Investigation may also be carried out pursuant to a request by the public authority affected.⁵²
 - (d) SPSO can investigate maladministration in a process leading up to contracts or commercial transactions, e.g. a failure to invite a particular company to tender.⁵³
 - (e) A new provision is introduced to enable SPSO to take action to resolve a complaint informally.⁵⁴
 - (f) There is a requirement for authorities listed in the *SPSO Act* to publicize the Ombudsman service.⁵⁵

The Public Services Ombudsman for Wales

2.2.41 The office of Public Services Ombudsman for Wales (PSOW) was established by the *Public Services Ombudsman (Wales) Act 2005 (PSOW Act)*, which came into force on 1 April 2006. This new office replaces the previous offices of Local Government Ombudsman for Wales, Health Service Ombudsman for Wales, Welsh Administration Ombudsman and Social Housing Ombudsman for Wales. The persons and organizations within PSOW's jurisdiction are listed in Schedule 3 to the *PSOW Act*. They include the National Assembly for Wales, local government organizations, health and social care institutions and school governing bodies.

⁵¹ Section 5 of the *SPSO Act* entitles SPSO to investigate the following matters: (a) any service failure and action taken in the exercise of administrative functions of an listed authority (other than a health service body, an independent provider, a family health service provider or a registered social landlord); (b) any service failure and any action taken by or on behalf of a health service body or an independent provider; (c) any action taken by or on behalf of a family health service provider in connection with the provision of family health services; and any action taken by or on behalf of a registered social landlord.

⁵² The *SPSO Act*, section 2(2).

⁵³ Actions taken in matters relating to contractual or other commercial transactions of a listed authority are still excluded from SPSO's jurisdiction. The *SPSO Act*, paragraph 7 of Schedule 4.

⁵⁴ Section 2(4) of the *SPSO Act* provides that "[t]he Ombudsman may take such action in connection with the complaint or request as the Ombudsman thinks may be of assistance in reaching any such decision." Such action may include action with a view to resolving the complaint or request.

⁵⁵ The *SPSO Act*, section 22.

2.2.42 Apart from the merger of the offices, the arrangements for PSOW are primarily modelled on those for PCA with the following exceptions.

- (a) PSOW is appointed by the Crown on the recommendation of the Secretary of State. The Secretary of State is required to consult the National Assembly for Wales before making the recommendation.⁵⁶ PSOW is appointed for a term of seven years, which is non-renewable. Similar to SPSO, PSOW is disqualified from certain public appointments or paid offices for three years after finishing his appointment.
- (b) The scope of investigation has been extended to include not only actions taken by an authority, but also any 'service failure'.
- (c) Complaints to PSOW are not subject to any Member of National Assembly for Wales filter and may be made whenever a member of the public claims to have sustained injustice or hardship as a result of maladministration or service failure. PSOW can also investigate in his own right.
- (d) The *PSOW Act* makes an express provision to ensure that, in the health and social care sector, the Ombudsman can consider synoptically complaints about the consequences of decisions made by social care professionals who are working alongside clinical professionals⁵⁷. In other words, PSOW is allowed to investigate not only clinical judgment, but also the exercise of professional judgment in connection with health and social care.
- (e) PSOW is not prohibited from investigating matters relating to contractual or other commercial transactions of a listed authority.
- (f) PSOW is given power to take steps to resolve a complaint informally without proceeding to a formal investigation.⁵⁸
- (g) PSOW is equipped with enforcement powers. PSOW may issue a certificate to the effect to the High Court if a listed authority has wilfully disregarded his report without lawful excuse.⁵⁹
- (h) PSOW is empowered to issue guidance to all bodies within his jurisdiction on the requirements of good administrative practice.⁶⁰ Similar to SPSO, there is a requirement for authorities listed in the *PSOW Act* to publicize the Ombudsman service.⁶¹

⁵⁶ The *PSOW Act*, paragraph 1 of Schedule 1.

⁵⁷ The *PSOW Act*, section 11(2).

⁵⁸ The *PSOW Act*, section 3.

⁵⁹ The *PSOW Act*, section 20.

⁶⁰ The *PSOW Act*, section 31.

⁶¹ The *PSOW Act*, section 33.

Other ombudsman services

2.2.43 Besides those mentioned above, there are other public sector ombudsman services in the UK. For instance, Northern Ireland has an ombudsman who considers complaints about government departments and other public bodies, and a Police Ombudsman.

2.2.44 In addition, the Financial Services Ombudsman investigates complaints about financial services providers such as banks, insurance companies and mortgage providers throughout the UK,⁶² and the Legal Services Ombudsman oversees the handling of complaints about lawyers in England and Wales. There is also the Housing Ombudsman who deals with disputes affecting housing providers in England, including all social landlords (e.g. housing associations) and some private landlords and management agents⁶³.

2.2.45 With respect to freedom of information, the Information Commissioner appointed under the *Freedom of Information Act 2000* has wide powers to investigate complaints relating to a failure to provide personal information held by public authorities, unsolicited direct marketing information and a failure to provide information about the environment held by public authorities.

⁶² The *Financial Services and Markets Act 2000*, Pt. XVI and 17th Schedule.

⁶³ The *Housing Act 1996*, section 51 and 2nd Schedule.

Chapter 3 – New Zealand

3.1 Basic arrangement

3.1.1 In New Zealand, the Office of the Ombudsmen was established in 1962.⁶⁴ The Ombudsmen are independent Officers of Parliament, who are accountable to Parliament rather than to the government.

3.1.2 When the Office of the Ombudsmen was first set up, its jurisdiction was limited to the investigation of complaints about the central government departments and organizations. The Ombudsmen's jurisdiction has continuously extended – covering education and hospital boards in 1968, including local government organizations in 1976, incorporating an independent review function in the freedom of information area in 1980s and a guidance function in the protected disclosure area in 2001, and including all Crown entities (except the Police Complaints Authority) in 2004.

3.1.3 In New Zealand, the name "Ombudsman" is protected by law. The law prohibits any other person using the name "Ombudsman" in connection with any business, trade, occupation or the provision of any service, except under an Act or with written consent of the Chief Ombudsman.⁶⁵

3.1.4 In New Zealand, there are public institutions other than the Ombudsmen dealing with complaints about human rights. The Human Rights Commission has the power to resolve disputes relating to unlawful discrimination under the *Human Rights Act 1993*.⁶⁶ There is also the Commissioner for Children who, established under the *Children's Commissioner Act 2003*, has the power to investigate any decisions or recommendations made, or any act done or omitted, in respect of any child. Both the Human Rights Commission and the Commissioner for Children are within the Ombudsmen's jurisdiction.

3.1.5 The Police Complaints Authority (PoCA) is an independent body established under the *Police Complaints Authority Act 1988* to deal with complaints against the police in respect of their policing activities. PoCA has the power to investigate serious cases involving allegations of misconduct, neglect of duty or grievances concerning police practice, policy or procedure. PoCA also investigates death or serious harm incidents involving police officers. PoCA is not within the Ombudsmen's jurisdiction.

⁶⁴ For a detailed history of the Office, see Gilling (1988).

⁶⁵ The *Ombudsmen Act 1975*, section 28A(1).

⁶⁶ It includes discrimination on the grounds of sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status or sexual orientation. For further discussion, see Legislative Council Secretariat (2004).

3.2 Jurisdiction and investigation power

The Office of the Ombudsmen

3.2.1 The Office of the Ombudsmen mainly operates under the provisions of the *Ombudsmen Act 1975*.⁶⁷ The Act contains provisions for the appointment of more than one Ombudsman (known as Officers of Parliament and Commissioners for Investigation), one of whom would be appointed the Chief Ombudsman. In terms of their legal power, the Ombudsmen are all equal. All Ombudsmen are appointed by the Governor-General on the recommendation of the House of Representatives. Currently, there are two Ombudsmen.

3.2.2 An Ombudsman is appointed for a term of five years and may be reappointed. An Ombudsman may be removed or suspended by the Governor-General, upon an address from the House of Representatives, on the grounds of disability, bankruptcy, neglect of duty or misconduct.⁶⁸

Jurisdiction

3.2.3 Section 13(1) of the *Ombudsmen Act 1975* provides that an Ombudsman may investigate any decision, recommendation, act or omission by any government department or organization listed in the Act if the action complained about relates to a matter of administration and affects a person in its capacity.

3.2.4 In New Zealand, the distinction between a matter of "administration" and "policy" is not always clear, which has been subject to various interpretations.⁶⁹ Two different approaches could be identified: (a) a narrow approach focusing on the literal terms and dictionary meanings and (b) a broader approach which takes account of the specific characteristics of an ombudsman office and contrasts the characteristics of the courts.⁷⁰

3.2.5 Section 13(2) of the Act empowers the Ombudsmen to investigate departmental recommendations to Ministers, which may be recommendations made by any department, organization, committee, officer or employee. Ministers themselves are also subject to the Ombudsmen's investigation.

⁶⁷ The Act was enacted so as to consolidate and amend the *Parliamentary Commissioner (Ombudsman) Act 1962*.

⁶⁸ The *Ombudsmen Act 1975*, section 6(1).

⁶⁹ Sir Guy Powles, the first New Zealand Parliamentary Commissioner, admitted that he found the administration/policy division difficult and complex. He resolved that if a complaint was related to a matter of administration involving a prescribed government department, it fell within his jurisdiction, even though it might also be related to a matter of policy. See Gilling (1988) pp. 53-4.

⁷⁰ See Keith (1971) and Keith (2005).

3.2.6 The government departments and organizations which are subject to the Ombudsmen's jurisdiction are listed in the First Schedule to the *Ombudsmen Act 1975*, including the Department of the Prime Minister and Cabinet, the Ministries, education authorities, the Electoral Commission, public health authorities and local organizations.⁷¹

3.2.7 The Ombudsmen do not have the power to investigate matters relating to court proceedings, the police⁷² and the army. However, the Ombudsmen are not prohibited from investigating personnel matters in the civil service and commercial transactions of a listed body.

3.2.8 Under the *Official Information Act 1982*⁷³, the Ombudsmen are able to investigate and review any decision made on a request for official information held by those Ministers of the Crown, and the central and local government departments and organizations that are subject to the legislation.⁷⁴

3.2.9 In January 2001, the *Protected Disclosures Act 2000*⁷⁵ or "whistle blowing" legislation came into force. Under that Act, the Ombudsmen are required to perform additional functions. The most important function is to provide advice to an employee who has made or is considering making a protected disclosure.⁷⁶

Investigation power

3.2.10 Each Ombudsman may make an investigation in response to a complaint or on his own initiative. The Ombudsman is also required to investigate and report on any petition referred to him by a committee of the House of Representatives.⁷⁷ The Prime Minister may, with the consent of the Chief Ombudsman, refer to an Ombudsman for investigation any matter which the Prime Minister considers should be investigated by an Ombudsman.⁷⁸

3.2.11 The Ombudsman may refuse to investigate a complaint if the matter to be investigated occurs more than 12 months before the complaint is received, if there is an existing remedy or a right of appeal to the courts or an administrative agency, or if any further investigation is unnecessary, or if the complaint is trivial, frivolous or vexatious or not made in good faith, or if the complainant is not personally affected.⁷⁹

⁷¹ As at April 2006, the Act listed 166 central government departments and organizations, and 49 local authorities and organizations.

⁷² See paragraph 3.1.5 of this research report.

⁷³ The Act requires that the New Zealand government, when asked, must release official information which is not exempt from the provisions of the Act, whether or not that information is damaging to the government.

⁷⁴ For further discussion, see Belgrave (2005).

⁷⁵ The purpose of the Act is to promote the public interest by facilitating the disclosure and investigation of matters of "serious wrongdoing" in or by an organization.

⁷⁶ The *Protected Disclosures Act 2000*, section 15.

⁷⁷ The *Ombudsmen Act 1975*, section 13(4).

⁷⁸ The *Ombudsmen Act 1975*, section 13(5).

⁷⁹ The *Ombudsmen Act 1975*, section 17.

3.2.12 The Ombudsman is required to inform the head of the government department or organization affected of his intention to make an investigation. All investigations must be conducted in private. An Ombudsman may hear or obtain information from such persons, and may make such inquiries, as he thinks fit.⁸⁰

3.2.13 The Ombudsman may require any person to furnish information or produce documents. In addition, the Ombudsman may summon and examine on oath any officer or employee of the government departments and organizations under his jurisdiction.⁸¹

3.2.14 Section 20 of the *Ombudsmen Act 1975* excludes the public interest immunity against disclosure or production of documents to the Ombudsmen, except where the Attorney-General certifies that the giving of information might prejudice the security, defence or international relations of New Zealand, or prejudice the investigation or detection of offences, or disclose deliberations or confidential proceedings of the Cabinet.

Other ombudsman services

3.2.15 In New Zealand, there are some other review authorities and agencies that deal with complaints outside the Ombudsmen's jurisdiction.⁸² For instance, there is the Health and Disability Commissioner who has the authority to deal with complaints concerning health or disability services. The Commissioner's role focuses on the quality of health and disability services provided, and does not deal with matters relating to access to services or funding. However, complaints against medical professionals are dealt with by the Medical Council of New Zealand. The Office of the Health and Disability Commissioner is subject to the *Ombudsmen Act 1975*, while the Medical Council of New Zealand is not.

⁸⁰ The *Ombudsmen Act 1975*, section 18(3).

⁸¹ The *Ombudsmen Act 1975*, section 19(2).

⁸² See <http://www.ombudsmen.govt.nz/alternat.htm>.

Chapter 4 – The Province of British Columbia in Canada

4.1 Basic arrangement

4.1.1 There is no federal ombudsman in Canada, whereas eight of Canada's ten provinces have provincial Ombudsmen.⁸³ BC is the last province among the eight provinces to establish an Ombudsman, the office of which was set up in 1979. The BC Ombudsman is an officer of the provincial legislature and reports to the provincial legislature.

4.1.2 In BC, complaints relating to human rights are handled by the BC Human Rights Tribunal, an independent quasi-judicial body created by the *BC Human Rights Code*. The Tribunal is responsible for accepting, screening, mediating and adjudicating human rights complaints.

4.1.3 In 2002, both the BC Children's Commission⁸⁴ and the Office of the Child, Youth and Family Advocate were abolished after the BC government concluded that there was too much duplication among the BC Children's Commission, the BC Coroner's Service⁸⁵, the Office of the Child, Youth and Family Advocate and the Ombudsman. At present, there is an Officer for Children and Youth, who is appointed by the Cabinet and is accountable to the Attorney General.

4.1.4 The abolition of the BC Children's Commission has aroused a lot of controversy. In November 2005, the government decided to conduct an independent review of the child protection system in BC. The review report was published in April 2006 with a recommendation to establish a new Representative for Children and Youth.⁸⁶ The Representative will be an independent officer of the provincial legislature, with the same standing as the Ombudsman and the Auditor General.

4.1.5 At the same time, the BC Ombudsman has maintained a proactive stance towards human rights of children. In 1987, the Ombudsman designated a Deputy Ombudsman for Children and Youth inside his office. Although the Deputy Ombudsman position was terminated in 1990, the office has continued to pay particular attention to the rights of children and youth.⁸⁷

4.1.6 The BC Office of the Police Complaint Commissioner is an independent agency established under the *Police Act* for overseeing complaints against the municipal police to ensure that they are handled fairly and impartially. In most cases, complaints are investigated by the Internal Affairs/Professional Standards Branch of the police department involved. In some cases, another police department is asked to investigate. The Police Complaint Commissioner is an officer of the provincial legislature. As such, the Office is completely independent from any police department or government ministry, and reports directly to the provincial legislature.

⁸³ See Bernt & Owen (2000).

⁸⁴ The BC Children Commission was a statutory body established in 1996.

⁸⁵ One of the duties of the Coroner's Service is to investigate special cases involving children's death.

⁸⁶ Hughes (2006).

⁸⁷ See Reif (2004) pp. 304-5.

4.2 Jurisdiction and investigation power

The Ombudsman of British Columbia

4.2.1 The BC Ombudsman operates under the provisions of the Ombudsman Act⁸⁸. The Ombudsman is appointed by the Lieutenant Governor on the recommendation of the Legislative Assembly of BC.⁸⁹ The Ombudsman is appointed for a term of six years and may be reappointed for one more term.

4.2.2 The Lieutenant Governor, based on cause or incapacity, must act on the recommendation of the Legislative Assembly to either suspend the Ombudsman or remove the Ombudsman from office.⁹⁰ The Ombudsman may also resign the office at his own request.

Jurisdiction

4.2.3 The Ombudsman, with respect to a matter of administration, may investigate a decision, an act done, or a procedure used by a prescribed authority that aggrieves or may aggrieve a person.⁹¹ Similar to the situation in New Zealand, the issue of whether "matters of administration" involving "policy matters" is a contentious issue. A court case has regarded that the term "matter of administration" should be understood broadly to encompass "*everything done by governmental authorities in the implementation of government policy.*"⁹² The court has also held that only the activities of the legislature and the courts are exempt from the Ombudsman's scrutiny.

4.2.4 The Ombudsman has jurisdiction over a wide range of public agencies, which are listed in the Schedule to the *Ombudsman Act*. They include provincial government ministries, crown corporations, government boards, the Electoral Boundaries Commission⁹³, hospitals and local health agencies, and municipal and regional governments. The Lieutenant Governor in Council may, by order, add authorities to the Schedule.

⁸⁸ Revised Statutes of British Columbia 1996, Chapter 340.

⁸⁹ The *Ombudsman Act*, section 2(1).

⁹⁰ The *Ombudsman Act*, section 6(2).

⁹¹ The *Ombudsman Act*, section 10(1).

⁹² *British Columbia Development Corporation v. Friedmann* [1984] 2 S.C.R. 447.

⁹³ Meanwhile, the Elections BC, a provincial legislature office responsible for the administration of the election laws, is not within the Ombudsman's jurisdiction.

4.2.5 The Ombudsman does not have jurisdiction to investigate certain complaints, such as complaints against banks, courts, doctors, the municipal police and private schools. Nonetheless, matters relating to personnel administration of the civil service and commercial transactions of a listed authority are subject to investigation by the Ombudsman.⁹⁴

Investigation power

4.2.6 The Ombudsman may make an investigation in response to a complaint or on his own initiative. If the Ombudsman investigates a matter, he is required to notify the authority affected and any other person the Ombudsman considers appropriate to notify.⁹⁵

4.2.7 The Ombudsman may receive and obtain information in the manner he considers appropriate. In addition, the Ombudsman has the discretion to conduct hearings.⁹⁶

4.2.8 The Ombudsman has the power to require a person to furnish information or produce documents or materials in the person's possession or control that relate to an investigation.⁹⁷ The Ombudsman has the power to summon and examine on any person whom the Ombudsman believes is able to give information relevant to an investigation.⁹⁸

4.2.9 People who provide relevant information to the Ombudsman are legally protected. Section 16 of the *Ombudsman Act* provides that a person must not discharge, suspend, expel, intimidate, coerce, evict, impose any pecuniary or other penalty on or otherwise discriminate against a person because that person complains, gives evidence or assists in the investigation under the Act.

4.2.10 The Attorney General may issue a certificate to restrict the Ombudsman's investigative powers if the giving of the information might interfere in the detection of an offence; result in the disclosure of the deliberation of the Executive Council; or result in the disclosure of proceedings of the Executive Council relating to matters of a secret nature and that the disclosure would be contrary to the public interest.⁹⁹

⁹⁴ Such matter must raise issues of procedure administrative fairness, internal review mechanisms are exhausted and the matter is not before the courts. Information provided by the Office of the BC Ombudsman.

⁹⁵ The *Ombudsman Act*, section 14(1).

⁹⁶ The *Ombudsman Act*, section 15(1).

⁹⁷ The *Ombudsman Act*, section 15(2)(b).

⁹⁸ The *Ombudsman Act*, section 15(2)(d).

⁹⁹ The *Ombudsman Act*, section 18(1).

Chapter 5 – Australia

5.1 Basic arrangement

5.1.1 In Australia, there is a Commonwealth Ombudsman that deals with complaints against decisions of the federal government and an Ombudsman in each state and the Northern Territory. Western Australia was the first Australian jurisdiction to establish the position of Ombudsman in 1972. The Commonwealth Ombudsman was established five years later. Under the Australian Capital Territory (ACT) legislation, and by arrangement between the Australian and ACT governments, the Commonwealth Ombudsman is also the Ombudsman for ACT¹⁰⁰.

5.1.2 In Australia, complaints relating to human rights are dealt with by means other than the Ombudsman. The Human Rights and Equal Opportunity Commission is a national independent statutory government body established in 1986. The Commission acts on matters relating to human rights with power to investigate and report on acts or practices of government institutions and agencies which have contravened human rights. The children's rights are also within the jurisdiction of the Commission.¹⁰¹

5.1.3 At present, some Australian states have the office of commissioner for children and young people, such as in New South Wales (NSW), Queensland, Tasmania and Victoria.¹⁰² There have been discussions on the introduction of similar offices in other states.¹⁰³

5.1.4 In Australia, the Ombudsmen generally exercise a re-investigatory role with respect to complaints against the police. The *Complaints (Australian Federal Police) Act 1981* establishes the mechanism by which complaints can be made about the actions of individual members of the Australian Federal Police (AFP). Complaints can be made to either the Commonwealth Ombudsman or AFP's Professional Standards Team.

5.1.5 In most cases, complaints are investigated by AFP's Professional Standards Team, but the Ombudsman may take over an investigation or, in some circumstances including where a complaint is about practices and procedures, conduct the investigation from the start. The Ombudsman has oversight of investigations conducted by AFP's Professional Standards Team. While only the Ombudsman can decide that an investigation should not be conducted, many complaints are resolved by conciliation.

¹⁰⁰ The ACT Ombudsman is given powers under the *Territory's Ombudsman Act 1989* (ACT), the *Public Interest Disclosure Act 1994* and the *Freedom of Information Act 1989*.

¹⁰¹ See Burdekin (2000) pp. 806-7.

¹⁰² There is a Commissioner for Children in both NSW and Tasmania. In Victoria, there is a Child Safety Commissioner, and in Queensland, there is a Commissioner for Children and Young People and Child Guardian.

¹⁰³ For a detailed discussion, see Reif (2004) pp. 324-5.

5.1.6 In both Queensland and South Australia, the Ombudsmen have no role in relation to complaints against the police, which are dealt with by other bodies. On the other hand, the Ombudsman in NSW has had power of direct investigation over the use of police powers and supervisory jurisdiction over primary investigations conducted by the police since 1993.

5.1.7 The Commonwealth Ombudsman also holds the offices of Defence Force Ombudsman, Immigration Ombudsman, Postal Industry Ombudsman and Taxation Ombudsman. The following discussion relates primarily to the Commonwealth Ombudsman, but recent developments in the state ombudsman offices will also be touched upon.

5.2 Jurisdiction and investigation power

The Commonwealth Ombudsman

5.2.1 Legislation establishing the office of Commonwealth Ombudsman was enacted in 1976, and the first Commonwealth Ombudsman commenced on 1 July 1977. The Commonwealth Ombudsman operates mainly under the provisions of the *Ombudsman Act 1976* as amended. Unlike many other jurisdictions, the Commonwealth Ombudsman is not an Officer of Parliament. His office is part of the Department of Prime Minister and Cabinet.

5.2.2 The *Ombudsman Act 1976* provides for the appointment of at least one, and not more than three, Deputy Commonwealth Ombudsmen. Both the Commonwealth Ombudsman and the Deputy Commonwealth Ombudsmen are appointed by the Governor-General on the recommendation of the Prime Minister.¹⁰⁴ They hold office for a term not exceeding seven years and are eligible for reappointment.

5.2.3 The Ombudsmen may resign their office by writing. The Governor-General may, with the consent of an Ombudsman, retire the Ombudsman on the grounds of physical or mental incapacity. In addition, the Governor-General may remove or suspend an Ombudsman on the grounds of misbehaviour, or physical or mental incapacity. In any event, the removal must be based on an address by each House of Parliament in the same parliamentary session.¹⁰⁵

5.2.4 A review of the legislation establishing the office of Commonwealth Ombudsman, which commenced in 2003–04, has continued to proceed. The review aims to improve and modernize the legislative framework, with a view to putting proposals to the government for the enactment of a new Ombudsman Act.

¹⁰⁴ The *Ombudsman Act 1976*, section 21.

¹⁰⁵ The *Ombudsman Act 1976*, section 28.

Jurisdiction

5.2.5 The Commonwealth Ombudsman is empowered to investigate any action that relates to a matter of administration taken by a government department or a prescribed authority.¹⁰⁶ The problem of the administration/policy distinction also exists in the Australian context, which has been subject to review in several court cases.¹⁰⁷ An amendment to the *Ombudsman Act 1976* in 2005 has extended the jurisdiction of the Ombudsman to include all government contractors.¹⁰⁸

5.2.6 Complaints about the following matters are excluded from the Ombudsman's jurisdiction:¹⁰⁹

- (a) actions taken by a Minister (but recommendations to a Minister or other actions of an officer of an agency relating to a Minister's decision are not excluded);
- (b) actions that constitute proceedings in Parliament;
- (c) actions taken by various judicial officers (except administrative actions); and
- (d) certain actions relating to government employment (including appointment, pay, discipline and removal).

5.2.7 The Ombudsman has discretion not to investigate the following complaints¹¹⁰:

- (a) complaints made more than 12 months after a decision;
- (b) complaints that are frivolous or vexatious or not made in good faith;
- (c) complaints where the complainant does not have sufficient interest in the decision;
- (d) complaints where the complainant has not raised the matter with the agency concerned;

¹⁰⁶ The department means a Department of State, excluding any part that is itself an Executive Agency or Statutory Agency. The Australian Electoral Commission is within the Ombudsman's jurisdiction.

¹⁰⁷ For detailed discussion, see Biganovsky (1999).

¹⁰⁸ Section 3(4B) of the *Ombudsman Act 1976* provides that actions of contractors and subcontractors, in exercising powers or performing functions for or on behalf of Australian government agencies, in the provision of goods and/or services to the public, will be taken to be the actions of the relevant agency.

¹⁰⁹ The *Ombudsman Act 1976*, section 5(2).

¹¹⁰ The *Ombudsman Act 1976*, section 6.

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- (e) complaints where the complainant has an alternative means of reviewing the decision;
 - (f) complaints where there is another office which has jurisdiction to deal with the matter and the complaint must then be transferred to that office; and
 - (g) complaints where an investigation is not warranted having regard to all the circumstances.

5.2.8 In addition to handling complaints about government departments and agencies, the Commonwealth Ombudsman has special responsibilities for complaints relating to the army, the federal police, freedom of information, immigration, the postal services and taxation.

5.2.9 Part IIA of the *Ombudsman Act 1976* gives the Commonwealth Ombudsman the function of the Defence Force Ombudsman (DFO). DFO can investigate complaints about administrative actions and the Defence Force employment matters. However, DFO cannot investigate actions connected with disciplinary proceedings, or the grant or refusal of an honour or award to an individual.

5.2.10 The *Freedom of Information Act 1982* provides the public a general right of access to documents held by government agencies. The Act provides members of the public a special right to file complaints with the Commonwealth Ombudsman about actions related to a request for documents.

5.2.11 Under the *Telecommunications (Interception) Act 1979* and the *Crimes Act 1914*, the Commonwealth Ombudsman is responsible for monitoring the integrity of the records of telecommunications interceptions and controlled (covert) operations conducted by AFP and the Australian Crime Commission (ACC). This role has expanded since 2004–05 with the passage of the *Surveillance Devices Act 2004*, which gives the Ombudsman a similar role in relation to AFP and ACC with regard to the use of listening devices and similar technologies.

5.2.12 Under changes to the *Ombudsman Act 1976* in 2005, the Commonwealth Ombudsman, in performing functions in relation to immigration and detention, may use the title of the Immigration Ombudsman. The Ombudsman's responsibilities are enhanced accordingly in relation to immigration, including assessing long-term immigration detainees and reviewing possible wrongful immigration detention matters.

5.2.13 Legislation establishing the Postal Industry Ombudsman (PIO) was passed in March 2006, and PIO will commence operations later this year. PIO will be able to investigate complaints about Australia Post and any other postal operators that register with the Ombudsman scheme.

5.2.14 The Commonwealth Ombudsman can investigate all complaints related to tax administration. If a complaint is justified, the Ombudsman can recommend that the Australian Taxation Office reconsiders its decision; gives further reasons for its decisions; pays compensation and/or changes existing procedures.

Investigation power

5.2.15 The Commonwealth Ombudsman may investigate a complaint made by a member of the public or on his own initiative.¹¹¹ The Ombudsman must inform the head of the relevant agency before commencing an investigation.

5.2.16 All investigations must be conducted in private. The Commonwealth Ombudsman may obtain information from such persons, and make such inquiries, as he thinks fit.

5.2.17 The Commonwealth Ombudsman is empowered to call any person to give evidence or produce documents to an investigating officer. A witness can be required to give evidence on oath. A person cannot refuse to answer a question or produce a document on the basis of self-incrimination or a secrecy obligation in another statute.¹¹²

5.2.18 The Commonwealth Ombudsman's power to obtain information is limited by power vested in the Attorney General if it can be certified that the giving of the information would prejudice security, defence or international relations; involve disclosures between the Commonwealth and a state that would prejudice relations between those bodies; or involve disclosure of proceedings of the Cabinet or the Executive Council.¹¹³

5.2.19 The Commonwealth Ombudsman may make an arrangement with the state Ombudsmen for an investigation that requires collaboration among the Ombudsmen or relates to actions administered jointly by the Commonwealth and one or more states.

5.2.20 The Ombudsman is allowed, either before or after the completion of an investigation, to discuss any matter relevant to the investigation with the responsible Minister or any other Minister concerned with the matter.¹¹⁴

¹¹¹ The *Ombudsman Act 1976*, section 5.

¹¹² The *Ombudsman Act 1976*, sections 8(2B), (2C) and (2D).

¹¹³ The *Ombudsman Act 1976*, section 9(3).

¹¹⁴ The *Ombudsman Act 1976*, section 8(8).

Ombudsmen in other Australian jurisdictions

5.2.21 The offices of Ombudsman in the states and the Territory all follow broadly the pattern of the Commonwealth Ombudsman, although there are some differences in the scope of jurisdiction.¹¹⁵ There are some special features in the state Ombudsman offices that are worth mentioning.

5.2.22 After a major independent review and parliamentary review of the office of the Queensland Ombudsman, the Queensland Parliament enacted the *Ombudsman Act 2001*. The Act recognizes a dual role for the Ombudsman to remedy complaints about specific administrative actions and to assist government agencies in improving their decision making and complaint handling. The Act also facilitates informal investigation and resolution of complaints conducted by the Ombudsman. In addition, the Act does not prohibit the Ombudsman from investigating matters relating to personnel administration in the civil service.

5.2.23 In Victoria, the Ombudsman has been given sweeping new powers to investigate and oversee the investigation of complaints by whistleblowers.¹¹⁶ The Victoria Parliament has also conferred on the Ombudsman functions not directly involving the resolution of citizens' grievances against the government, such as to audit police records of telephone interception under the telecommunications interception legislation¹¹⁷. With respect to grievances concerning civil servants, although the Ombudsman is not allowed to investigate matters relating to employment, he can intervene in order to avoid injustice.¹¹⁸

5.2.24 In NSW, the Ombudsman has been given jurisdiction to investigate cases involving alleged child abuse.¹¹⁹ This represents a major change to the traditional role of the Ombudsman. The jurisdiction of the Ombudsman is extended to cover actions by private bodies, including private schools and child care centres, in addition to government agencies. Besides, he is also empowered to investigate matters other than maladministration, namely, whether child abuse has occurred.¹²⁰

¹¹⁵ For details, see Pearce (2000) and Del Villar (2003).

¹¹⁶ The *Whistleblowers Protection Act 2001* commenced in January 2002.

¹¹⁷ The *Telecommunications (Interception) (State Provisions) Act 1988* enables the Victoria Police Force to obtain warrants to intercept and record telephone conversations.

¹¹⁸ Section 5 of the *Ombudsman Act 1973* provides that "[t]he Ombudsman shall not investigate any matter with respect to persons who are or were in service under an authority so far as the matter relates to terms and conditions of employment (including matters relating to appointments, promotions, removals, pay, discipline and superannuation, and other personnel matters) unless the Ombudsman considers that the matter merits investigation in order to avoid injustice."

¹¹⁹ The *Ombudsman Act 1974*, Part 3A.

¹²⁰ See Reif (2004) pp. 308-9.

Chapter 6 – Analysis

6.1 Introduction

6.1.1 The ombudsman system of Hong Kong was established in 1988 with the enactment of the *Commissioner for Administrative Complaints (COMAC) Ordinance*.¹²¹ The Ordinance provided for the appointment of COMAC to investigate complaints concerning administrative actions. The complaints had to be referred by Members of the Legislative Council (LegCo). Only those government departments and public bodies listed in Schedule 1 to the Ordinance were brought within COMAC's jurisdiction. Both the police and the Independent Commission Against Corruption (ICAC) were excluded from the list.¹²²

6.1.2 In 1994, the *COMAC Ordinance* was amended to provide direct access to COMAC, expand COMAC's jurisdiction to six major public bodies¹²³, allow COMAC to publish his inquiry reports without disclosing the identity of the complainant and the persons against whom adverse findings were made, and empower COMAC to initiate direct investigation.¹²⁴

6.1.3 In 1996, the *COMAC Ordinance* was further amended to change the title of COMAC to the Ombudsman and confer on the Ombudsman monitoring powers relating to the *Code on Access to Information*.

¹²¹ In April 1987, the Hong Kong Government released a consultative document: "Redress of Grievances". In October 1987, the Government published the COMAC Bill 1987, in the form of a white bill, for public discussion. LegCo set up an Ad Hoc group to study the bill. In May 1988, the Government decided to introduce the Bill into LegCo. The *COMAC Ordinance* was enacted in July 1988 and came into force on 1 February 1989.

¹²² The Government explained that the reasons for their exclusion were "*first, both the police and the ICAC have already independently monitored redress systems which are working well and there is no justification for replacing or duplicating them; secondly, if the Commissioner for Administrative Complaints took over these organizations, most of his time would be taken up in dealing with complaints against the police which number about 400 per month – some eight times the anticipated monthly volume of complaints to be dealt with by the Commissioner; and thirdly, complaints against the police and the ICAC are of a fundamentally different nature to maladministration complaints, being for the most part justifiable in the courts or involving internal discipline*". See *Hansard*, 22 June 1988, p. 1 654. Nevertheless, the LegCo Ad Hoc group considered that they should be brought within COMAC's jurisdiction.

¹²³ They were the Mass Transit Railway Corporation, the Kowloon-Canton Railway Corporation, the Securities and Futures Commission, the Urban Council, the Regional Council and the Housing Authority.

¹²⁴ These amendments were the result of a comprehensive review carried out in mid-1992. At that time, a consultative document was made public to solicit public views. A LegCo Ad Hoc group was also set up to oversee the review. An amendment enabling COMAC to initiate investigation was introduced by a Member of LegCo but was not supported by the Government. See *Hansard*, 15 June 1994, pp. 4 345-56.

6.1.4 There was another major amendment to the *Ombudsman Ordinance* in 2001. The Ordinance was amended to formalize the separation of the Office of the Ombudsman from the Government, to give statutory status to mediation as an alternative dispute resolution method for processing complaints and to bring the Equal Opportunities Commission and the Office of the Privacy Commissioner for Personal Data within the Ombudsman's jurisdiction.

6.1.5 The Ombudsman of the Hong Kong Special Administrative Region (HKSAR), in her 2004 Annual Report, indicated that a review of the Ombudsman's jurisdiction was underway. The Ombudsman also mentioned the review in the 2005 Annual Report and explained that proposals would be made to the Government for

- (a) adding more organizations to Schedule 1 to the *Ombudsman Ordinance*;
- (b) relaxing some of the restrictions on the Ombudsman's investigation powers in Schedule 2 to the *Ombudsman Ordinance*; and
- (c) resolving some of the difficulties or uncertainties encountered by the officers of the Ombudsman Office in discharging their duties.¹²⁵

6.1.6 Tables 1 to 5 (on pages 40-49) summarize various features of the jurisdiction of the ombudsman systems in the four places studied and the HKSAR. The following analysis will look at some of the important issues with reference to the HKSAR.

6.2 Arrangement of ombudsman services

6.2.1 There is only one ombudsman scheme operating in the HKSAR. Meanwhile, LegCo operates a Redress System under which the public can make representations on or seek solutions to problems arising from Government policies, decisions and procedures.¹²⁶ Under the Redress System, LegCo Members provide assistance, where justified, for members of the public who are aggrieved by Government actions or policies. They also deal with public representations on Government policies and legislation as well as other matters of public concern.¹²⁷

¹²⁵ Office of the Ombudsman (2005) paragraph 2.27.

¹²⁶ Under Article 73(8) of the *Basic Law of the HKSAR*, one of LegCo's functions is "to receive and handle complaints from Hong Kong residents".

¹²⁷ The predecessor of the LegCo Redress System was the OMELCO Redress System. OMELCO was established in 1963, which stood for the "Office of Unofficial Members of the Executive and Legislative Councils". One of the main reasons to establish OMELCO was to provide a means of redress for members of the public aggrieved by Government actions or policies. For further information, see OMELCO Office (1970) & Scott (1983).

6.2.2 In the United Kingdom (UK), there is a wide range of ombudsman schemes. The Parliamentary Commissioner for Administration (PCA) deals with complaints about government departments; the Health Service Commissioner (HSC) handles complaints about health services and the Commissioners for Local Administration (CLAs) deal with complaints about local authorities. In recent years, devolution has led to the establishment of a single integrated public services ombudsman in both Scotland and Wales.

6.2.3 In New Zealand, the Ombudsman is an Officer of Parliament to inquire into complaints raised against central, regional and local government organizations and agencies. The Ombudsman of the Province of British Columbia in Canada (BC) is an officer of the provincial legislature dealing with complaints concerning provincial government ministries and local organizations.

6.2.4 In Australia, there is a Commonwealth Ombudsman that deals with complaints against decisions of the federal government and an Ombudsman in each state and the Northern Territory to deal with local matters. The Commonwealth Ombudsman also holds the offices of Defence Force Ombudsman, Immigration Ombudsman, Postal Industry Ombudsman and Taxation Ombudsman.

6.3 Complaints relating to the police

6.3.1 Under paragraph 10 of Schedule 2 to the *Ombudsman Ordinance*, any action taken by ICAC, the Hong Kong Police Force or the Hong Kong Auxiliary Police Force in relation to the prevention, detection or investigation of any crime or offence is not subject to investigation by the HKSAR Ombudsman.

6.3.2 Among the selected places, only New South Wales (NSW) of Australia has an anti-corruption body similar to that of the HKSAR. The body is also called the Independent Commission Against Corruption, which is not within the NSW Ombudsman's jurisdiction. Therefore, the following discussion focuses on complaints relating to the police.

6.3.3 In the HKSAR, complaints against the police are handled by the Complaints Against Police Office (CAPO) of the Hong Kong Police Force. The investigations of CAPO are monitored and reviewed by the Independent Police Complaints Council (IPCC), which is an independent advisory council appointed by the Chief Executive (CE). The Ombudsman or her representative is an ex officio member of IPCC.¹²⁸

¹²⁸ In May 2006, the HKSAR Government announced that a bill would be introduced into LegCo as soon as possible to establish IPCC as a statutory body. See LegCo paper: CB(2)2200/05-06(04).

6.3.4 Among the selected places, there are different arrangements regarding the relationship between the ombudsmen and the police. In the UK, there are specialized mechanisms for dealing with complaints in relation to the police service. The police are not within the jurisdiction of PCA. The Independent Police Complaints Commission is responsible for overseeing the system for handling complaints made against the police forces in England and Wales. The Commission has its own independent investigators, giving it the choice of supervising police investigations or conducting independent investigation itself for serious complaints.

6.3.5 The oversight of the police complaints system in Northern Ireland and Scotland is the respective responsibility of the Police Ombudsman for Northern Ireland and the Procurator Fiscal.

6.3.6 In New Zealand, complaints against the police are handled by an independent statutory body: the Police Complaints Authority (PoCA). PoCA has the power to investigate serious cases involving allegations of misconduct, neglect of duty or grievances concerning police practices, policies or procedures. PoCA also investigates death or serious harm incidents involving police officers. PoCA is not within the Ombudsmen's jurisdiction.

6.3.7 In BC, the Ombudsman does not have jurisdiction to investigate complaints against the municipal police. However, there is the Office of the Police Complaint Commissioner for overseeing complaints against the municipal police to ensure that they are handled fairly and impartially. The Police Complaint Commissioner is an officer of the provincial legislature. As such, the Office is completely independent from any police department or government ministry, and reports directly to the provincial legislature.

6.3.8 In Australia, the Ombudsmen generally exercise a re-investigatory role with respect to complaints against the police. Although in some jurisdictions, a complaint may be made either directly to the Ombudsman or to the police, the initial investigation is usually conducted by the police. The Ombudsman's role is to monitor the internal investigations and ensure that they are conducted properly. The Ombudsman can investigate only if he is not satisfied with the outcome of the internal investigations. The exception is NSW. Since 1993, the NSW Ombudsman has had power of direct investigation over the use of police powers and supervisory jurisdiction over primary investigations conducted by the police.

6.4 Protection of human rights and children's rights

6.4.1 At the meeting of the Panel on Home Affairs of LegCo on 10 February 2006, the HKSAR Government indicated that there had been initial discussion with the Ombudsman on whether the remit of the Ombudsman should assume the role of the Commissioner for Human Rights or the Commissioner for Children.¹²⁹

¹²⁹ See LegCo paper No. CB(2)1294/05-06 and CB(2)1727/05-06(01).

6.4.2 Among the places studied, their Ombudsman schemes are not used for handling complaints concerning human rights¹³⁰. Those complaints are dealt with by other public bodies. Both New Zealand and Australia have their own human rights commissions. The UK is on its way to establish a Commission for Equality and Human Rights. In BC, human rights complaints are dealt with by the BC Human Rights Tribunal.

6.4.3 For protection of children's rights, independent commissioners for children and young people are set up in various jurisdictions of the UK. These commissioners have different powers. For instance, the Children's Commissioner for Wales has review and investigative powers and can call for information (people and papers) backed up by contempt of court powers. On the other hand, the remit of the Children's Commission for England is to look after the interests of children and young people as a whole. The Commission is not an ombudsman and does not have the powers to consider individual cases.

6.4.4 In New Zealand, there is a Commissioner for Children who has the power to investigate any decisions or recommendations made, or any act done or omitted, in respect of any child. In BC, there is an Officer for Children and Youth. BC is considering setting up a new Representative for Children and Youth. The BC Ombudsman has also maintained a proactive stance towards children's rights.

6.4.5 In Australia, protection of children's rights falls within the jurisdiction of the national human rights commission and the children's commissioners in some Australian states. In NSW, the Ombudsman has been given jurisdiction to investigate cases involving alleged child abuse.

6.5 Matters subject to investigation

6.5.1 In the HKSAR, the Ombudsman may investigate any action (except such actions specified in Schedule 2 to the *Ombudsman Ordinance*) taken by or on behalf of a specified organization in the exercise of its administrative functions in any case where a complaint is made by a person who claims to have sustained injustice in consequence of maladministration in connection with that action.¹³¹

6.5.2 The *Ombudsman Ordinance* defines "maladministration" as "inefficient, bad or improper administration".¹³² Instances of maladministration include unreasonable conduct, such as delay, discourtesy and lack of consideration; abuse of power, such as decisions based on a mistake of law or fact; and discriminatory decisions and procedures.¹³³

¹³⁰ Some ombudsmen in Latin America and Europe assume the role of safeguarding human rights. See Hossain (2000).

¹³¹ The *Ombudsman Ordinance*, section 7(1).

¹³² The *Ombudsman Ordinance*, section 2.

¹³³ Ibid.

6.5.3 In the HKSAR, a complaint must relate injustice to any action taken by or on behalf of a specified organization "in the exercise of its administrative functions". The *Ombudsman Ordinance* does not define the meaning of "administrative functions". In a 1997 case¹³⁴, the Court of First Instance understood that meaning as "any action taken by an organization in the management of its affairs". The Court also ruled that the exercise of a clinical judgment by medical practitioners was not an administrative function.¹³⁵

6.5.4 The HKSAR Ombudsman can investigate complaints relating to the *Code on Access to Information*. In addition to those public organizations within the Ombudsman's jurisdiction, the Ombudsman is empowered to investigate complaints of non-compliance with the Code against ICAC, the Hong Kong Police Force, the Hong Kong Auxiliary Police Force and the Secretariat of the Public Service Commission.

6.5.5 In recent years, there has been an expansion of the role of public sector ombudsmen around the world. In addition to their traditional role of investigating complaints of maladministration, the public sector ombudsmen in the selected places are given new functions in investigating complaints caused by service failure, performing a supervisory role in the freedom of information and protected disclosure areas and ensuring the quality of service to the public by government contractors.

6.5.6 In the UK, PCA may investigate any action taken by or on behalf of a prescribed government department or authority where a member of the public claims to have sustained injustice in consequence of maladministration in connection with the action so taken.

6.5.7 In the UK, unlike PCA, HSC's jurisdiction is much broader than maladministration. HSC may investigate complaints about hardship or injustice caused by the failure of the National Health Service or a related body to provide a service, by a failure in service or by maladministration. In addition, HSC is permitted to investigate matters of clinical judgment, including the merits of clinical decisions. Meanwhile, CLAs have jurisdiction to investigate any complaint of injustice arising from maladministration by local authorities and a number of other public bodies.

6.5.8 Also in the UK, the jurisdiction of the Scottish Public Services Ombudsman (SPSO) and the Public Services Ombudsman for Wales (PSOW) includes not only any action taken by an authority, but also any "service failure", i.e. any failure in a service provided or failure to provide a service. In addition, PSOW is allowed to investigate not only clinical judgment, but also the exercise of professional judgment in connection with health and social care.

¹³⁴ *Ong Kin Tony v The Commissioner for Administrative Complaints*, [1997] *Hong Kong Law Reports and Digest*, 1191.

¹³⁵ See Cooray (1999) endnotes 14.

6.5.9 In New Zealand, matters subject to investigation by the Ombudsmen are not limited to maladministration. The New Zealand Ombudsmen may investigate any decision, recommendation, act or omission by any prescribed department or organization if the action complained about relates to a matter of administration and affects any person in its capacity. In addition, the jurisdiction of the Ombudsmen in New Zealand has in recent years extended into the freedom of information and protected disclosure areas. In BC, the Ombudsman, with respect to a matter of administration, may investigate a decision, an act done, or a procedure used by a prescribed authority that aggrieves or may aggrieve a person.

6.5.10 In Australia, the Commonwealth Ombudsman is empowered to investigate any action that relates to a matter of administration taken by a government department or a prescribed authority. A legislative amendment has extended the jurisdiction of the Ombudsman to include all government contractors since 2005. In addition to handling complaints about government departments and agencies, the Commonwealth Ombudsman has special responsibilities for complaints relating to the army, the federal police, freedom of information, immigration, the postal services and taxation.

6.5.11 The issue of the administration/policy distinction, i.e. "whether matters of administration" involve "policy matters", is very common in places where the Ombudsmen's jurisdiction is based on "matters of administration", such as New Zealand, BC, Australia and the HKSAR.

6.6 Organizations subject to investigation

6.6.1 In most of the places studied and the HKSAR, bodies within the jurisdiction of the Ombudsmen are listed in their enabling legislation. New bodies must be brought specifically within the jurisdiction of the Ombudsmen before complaints against them can be considered.

6.6.2 The only exception is the Australian Commonwealth Ombudsman. The Commonwealth Ombudsman is empowered to investigate any action that relates to a matter of administration taken by a government department or a prescribed authority. The meanings of "government department" and "prescribed authority" are provided in the interpretation section of its enabling legislation.

6.6.3 In the HKSAR, the organizations covered by the *Ombudsman Ordinance* are listed in Schedule 1 to the Ordinance. They include all government departments (except the Hong Kong Police Force and ICAC) and 17 major statutory organizations¹³⁶.

6.6.4 In the UK, the authorities subject to investigation by PCA are listed in Schedule 2 to the *Parliamentary Commissioner Act 1967*. They include central government departments, executive agencies, the Electoral Commission, advisory groups and certain non-departmental public bodies. The bodies within HSC's jurisdiction are listed in section 2 of the *Health Service Commissioner Act 1993*. They are the National Health Service organizations, which include private sector providers delivering services on behalf of the National Health Service. Section 25 of the *Local Government Act 1974* lists those organizations subject to investigation by CLAs, which include local councils, local police authorities, development corporations and water boards.

6.6.5 The persons and organizations covered by the *Scottish Public Services Ombudsman Act 2002* are listed in Schedule 2 to the Act. They include the Scottish Parliament, the Scottish Executive, the Scottish public authorities, health service organizations and local authorities. The persons and organizations subject to investigation by PSOW are listed in Schedule 3 to the *Public Services Ombudsman (Wales) Act 2005*. They include the National Assembly for Wales, local government organizations, health and social care institutions, and school governing bodies.

6.6.6 In New Zealand, the First Schedule to the *Ombudsmen Act 1975* lays down those departments and organizations subject to the jurisdiction of the Ombudsmen. They include the Department of the Prime Minister and Cabinet, the Ministries, education authorities, the Electoral Commission, public health authorities and local organizations. In BC, the organizations covered are listed in the Schedule to the *Ombudsman Act*, comprising not only provincial government ministries, crown corporations, the Electoral Boundaries Commission, hospitals and local health agencies, but also colleges and universities, school boards, professional disciplinary bodies and municipalities.

¹³⁶ They are the Airport Authority, the Employees Retraining Board, the Equal Opportunities Commission, the Hong Kong Arts Development Council, the Hong Kong Examinations and Assessment Authority, the Hong Kong Housing Authority, the Hong Kong Housing Society, the Hong Kong Monetary Authority, the Hong Kong Sports Development Board, the Hospital Authority, the Kowloon-Canton Railway Corporation, the Legislative Council Secretariat, the Mandatory Provident Fund Schemes Authority, the Office of the Privacy Commissioner for Personal Data, the Securities and Futures Commission, the Urban Renewal Authority and the Vocational Training Council.

6.7 Exclusions from jurisdiction

6.7.1 In the HKSAR, Schedule 2 to the *Ombudsman Ordinance* provides for the following matters to be excluded from investigation:

- (a) actions certified by CE in relation to security, defence or international relations;
- (b) legal proceedings or prosecution decisions;
- (c) exercise of power to pardon criminals by CE;
- (d) contractual or commercial transactions;
- (e) personnel matters in public organizations¹³⁷;
- (f) grant of honours, awards or privileges by the Government;
- (g) actions by CE personally;
- (h) imposition or variation of conditions of land grant;
- (i) actions in relation to the Hong Kong Codes on Takeovers and Mergers and Share Repurchases; and
- (j) crime prevention and investigation actions by ICAC or the police.

6.7.2 In both the 2004 and 2005 Annual Reports, the HKSAR Ombudsman repeatedly raised the issue of whether the Ombudsman might be unduly restrictive regarding personnel matters in the civil service.¹³⁸ The issue of whether to extend COMAC's jurisdiction to cover civil service grievances was also considered in the comprehensive review carried out in mid-1992.¹³⁹

¹³⁷ Paragraph 5 of Schedule 2 to the *Ombudsman Ordinance* provides that:
"Any action taken in respect of appointments or removals, pay, conditions of service, discipline, pension, superannuation or other personnel matters, in relation to -
(a) service in any office or employment under the Government or under any organization; or
(b) service in any office, or under any contract for services, in respect of which power to take action, or to determine or approve the action to be taken, in such matters is vested in the Chief Executive or any organization."

¹³⁸ Office of the Ombudsman (2004) paragraph 5.5 and Office of the Ombudsman (2005) paragraph 5.6.

¹³⁹ See footnote 124 of this research report.

6.7.3 In the UK, there is a long list of matters that are not subject to investigation by PCA. These include actions affecting foreign affairs, investigation of crime, protection of state security, conduct of civil or criminal proceedings, personnel administration (including pay, discipline and removal) in the civil service, and contractual and commercial transactions.

6.7.4 Two controversial items in PCA's list of exclusions are personnel administration in the civil service and contractual and commercial transactions. The UK Parliament has made repeated attempts to bring these exclusions into PCA's jurisdiction, but so far without success.

6.7.5 In the UK, matters that are excluded from investigation by HSC include personnel matters, contractual or commercial transactions (except when made for providing services for patients), matters subject to statutory inquiries and cases where there are legal remedies. CLAs have no power to investigate matters relating to the internal regulation of schools, personnel matters, actions concerning the commencement of legal proceedings and criminal investigations, and commercial and contractual matters. Both SPSO and PSOW are subject to similar exclusions as PCA, HSC and CLAs.

6.7.6 In New Zealand, the Ombudsmen do not have the power to investigate matters relating to court proceedings, the police and the army. In BC, complaints against banks, courts, doctors, the municipal police and private schools are not within the Ombudsman's jurisdiction. Nonetheless, both the New Zealand Ombudsmen and the BC Ombudsman are not prohibited from investigating personnel matters in the civil service and commercial transactions of a listed body.

6.7.7 In Australia, matters that are excluded from the Commonwealth Ombudsman's jurisdiction are actions taken by a Minister, actions that constitute proceedings in Parliament, actions taken by various judicial officers (except administrative actions) and certain actions relating to government employment (including appointment, pay, discipline and removal). In Queensland and Victoria, the Ombudsmen can also handle matters relating to personnel administration in the civil service.

6.8 Investigation power

6.8.1 Among the selected places and the HKSAR, all Ombudsmen are equipped with extensive powers to conduct their investigations. Those powers are similar, including the power to obtain information (including classified documents) and make inquiries as the Ombudsmen think fit, and the power to summon witnesses to give evidence. In order to give backing to these powers, there are penalties for not co-operating with the Ombudsmen's investigations.

6.8.2 In New Zealand, BC, Australia and the HKSAR, complaints are not filtered by legislators, and their Ombudsmen can investigate on their own initiative. In the UK, complaints to PCA have to be referred by Members of Parliament, and only PSOW has the power to perform direct investigation.

Table 1 — Appointment procedure

Places	Ombudsmen	Year of establishment	Major relevant legislation	Appointment procedure
The United Kingdom	The Parliamentary Commissioner for Administration (PCA)	1967	<i>The Parliamentary Commissioner Act 1967</i>	PCA is appointed by the Crown and holds office "during good behaviour" until he attains the age of 65. In practice, the appointment of PCA is made by the Queen on the advice of the Prime Minister after consultation with the Leader of the Opposition and the Chairman of the Select Committee on Public Administration.
	The Health Service Commissioner for England (HSC)	1973	<i>The Health Service Commissioner Act 1993</i>	HSC is appointed by the Crown and holds office until he attains the age of 65.
	The Commissioners for Local Administration in England (CLAs)	1974	<i>The Local Government Act 1974</i>	CLAs are appointed by the Crown on the recommendation of the Secretary of State, and hold office "during good behaviour" until they attain the age of 65.
	The Scottish Public Services Ombudsman (SPSO)	2002	<i>The Scottish Public Services Ombudsman Act 2002</i>	SPSO and Deputy Ombudsmen are appointed by the Crown on the nomination of the Scottish Parliament. They are appointed for a period to be determined by the Scottish Parliamentary Corporate Body, which must not exceed five years. They are eligible for re-appointment for a second term. A third term is allowed only if it is desirable in the public interest under special circumstances.
	The Public Services Ombudsman for Wales (PSOW)	2006	<i>The Public Services Ombudsman (Wales) Act 2005</i>	PSOW is appointed by the Crown on the recommendation of the Secretary of State. The Secretary of State is required to consult the National Assembly for Wales before making the recommendation. PSOW is appointed for a term of seven years, which is non-renewable.

Table 1 — Appointment procedure (cont'd)

Places	Ombudsmen	Year of establishment	Major relevant legislation	Appointment procedure
New Zealand	Officers of Parliament and Commissioners for Investigation	1962	<i>The Ombudsmen Act 1975</i>	All Ombudsmen are appointed by the Governor-General on the recommendation of the House of Representatives, with one of them being appointed the Chief Ombudsman. All Ombudsmen are appointed for a term of five years and may be reappointed.
The Province of British Columbia in Canada	The Ombudsman	1979	<i>The Ombudsman Act</i>	The Ombudsman is appointed by the Lieutenant Governor on the recommendation of the Legislative Assembly of British Columbia. The Ombudsman is appointed for a term of six years and may be reappointed for another six-year term.
Australia	The Commonwealth Ombudsman	1977	<i>The Ombudsman Act 1976</i>	Both the Commonwealth Ombudsman and the Deputy Commonwealth Ombudsmen are appointed by the Governor-General on the recommendation of the Prime Minister. They hold office for a term not exceeding seven years and are eligible for reappointment.
The Hong Kong Special Administrative Region	The Ombudsman	1988	<i>The Ombudsman Ordinance</i>	The Ombudsman is appointed by the Chief Executive for a term of five years and is eligible for reappointment.

Table 2 — Matters subject to investigation

Places	Ombudsmen	Matters subject to investigation
The United Kingdom	The Parliamentary Commissioner for Administration (PCA)	PCA may investigate any action taken by or on behalf of a prescribed government department or authority where a member of the public claims to have sustained injustice in consequence of maladministration in connection with the action so taken.
	The Health Service Commissioner for England (HSC)	HSC may investigate complaints about hardship or injustice caused by the failure of the National Health Service or a related body to provide a service, by a failure in service or by maladministration.
	The Commissioners for Local Administration in England (CLAs)	CLAs may investigate any complaint of injustice arising from maladministration by local authorities and a number of other public bodies.
	The Scottish Public Services Ombudsman (SPSO)	SPSO may investigate complaints relating to any service failure and actions taken in the exercise of administrative functions of a listed authority.
	The Public Services Ombudsman for Wales (PSOW)	PSOW may investigate complaints relating to any service failure and actions taken in the exercise of administrative functions of a listed authority.
New Zealand	Officers of Parliament and Commissioners for Investigation	The Ombudsman may investigate any decision, recommendation, act or omission by any prescribed department or organization if the action complained about relates to a matter of administration and affects any person in its capacity. The Ombudsman also has special responsibilities for complaints relating to the freedom of information and protected disclosure areas.

Table 2 — Matters subject to investigation (cont'd)

Places	Ombudsmen	Matters subject to investigation
The Province of British Columbia in Canada	The Ombudsman	The Ombudsman, with respect to a matter of administration, may investigate a decision, an act done, or a procedure used by a prescribed authority that aggrieves or may aggrieve a person.
Australia	The Commonwealth Ombudsman	The Commonwealth Ombudsman is empowered to investigate any action that relates to a matter of administration taken by a government department or a prescribed authority. Actions by government contractors are included. The Ombudsman also has special responsibilities for complaints relating to the army, the federal police, freedom of information, immigration, the postal services and taxation.
The Hong Kong Special Administrative Region	The Ombudsman	The Ombudsman may investigate any action taken by or on behalf of a prescribed organization in the exercise of its administrative functions in any case where a complainant claims to have sustained injustice in consequence of maladministration in connection with that action. The Ombudsman can also investigate complaints relating to the <i>Code on Access to Information</i> .

Table 3 — Organizations subject to investigation

Places	Ombudsmen	Organizations subject to investigation
The United Kingdom	The Parliamentary Commissioner for Administration (PCA)	The central government departments, advisory groups, executive agencies, the Electoral Commission, certain non-departmental public bodies and tribunals.
	The Health Service Commissioner for England (HSC)	The National Health Service organizations – including private sector providers delivering services on behalf of the National Health Service.
	The Commissioners for Local Administration in England (CLAs)	Local councils, local police authorities, development corporations and water boards.
	The Scottish Public Services Ombudsman (SPSO)	The Scottish Parliament, the Scottish Executive, the Scottish public authorities, health service organizations and local authorities.
	The Public Services Ombudsman for Wales (PSOW)	The National Assembly for Wales, local government organizations, health and social care institutions and school governing bodies.
New Zealand	Officers of Parliament and Commissioners for Investigation	The Department of the Prime Minister and Cabinet, the Ministries, education authorities, the Electoral Commission, public health authorities and local organizations.

Table 3 — Organizations subject to investigation (cont'd)

Places	Ombudsmen	Organizations subject to investigation
The Province of British Columbia in Canada	The Ombudsman	Provincial government ministries, crown corporations, school boards, the Electoral Boundaries Commission, hospitals and local health agencies, colleges and universities, professional disciplinary bodies and municipalities.
Australia	The Commonwealth Ombudsman	Any government department and prescribed authority, including the Australian Electoral Commission.
The Hong Kong Special Administrative Region	The Ombudsman	All government departments (except the Hong Kong Police Force and ICAC) and 17 major statutory organizations.

Table 4 — Exclusions from jurisdiction

Places	Ombudsmen	Exclusions from jurisdiction
The United Kingdom	The Parliamentary Commissioner for Administration (PCA)	Actions affecting foreign affairs, investigation of crime, protection of state security, conduct of civil or criminal proceedings, personnel administration (including pay, discipline and removal) in the civil service, and contractual and commercial transactions.
	The Health Service Commissioner for England (HSC)	Personnel matters, contractual or commercial transactions (except when made for providing services for patients), matters subject to statutory inquiries and cases where there are legal remedies.
	The Commissioners for Local Administration in England (CLAs)	Matters relating to the internal regulation of schools, personnel matters, actions concerning the commencement of legal proceedings and criminal investigations, and commercial and contractual matters.
	The Scottish Public Services Ombudsman (SPSO)	Similar to the exclusions of PCA, HSC and CLAs.
	The Public Services Ombudsman for Wales (PSOW)	Similar to the exclusions of PCA, HSC and CLAs.
New Zealand	Officers of Parliament and Commissioners for Investigation	Matters relating to court proceedings, the police and the army.
The Province of British Columbia in Canada	The Ombudsman	Complaints against banks, courts, doctors, the municipal police and private schools.

Table 4 — Exclusions from jurisdiction (cont'd)

Places	Ombudsmen	Exclusions from jurisdiction
Australia	The Commonwealth Ombudsman	Actions taken by a Minister, actions that constitute proceedings in Parliament, actions taken by various judicial officers (except administrative actions) and certain actions relating to government employment (including appointment, pay, discipline and removal).
The Hong Kong Special Administrative Region	The Ombudsman	Actions in relation to security, defence or international relations; legal proceedings or prosecution decisions, exercise of power to pardon criminals; contractual or commercial transactions, personnel matters in public organizations; grant of honours, awards or privileges by the Government; actions by the Chief Executive personally; imposition or variation of conditions of land grant; actions in relation to the Hong Kong Codes on Takeovers and Mergers and Share Repurchases, crime prevention and investigation actions by the police or ICAC.

Table 5 — Investigation powers

Places	Ombudsmen	Filtered by legislators	Direct investigation	Summoning of witnesses	Access to documents (including classified documents)	Penalty for not co-operating in investigation
The United Kingdom	The Parliamentary Commissioner for Administration (PCA)	Yes.	No.	Yes.	Yes.	Yes.
	The Health Service Commissioner for England (HSC)	No.	No.	Yes.	Yes.	Yes.
	The Commissioners for Local Administration in England (CLAs)	No.	No.	Yes.	Yes.	Yes.
	The Scottish Public Services Ombudsman (SPSO)	No.	No.	Yes.	Yes.	Yes.
	The Public Services Ombudsman for Wales (PSOW)	No.	Yes.	Yes.	Yes.	Yes.

Table 5 — Investigation powers (cont'd)

Places	Ombudsmen	Filtered by legislators	Direct investigation	Summoning of witnesses	Access to documents (including classified documents)	Penalty for not co-operating in investigation
New Zealand	Officers of Parliament and Commissioners for Investigation	No.	Yes.	Yes.	Yes.	Yes.
The Province of British Columbia in Canada	The Ombudsman	No.	Yes.	Yes.	Yes.	Yes.
Australia	The Commonwealth Ombudsman	No.	Yes.	Yes.	Yes.	Yes.
The Hong Kong Special Administrative Region	The Ombudsman	No.	Yes.	Yes.	Yes.	Yes.

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