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Panel on Administration of Justice and Legal Services

Background brief for meeting on 25 February 2008

Review of the jurisdiction of the Office of The Ombudsman

Purpose

This paper provides information on the past discussions of Members of the Legislative Council (LegCo) on the review of the jurisdiction of the Office of The Ombudsman (the Review).

The Ombudsman's jurisdiction

2. Section 7(1) of The Ombudsman Ordinance (Cap. 397) (TOO) empowers The Ombudsman to investigate any action taken by or on behalf of –

- (a) an organization set out in Part I of Schedule 1 in the exercise of its administrative functions; or
- (b) an organization set out in Part II of Schedule 1 in the exercise of its administrative functions in relation to the Code on Access to Information published by the Government.

3. Part I of Schedule 1 currently comprises all Government departments (except Police) and 17 public bodies. Section 8 of TOO provides that The Ombudsman shall not undertake or continue any investigation that relates to any action or matter specified in Schedule 2. Schedules 1 and 2 to TOO are in **Appendices I and II** respectively.

Background

4. In the light of the calls received from time to time to extend her jurisdiction to cover more organizations, The Ombudsman decided to conduct a review in 2005. The Ombudsman also considered it desirable to resolve some uncertainties and/or difficulties encountered in investigations by her Office.

5. Noting that The Ombudsman would be conducting the review, the Panel on Administration of Justice and Legal Service (the Panel) agreed on 15 December 2005 that a research be conducted on the purviews of ombudsmen in overseas jurisdictions. At the meeting on 26 June 2006, the Panel considered the Research Report on "Jurisdiction of Ombudsman Systems in Selected Places" prepared by the Research and Library Services Division of the LegCo Secretariat (the Research Report). The research has studied the jurisdiction of the ombudsman systems in the United Kingdom, New Zealand, the Province of British Columbia in Canada and Australia, focusing on the arrangement of ombudsman services, the organizations covered, and the investigation powers and purviews of the ombudsmen. The Ombudsman and representatives of the Hong Kong Bar Association attended the meeting to give views on the relevant issues.

6. The Ombudsman's Review consists of two parts: Part I will be an "operational" review of the TOO, and Part II a more generalized review of developments in ombudsmanship. Part I of the Review covers the following aspects -

- (a) whether more, and if so which, organizations should be brought within The Ombudsman's jurisdiction under Schedule 1 to TOO;
- (b) whether certain restrictions on The Ombudsman's investigative powers, set out in Schedule 2 to TOO, should be relaxed; and
- (c) whether the apparent conflict between the secrecy requirements in TOO and other ordinances should be resolved.

7. The Ombudsman submitted Part I and Part II of the Report on Review of Jurisdiction of the Office of The Ombudsman (the Review Report) to the Administration in November 2006 and November 2007 respectively.

8. On 11 December 2007, the Complaints Division of the LegCo Secretariat arranged an annual meeting between LegCo Members and The Ombudsman. The minutes of the meeting are in **Appendix III**.

9. On 13 December 2007, the Administration briefed the Panel on its initial response to the recommendations made by The Ombudsman in Part I of the Review Report (as set out in **Appendix IV**).

Issues raised

Part I of the Review Report on The Ombudsman's jurisdiction

10. At the Panel meeting on 26 June 2006, the Bar Association expressed the view that the existing scope of The Ombudsman's purview was too restrictive. The Ombudsman was asked to consider the suggestions of bringing the subvented agencies

within the remit of The Ombudsman insofar as their public functions were concerned. As a general rule, agencies that were amenable to judicial review should also be amenable to the jurisdiction of The Ombudsman as regards maladministration. Ms Emily LAU shared the view of the Bar Association. She asked The Ombudsman to take into account the findings in the Research Report in considering the organizations and matters that should be brought within the remit of The Ombudsman in conducting her review.

11. On 13 December 2007, the Administration briefed the Panel on its initial response to the recommendations made in Part I of the Review Report, The Ombudsman has recommended the inclusion of eight bodies in Part I of Schedule 1 to TOO after taking into account their executive powers, extensive interface with or impact on the public and the main source of funding. The eight bodies are -

- (a) Auxiliary Medical Service;
- (b) Civil Aid Service;
- (c) Board of Management of Chinese Permanent Cemeteries;
- (d) Chinese Temples Committee;
- (e) Consumer Council;
- (f) Estate Agents Authority;
- (g) the Electoral Affairs Commission (EAC); and
- (h) the District Councils (DCs).

12. Some Panel members expressed support for the recommendations to include the above eight bodies under the purview of The Ombudsman. While the Administration would proceed to consult the six bodies listed in paragraph 11(a) to (f) on the recommendation, it did not see a case for including the EAC and the DCs in the Schedule as recommended by The Ombudsman in view of their lack of executive powers.

13. At the meeting held between LegCo Members and The Ombudsman on 11 December 2007, The Ombudsman explained that it was not the intention of her Office to interfere with elections or any statutory functions performed by the EAC and DCs. The power and functions of The Ombudsman were clearly defined in TOO, and The Ombudsman could only investigate, inter alia, actions taken by an organization in the exercise of its administrative functions. It was on that basis that she had recommended the inclusion of the EAC and DCs within the jurisdiction of The Ombudsman.

14. To facilitate the Panel to further consider the matter, members requested the Administration to provide -

- (a) a paper explaining why it did not see a case for subjecting the EAC and the DCs to The Ombudsman's jurisdiction; and
- (b) a copy of the Review Report for reference of members.

Part II of the Review Report

15. The Ombudsman submitted Part II of the Review Report to the Administration in November 2007. The Administration has yet to inform the Panel of its views on the Report.

16. At the meeting held between LegCo Members and The Ombudsman on 11 December 2007, The Ombudsman advised that Part II of the Review covered developments of ombudsman offices in other jurisdictions and their implications on Hong Kong's ombudsman system, and these issues were not directly within her jurisdiction. Although she had not come up with any specific recommendations in Part II of the Review Report, she had provided her review findings to the Administration for consideration.

17. Ms Emily LAU expressed concern whether the role of The Ombudsman should be expanded to cover human rights protection, having regard to overseas experience. The Ombudsman advised that it was inappropriate for her to comment on this as it should be a policy decision to be made by the Administration. Based on her review findings, the scope of the ombudsman's activities had been expanded to cover human rights protection for the newly established ombudsman institutions. However, places such as New Zealand, United Kingdom, Australia and Hong Kong followed the classical ombudsman model. While The Ombudsman was not explicitly charged with human rights responsibilities, the essence of an ombudsman's work was to ensure the protection of individual rights by public administration. As regards the existing mechanism for protection of human rights in Hong Kong, various statutory bodies and institutions, including The Ombudsman, the Equal Opportunities Commission, the Privacy Commissioner's Office and other local bodies, had a role to oversee human rights protection as provided for under the respective ordinances. The question of whether one single institution should be set up to oversee all issues on human rights protection in Hong Kong was a policy issue to be examined by the Administration. The Ombudsman advised that she had highlighted the implications for putting in place such a system in Part II of the Review Report. To her understanding, the Administration held the view that there was an extensive mechanism for the protection of human rights in Hong Kong, and it did not see an obvious need for establishing another human rights institution to duplicate or supersede the existing mechanisms.

Public consultation

18. At the Panel meeting on 26 June 2006, Ms Emily LAU pointed out that as the jurisdiction of the Office of The Ombudsman was a matter of concern to the general public, the Administration should issue a consultation document to seek public views on the conclusions and recommendations made by The Ombudsman in her report. She held the view that The Ombudsman should also consult the public when conducting the Review.

19. The Ombudsman responded that her Office was aware of public views and expectation from correspondence received daily from complainants. It was, however, inappropriate for her to conduct a public consultation exercise. The appropriate channel was for her to submit her Review Report for the consideration of the Government. If the Government accepted certain recommendations, it would introduce legislative amendments to TOO to give effect to these recommendations.

20. The Administration has advised the Panel in writing that if The Ombudsman's proposals involve policy or legislative changes, it will consult the relevant parties on a need basis. As regards the Panel's request for a consultation document to seek public views on the report, the Administration is of the view that the course of actions to be taken will very much depend on the content of the Review Report and the aspects of the report which the public will be interested in.

Latest development

21. Part I of the Review Report was issued to members on 28 January 2008. The Panel will follow up paragraph 14(a) above and other relevant issues at the meeting on 25 February 2008.

Relevant papers

22. A list of relevant papers available on the LegCo website (<http://www.legco.gov.hk>) is in **Appendix V**.

~~95. 過渡性條文~~

~~對於在本條例生效日期前發生的事項，可根據本條例提出申訴；而就第 10(1)(a) 條而言，本條例的制定日期與生效日期之間相距的時間，不得計算在內，但在制定日期前的任何時間則須計算在內。~~

~~25. Transitional~~

~~A complaint under this Ordinance may be made in respect of matters which arose before the commencement of this Ordinance and for the purposes of section 10(1)(a) any time elapsing between the date of the enactment and the date of the commencement of this Ordinance (but not any time before the first of those dates) shall be disregarded.~~

附表 1 [第 2(1)、7(1) 及 24 條]
(由 2006 年第 168 號法律公告修訂)

SCHEDULE 1 [ss. 2(1), 7(1) & 24]
(Amended L.N. 168 of 2006)

本條例適用的機構

ORGANIZATIONS TO WHICH THIS ORDINANCE APPLIES

第 I 部[#]

(由 1994 年第 44 號第 17 條修訂；由 1996 年第 74 號第 9 條修訂)

PART I[#]

(Amended 44 of 1994 s. 17; 74 of 1996 s. 9)

入境事務處。(由 1997 年第 362 號法律公告修訂)
九廣鐵路公司。(由 1994 年第 44 號第 17 條增補)
土木工程拓展署。(由 1992 年第 183 號法律公告代替。由 2004 年第 104 號法律公告修訂)
土地註冊處。(由 1993 年第 8 號第 28 條增補)
工業貿易署。(由 2000 年第 173 號法律公告代替)
大學教育資助委員會秘書處。(由 1995 年第 35 號法律公告修訂)
公司註冊處。(由 1993 年第 8 號第 28 條增補)
公務及司法人員薪俸及服務條件諮詢委員會聯合秘書處。(由 2001 年第 253 號法律公告增補)
水務署。
立法會秘書處。(由 1994 年第 14 號第 24 條代替。由 1998 年第 25 號第 2 條修訂)
司法機構政務長轄下所有法院與審裁處的登記處及行政辦事處。(由 1996 年第 155 號法律公告代替)
民政事務總署。(由 1997 年第 362 號法律公告修訂)
民航處。
† 民眾安全服務處(部門)。(由 1996 年第 155 號法律公告增補)
市區重建局。(由 2000 年第 63 號第 38 條代替)
平等機會委員會。(由 2001 年第 30 號第 19 條增補)

Agriculture, Fisheries and Conservation Department. (Replaced L.N. 331 of 1999)
Airport Authority. (Added L.N. 155 of 1996)
All registries and administrative offices of courts and tribunals for which the Judiciary Administrator has responsibility. (Replaced L.N. 155 of 1996)
Architectural Services Department.
Audit Commission. (Amended L.N. 362 of 1997)
*Auxiliary Medical Service (department). (Added L.N. 155 of 1996. Amended 57 of 1997 s. 34)
Buildings Department. (Replaced L.N. 282 of 1993)
Census and Statistics Department.
†Civil Aid Service (department). (Added L.N. 155 of 1996. Amended 58 of 1997 s. 34)
Civil Aviation Department.
Civil Engineering and Development Department. (Replaced L.N. 183 of 1992. Amended L.N. 104 of 2004)
Companies Registry. (Added 8 of 1993 s. 28)
Correctional Services Department.
Customs and Excise Department.

[#] 《2003 年教育重組(雜項修訂)條例》(2003 年第 3 號)自本附表第 I 部廢除“教育署”。相關的保留及過渡性條文見於該條例第 29 條。

† 請參閱載於第 518 章第 33(4) 條的保留條文。

[#] “Education Department” was repealed from Part I of this Schedule by the Education Reorganization (Miscellaneous Amendments) Ordinance 2003 (3 of 2003). For the related saving and transitional provisions, see section 29 of the Ordinance.

* Please see the saving provisions contained in section 33(4) of Cap. 517.

† Please see the saving provisions contained in section 33(4) of Cap. 518.

行政長官辦公室總務室。(由 1996 年第 155 號法律公告增補。由 1998 年第 25 號第 2 條修訂)

地政總署。(由 1993 年第 282 號法律公告增補)

投資推廣署。(由 2000 年第 152 號法律公告增補)

法律援助署。

房屋署。

社會福利署。

知識產權署。(由 1990 年第 236 號法律公告增補)

屋宇署。(由 1993 年第 282 號法律公告代替)

政府化驗所。

政府物流服務署。(由 2003 年第 164 號法律公告代替)

政府飛行服務隊。(由 1993 年第 242 號法律公告增補)

政府產業署。(由 1991 年第 181 號法律公告增補)

政府統計處。

政府新聞處。

政府總部。(由 1998 年第 25 號第 2 條修訂)

食物環境衛生署。(由 1999 年第 78 號第 7 條增補)

律政司。(由 1997 年第 362 號法律公告修訂)

香港天文台。(由 1998 年第 25 號第 2 條修訂)

香港考試及評核局。(由 2002 年第 23 號第 27 條代替)

香港房屋委員會。(由 1994 年第 44 號第 17 條增補。由 2006 年第 168 號法律公告修訂)

香港房屋協會。(由 1996 年第 155 號法律公告增補)

香港金融管理局。(由 1993 年第 97 號法律公告增補)

香港海關。

香港電台。

香港藝術發展局。(由 1995 年第 26 號第 20 條增補)

香港體育學院有限公司。(由 2005 年第 5 號法律公告增補)

建築署。

個人資料私隱專員。(由 2001 年第 30 號第 19 條增補)

消防處。

海事處。

財務匯報局。(由 2006 年第 18 號第 81 條增補)

庫務署。

破產管理署。(由 1992 年第 183 號法律公告增補)

差餉物業估價署。

Department of Health. (*Added L.N. 414 of 1989*)

Department of Justice. (*Amended L.N. 362 of 1997*)

Drainage Services Department. (*Added L.N. 357 of 1989*)

Electrical and Mechanical Services Department.

Employees Retraining Board. (*Added L.N. 139 of 1999*)

Environmental Protection Department.

Equal Opportunities Commission. (*Added 30 of 2001 s. 19*)

Financial Reporting Council. (*Added 18 of 2006 s. 81*)

Fire Services Department.

Food and Environmental Hygiene Department. (*Added 78 of 1999 s. 7*)

General Office of the Chief Executive's Office. (*Added L.N. 155 of 1996. Amended 25 of 1998 s. 2*)

Government Flying Service. (*Added L.N. 242 of 1993*)

Government Laboratory.

Government Logistics Department. (*Replaced L.N. 164 of 2003*)

Government Property Agency. (*Added L.N. 181 of 1991*)

Government Secretariat.

Highways Department.

Home Affairs Department. (*Replaced L.N. 155 of 1996*)

Hong Kong Arts Development Council. (*Added 26 of 1995 s. 20*)

Hong Kong Housing Authority. (*Added 44 of 1994 s. 17*)

Hong Kong Housing Society. (*Added L.N. 155 of 1996*)

Hong Kong Monetary Authority. (*Added L.N. 97 of 1993*)

Hong Kong Observatory. (*Amended 25 of 1998 s. 2; L.N. 168 of 2006*)

Hong Kong Sports Institute Limited. (*Added L.N. 5 of 2005*)

Hospital Authority. (*Added L.N. 420 of 1991*)

Housing Department.

Immigration Department.

Information Services Department.

Inland Revenue Department.

Intellectual Property Department. (*Added L.N. 236 of 1990*)

Invest Hong Kong. (*Added L.N. 152 of 2000*)

Joint Secretariat for the Advisory Bodies on Civil Service and Judicial Salaries and Conditions of Service. (*Added L.N. 253 of 2001*)

Kowloon-Canton Railway Corporation. (*Added 44 of 1994 s. 17*)

Labour Department.

Land Registry. (*Added 8 of 1993 s. 28*)

Lands Department. (*Added L.N. 282 of 1993*)

強制性公積金計劃管理局。(由 1999 年第 139 號法律公告增補)

郵政署。

規劃署。(由 1989 年第 414 號法律公告增補)

康樂及文化事務署。(由 1999 年第 78 號第 7 條增補)

勞工處。

稅務局。

渠務署。(由 1989 年第 357 號法律公告增補)

路政署。

電訊管理局。(由 1993 年第 242 號法律公告增補)

運輸署。

僱員再培訓局。(由 1999 年第 139 號法律公告增補)

漁農自然護理署。(由 1999 年第 331 號法律公告代替)

審計署。(由 1997 年第 362 號法律公告修訂)

影視及娛樂事務管理處。

學生資助辦事處。(由 2006 年第 168 號法律公告增補)

衛生署。(由 1989 年第 414 號法律公告增補)

機場管理局。(由 1996 年第 155 號法律公告增補)

機電工程署。

選舉事務處。(由 1994 年第 251 號法律公告增補)

環境保護署。

職業訓練局。(由 1996 年第 155 號法律公告增補)

醫院管理局。(由 1991 年第 420 號法律公告增補)

* 醫療輔助隊(部門)。(由 1996 年第 155 號法律公告增補)

證券及期貨事務監察委員會。(由 1994 年第 44 號第 17 條增補)

懲教署。

(由 1989 年第 76 號法律公告修訂；由 1989 年第 373 號法律公告修訂；由 1993 年第 8 號第 28 條修訂；由 1999 年第 78 號第 7 條修訂；由 2000 年第 13 號第 65 條修訂；由 2000 年第 152 號法律公告修訂；由 2000 年第 63 號第 38 條修訂；由 2001 年第 253 號法律公告修訂；由 2003 年第 3 號第 28 條修訂；由 2003 年第 164 號法律公告修訂；由 2004 年第 104 號法律公告修訂；由 2004 年第 11 號第 18 條修訂；由 2006 年第 168 號法律公告修訂)

Legal Aid Department.

Legislative Council Secretariat. (Replaced 14 of 1994 s. 24)

Leisure and Cultural Services Department. (Added 78 of 1999 s. 7)

Mandatory Provident Fund Schemes Authority. (Added L.N. 139 of 1999)

Marine Department.

Office of the Telecommunications Authority. (Added L.N. 242 of 1993)

Official Receiver's Office. (Added L.N. 183 of 1992)

Planning Department. (Added L.N. 414 of 1989)

Post Office.

Privacy Commissioner for Personal Data. (Added 30 of 2001 s. 19)

Radio Television Hong Kong.

Rating and Valuation Department.

Registration and Electoral Office. (Added L.N. 251 of 1994)

Securities and Futures Commission. (Added 44 of 1994 s. 17)

Social Welfare Department.

Student Financial Assistance Agency. (Added L.N. 168 of 2006)

Television and Entertainment Licensing Authority.

The Hong Kong Examinations and Assessment Authority. (Replaced 23 of 2002 s. 27)

Trade and Industry Department. (Replaced L.N. 173 of 2000)

Transport Department.

Treasury.

University Grants Committee, Secretariat. (Amended L.N. 35 of 1995)

Urban Renewal Authority. (Replaced 63 of 2000 s. 38)

Vocational Training Council. (Added L.N. 155 of 1996)

Water Supplies Department.

(Amended L.N. 76 of 1989; L.N. 373 of 1989; 8 of 1993 s. 28; 78 of 1999 s. 7; 13 of 2000 s. 65; L.N. 152 of 2000; 63 of 2000 s. 38; L.N. 253 of 2001; 3 of 2003 s. 28; L.N. 164 of 2003; L.N. 104 of 2004; 11 of 2004 s. 18; L.N. 168 of 2006)

* 請參閱載於第 517 章第 33(4) 條的保留條文。

第 II 部

公務員敘用委員會秘書處。

投訴警方獨立監察委員會秘書處。

香港輔助警隊。 (由 1998 年第 25 號第 2 條修訂)

香港警隊。 (由 1998 年第 25 號第 2 條修訂)

廉政公署。 (由 1997 年第 362 號法律公告修訂)

(第 II 部由 1996 年第 74 號第 9 條增補)

PART II

Independent Commission Against Corruption.

Hong Kong Auxiliary Police Force. (*Amended 25 of 1998 s. 2*)

Hong Kong Police Force. (*Amended 25 of 1998 s. 2*)

Secretariat of the Independent Police Complaints Council.

Secretariat of the Public Service Commission.

(*Part II added 74 of 1996 s. 9*)

~~5. 豁免繳稅~~

- (1) 專員獲豁免繳付根據《稅務條例》(第 112 章) 徵收的稅項。
- (2) 為免生疑問，現宣布第 (1) 款不適用於本條例第 3(6) 條提述的由政府一般收入撥付的薪金或其他利益，亦不就該等薪金或其他利益而適用。
- (附表 1A 由 2001 年第 30 號第 20 條增補)

~~5. Exemption from taxation~~

- (1) The Ombudsman shall be exempt from taxation under the Inland Revenue Ordinance (Cap. 112).
- (2) For the avoidance of doubt, it is declared that subsection (1) does not apply to or in relation to any salary or other benefit referred to in section 3(6) of this Ordinance payable out of the general revenue.
- (Schedule 1A added 30 of 2001 s. 20)

附表 2

[第 8 條]

不受調查的行動

1. 在行政長官證明會影響香港保安、防衛或國際關係(包括與任何國際組織的關係)的事情上所作的行動。(由 1998 年第 25 號第 2 條修訂)
2. 在香港任何法庭或審裁處的任何民事或刑事法律程序的展開或進行，包括是否為任何罪行檢控任何人的決定。(由 1997 年第 80 號第 102 條修訂)
3. 行政長官行使權力，赦免被裁定犯了刑事罪行的人或改判這些人的刑罰。(由 1998 年第 25 號第 2 條代替)
4. 在合約或其他商業交易上所作的行動，但不包括招標、確定投標人資格及挑選中標人時採取的程序。
5. 與以下項目有關的任免、薪酬、服務條件、紀律、退休金、離職金或其他人事問題上所作出的行動——
 - (a) 在政府或任何機構的職位或受僱工作中服務；或
 - (b) 在任何職位或根據任何服務合約而提供服務，而就該項服務作出與上述各問題有關的行動的權力，或決定採取或批准採取該行動的權力，是賦予行政長官或任何機構者。(由 1994 年第 44 號第 18 條修訂；由 1998 年第 25 號第 2 條修訂)

SCHEDULE 2

[s. 8]

ACTIONS NOT SUBJECT TO INVESTIGATION

1. Any action taken in matters certified by the Chief Executive as affecting security, defence or international relations (including relations with any international organization) in respect of Hong Kong. (Amended 25 of 1998 s. 2)
2. The commencement or conduct of any proceedings, whether civil or criminal, before a court of law or tribunal in Hong Kong, including any decision whether or not to prosecute any person for an offence.
3. Any exercise of the power by the Chief Executive to pardon persons convicted of criminal offences or commute their penalties. (Replaced 25 of 1998 s. 2)
4. Any action taken in relation to contractual or other commercial transactions but excluding procedures adopted in inviting tenders, determining the qualification of persons entitled to tender and the selection of the successful tenderer.
5. 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. (Amended 44 of 1994 s. 18; 25 of 1998 s. 2)

6. 在政府授與權內頒賜勳銜、獎賞或特權。 (由 1998 年第 25 號第 2 條修訂)
7. 行政長官親自作出的行動。 (由 1998 年第 25 號第 2 條修訂)
8. 關乎政府土地權益的批出、延期或續期條件的施加或更改的決定。 (由 1994 年第 44 號第 18 條增補。由 1998 年第 25 號第 2 條修訂；由 1998 年第 29 號第 105 條修訂)
9. 與證券及期貨事務監察委員會所印發的「香港公司收購、合併及股份購回守則」有關的任何行動。 (由 1994 年第 44 號第 18 條增補)
10. 廉政公署、香港輔助警隊或香港警隊就防止、偵查或調查任何刑事罪或罪行而作出的行動，不論該行動是否由其中任何一個機構單獨作出，或是由其中多於一個的機構共同作出或由其中任何一個或多於一個的機構與任何其他機構或人士共同作出。 (由 1996 年第 74 號第 10 條增補。由 1997 年第 362 號法律公告修訂；由 1998 年第 25 號第 2 條修訂；由 2002 年第 23 號第 126 條修訂)

6. The grant of honours, awards or privileges within the gift of the Government. (*Amended 25 of 1998 s. 2*)
7. Any action taken personally by the Chief Executive. (*Amended 25 of 1998 s. 2*)
8. Any decision concerning the imposition or variation of any condition of granting, extending or renewing any interest in Government land. (*Added 44 of 1994 s. 18. Amended 25 of 1998 s. 2; 29 of 1998 s. 105*)
9. Any action taken in relation to the Hong Kong Codes on Takeovers and Mergers and Share Repurchases issued by the Securities and Futures Commission. (*Added 44 of 1994 s. 18*)
10. Any action taken by the Independent Commission Against Corruption, the Hong Kong Auxiliary Police Force or the Hong Kong Police Force in relation to the prevention, detection or investigation of any crime or offence, whether or not the action is taken solely by any one of these organizations, or jointly by more than one of these organizations or by any one or more of them together with any other organizations or persons. (*Added 74 of 1996 s. 10. Amended 25 of 1998 s. 2*)

立法會
Legislative Council

LC Paper No. CP 286/07-08

(These minutes have been seen by The Ombudsman)

Ref.: CP/G06/4 XI

**Legislative Council Members' meeting
with Ms Alice TAI Yuen-ying, JP, The Ombudsman,
held on Tuesday, 11 December 2007, at 11:00 am
in Conference Room A of the Legislative Council Building**

Members Present : Hon Miriam LAU Kin-ye, GBS, JP (Chairman)
Hon Albert HO Chun-yan
Dr Hon YEUNG Sum, JP
Hon Emily LAU Wai-hing, JP
Dr Hon Fernando CHEUNG Chiu-hung
Hon WONG Ting-kwong, BBS

Attendance by Invitation : Office of The Ombudsman

Ms Alice TAI Yuen-ying, JP
The Ombudsman

Mr MOK Yun-chuen
Chief Manager

Staff in Attendance : Mrs Constance LI
Principal Council Secretary (Complaints)

Ms Shirley CHAN
Senior Council Secretary (Complaints)3

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The Chairman welcomed Ms Alice TAI, The Ombudsman, and Mr MOK Yun-chuen, Chief Manager of The Ombudsman's Office, to the meeting. She said that the purposes of the meeting were for The Ombudsman to brief Members on the work of The Ombudsman's Office (the Office), and for both parties to exchange views on issues of mutual concern. The Chairman reminded Members that the meeting was not covered by the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) and that individual cases would not be discussed.

I. The work of The Ombudsman's Office in the previous year

(LC Paper No. CP 131/07-08(01) - (04))

2. At the request of Ms Emily LAU, the Chairman agreed that Ms Emily LAU and Dr Fernando CHEUNG could raise their questions after The Ombudsman had briefed Members on the work of her Office in the past year.

Briefing by The Ombudsman

3. The Ombudsman briefed Members on the work of her Office for the year 2006-2007 and for the first seven months of 2007-2008 (LC Paper No. CP 131/07-08(01)). In order to cope with the continual workload increase, she advised that her Office had recruited three more investigation officers and increased the number of investigation teams from four to five.

Review of The Ombudsman's jurisdiction

4. The Ombudsman said that the review covered both operational issues relating to The Ombudsman Ordinance (Cap. 397) (the Ordinance) and other more philosophical issues relating to recent developments in ombudsman institutions in other parts of the world. Part 1 of the review was presented to the Administration in November 2006. It covered the following three aspects:-

(a) Extension of The Ombudsman's jurisdiction

5. The Ombudsman briefed Members on the criteria for bringing organizations within The Ombudsman's jurisdiction and possible additions to the list of organizations

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in Part I of Schedule 1 to the Ordinance. She had recommended the inclusion of eight more public bodies, having considered their main source(s) of funding, executive powers and extensive interface with or impact on the public.

6. The Ombudsman said that she noted from the Administration's paper for the Panel on Administration of Justice and Legal Services that the Administration had reservations about including District Councils (DCs) and Electoral Affairs Commission (EAC) in Schedule 1 to the Ordinance. The Ombudsman explained the reasons for recommending inclusion of DCs and EAC. She said that as the role of DCs would be expanded to cover management of some district facilities such as leisure and sports facilities, DCs would be transformed into an entity with real executive powers similar to those of the former Municipal Councils. Since the former Municipal Councils were also under The Ombudsman's jurisdiction in the past, she had recommended that DCs should be brought under The Ombudsman's jurisdiction. Regarding the proposed inclusion of EAC, she said that the intention was to investigate complaints about the administrative arrangements for elections, and The Ombudsman would not deal with election-related matters.

(b) Relaxation of restrictions on The Ombudsman's investigative powers

7. The Ombudsman said that there was scope for relaxing some of the restrictions on The Ombudsman's investigative powers set out in Schedule 2 to the Ordinance. Concerning items (4) and (8) of Schedule 2, there had been contention by the Government on her inquiries over the application or otherwise of item (4) of Schedule 2 to complaints concerning land administration, and also the interpretation of "condition" of land grant in item (8) of Schedule 2. So far, The Ombudsman had completed the investigations into all such complaints with the co-operation of the relevant government departments. Since there were dispute over these issues from time to time, she had recommended that the Administration should clarify its stance on the interpretation of items (4) and (8) of Schedule 2.

8. Regarding item (5) of Schedule 2 concerning exclusion of personnel matters such as appointment, removal and pay from The Ombudsman's jurisdiction, The Ombudsman agreed that she should not investigate personnel matters within the realm of staff management. However, she

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considered that there were good grounds to relax the restriction in item (5) to empower her to investigate complaints about the administrative aspects surrounding personnel matters.

(c) Conflict between the secrecy requirements in The Ombudsman Ordinance and other ordinances

9. The Ombudsman drew Members' attention to the possible conflicts among the Privacy Commission for Personal Data (PCPD), the Equal Opportunities Commission (EOC) and her Office which were subject to each others' jurisdiction on matters under their respective purview. Under the law, each of these organizations had the power to obtain information concerning complaints lodged with them, but at the same time was prohibited from disclosing such information upon being inquired or investigated by another party. This would inevitably lead to conflict when a complaint was filed with one of them against another. In so far as The Ombudsman was concerned, her legal obligation to maintain secrecy on complaint and investigation related information was not an excuse for exemption for disclosure under the ordinances of the other two organizations. The Ombudsman considered that such conflict should be resolved in the long term.

10. As regards Part 2 of the review, The Ombudsman said that it had just been completed and was submitted to the Administration on 23 November 2007. This part of the review gave a snapshot impression of recent developments in areas of promotion and protection of human rights and some pointers to possible implications for the ombudsman system if such developments were to be pursued in Hong Kong. The Ombudsman further said that she was mindful that these areas were essentially policy matters for the Administration to consider. Nevertheless, she had, at Members' request, canvassed the recent trends and developments with ombudsman offices in other parts of the world in the course of the review.

The Ombudsman's follow-up with the Administration on the implementation of her recommendations

11. Referring to her paper for the meeting (LC Paper No. CP 131/07-08(01)), The Ombudsman said that whilst The Ombudsman's recommendations were not legally binding, the acceptance rate had always been high. She explained that

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The Ombudsman had no power to interfere with the work of Government or scheduled organizations. Where a head of organization, in the absence of acceptable reasons, refused to act on The Ombudsman's recommendations within a reasonable period of time, The Ombudsman could ultimately submit a report to the Chief Executive, together with such further observations as he thought fit to make. Under section 16(6) of the Ordinance, such report should be laid before the Legislative Council (LegCo) within a month of receipt. Through alerting LegCo and the media, the matter would be exposed to public scrutiny and judgment.

Discussion

Work of The Ombudsman

12. Members commended The Ombudsman for her work in the past years. Dr Fernando CHEUNG said that direct investigations initiated by The Ombudsman were very effective to help identify areas where public administration would need improvement. Referring to the decrease in the number of recommendations made by The Ombudsman in recent years, he asked whether The Ombudsman would need to increase the resources of her Office to cope with the increasing workload.

13. The Ombudsman thanked Members for their support to the work of her Office. She said that in 2006-2007, a total of 134 recommendations had been made to improve various aspects of public administration; 97% of these recommendations had been accepted for implementation, while those relating to policies and legislation would take time to be implemented. The Ombudsman said that as far as she could recall, the Administration had only on one occasion issued a press release to defend its position in response to the findings in a direct investigation report, and that happened in relation to the Administration of the Mid-Levels Moratorium. She further said that the Ombudsman system had been in operation for almost 20 years and Government bureaux/departments had made improvements in various aspects. In some cases, improvements had already been made at the initiatives of relevant bureaux/departments in the course of The Ombudsman's investigations. As such, the decrease in the number of recommendations could be seen as a sign of improvement in public administration and effectiveness of the Ombudsman system.

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14. The Ombudsman advised that recommendations were made to provide remedy in specific cases or instigate improvements to the administrative systems, procedures and practices of organizations concerned. Her Office would follow up on the recommendations made by seeking periodic progress reports from the organization concerned on the implementation of the recommendations or acceptable alternative solutions. In response to Mr Albert HO, The Ombudsman said that she did not have information on the disciplinary actions taken by the Administration against individual officials arising from The Ombudsman's investigations.

15. On the need for additional resources, The Ombudsman said that since delinking from the Administration in 2001, her Office had been funded under the "one-line" vote arrangement. For long term planning and also effective management of her resources under this arrangement, she introduced a new remuneration package for her contract staff since then. This had enabled her Office to sustain and where necessary, adjust its work momentum to cope with increasing service demand without the need for additional resources. In the past year, resources had been earmarked for recruiting six more contract staff for setting up one additional investigation team.

16. Mr Albert HO noted that out of the 5 340 complaints handled and concluded by The Ombudsman in 2006-2007, only 71 were concluded by means of full investigation. Of the 71 investigations, 31 allegations (which represented 40% of all investigations) were substantiated or partially substantiated after full investigation. He enquired about the selection criteria for determining the mode of investigation, and whether adequate resources were put in place for conducting full investigations which were proved to be very effective.

17. On investigation procedures and practices, The Ombudsman advised that the Office conducted preliminary inquiries under the Ordinance to determine whether a full investigation was necessary. Preliminary inquiries were undertaken normally for cases which were less complicated. Such inquiries generally took less time as they were not subject to the statutory formalities of full investigation. For complex cases involving issues of principle, serious maladministration, gross injustice, systemic flaws or

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procedural deficiencies, The Ombudsman would order a full investigation. This involved extensive and intensive probing for evidence. When the draft report of a full investigation was ready, the organization(s) concerned and any individual(s) criticised or adversely affected would be invited to comment. The final report would be given to the head(s) of the organisation(s) for information and implementation of The Ombudsman's recommendations.

18. Mr Albert HO remarked that despite the fact that full investigations might take longer time and greater effort to complete, they were proved to be more effective in identifying areas of maladministration. He therefore called on The Ombudsman to deploy adequate resources for carrying out full investigation and seek additional provisions where necessary. He also asked whether The Ombudsman had conducted any customer satisfaction survey in respect of the work of her Office.

19. The Ombudsman replied that her Office conducted in-house quality control from time to time. Her Office had also introduced a number of measures to facilitate members of the public to access its services. At present, if a person could not properly express his complaint in writing, he could lodge his complaint by telephone. A complaint summary recording the complaint in point form would be posted to the complainant for confirmation. Regarding cases which were outside the purview of The Ombudsman, complainants would be advised of the appropriate channels to pursue their cases.

Review of the jurisdiction of The Ombudsman

20. Dr YEUNG Sum said that he supported The Ombudsman's recommendation to include DCs and EAC in the jurisdiction of The Ombudsman, as the 18 DCs would be empowered to manage some of the district facilities and approve the budget of minor works programme in the districts. Given the expansion of role of the DCs, they were no longer simply advisory bodies. Dr YEUNG also pointed out that the arrangements of the recent 2007 District Council election in the Hong Kong districts also warranted review, and such arrangements should also come under the purview of The Ombudsman. Ms Emily LAU and Dr Fernando CHEUNG shared similar views.

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21. The Ombudsman said that it was not the intention of The Ombudsman to interfere with elections or any statutory functions performed by DCs and EAC. The power and functions of The Ombudsman were clearly defined in the Ordinance, and The Ombudsman could only investigate, inter alia, action taken by an organization in the exercise of its administrative functions. It was on this basis that she recommended for consideration of the LegCo and the Government inclusion of DCs and EAC within the jurisdiction of The Ombudsman.

22. Dr YEUNG Sum remarked that the Ordinance had been enacted years ago. With rising expectation from the public, the Administration and the LegCo should carry out a comprehensive review of the Ordinance. The Chairman said that the Panel on Administration of Justice and Legal Services would discuss matters relating to the review at its forthcoming meeting to be held on 13 December 2007. Members could follow up these issues at the Panel meeting.

23. Ms Emily LAU expressed regret that the Administration had taken more than a year to examine The Ombudsman's recommendations for expanding the jurisdiction of The Ombudsman. As she was much concerned about the arrangements and mechanisms for protection of human rights in Hong Kong, she had hoped that Part 2 of the review could be completed earlier. She also considered it undesirable for issues relating to the review of the jurisdiction of The Ombudsman and human rights protection to be taken up by different committees of the LegCo, as it would be difficult for Members to follow up the related issues.

24. The Ombudsman explained the rationale for splitting the review into two parts. She said that Part 1 of the review was directly related to The Ombudsman's jurisdiction. In this respect, she had re-examined the criteria for including public bodies under the purview of The Ombudsman and had recommended some additions. The review had also revisited the legislative intent for some of the restrictions on its investigative power, and sought to resolve the difficulties or uncertainties encountered in inquiries. Part 2 of the review covered developments in overseas ombudsman jurisdictions and their implications on Hong Kong's ombudsman system, and these issues were not directly within her jurisdiction. However, at the request of Members, she had collated information regarding recent developments in ombudsman

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institutions in other parts of the world, but did not come up with any specific recommendations. She had also provided her review findings to the Administration for consideration.

25. Dr Fernando CHEUNG enquired why the findings of Part 2 of the review could not be released. The Ombudsman advised that as the review would involve amending The Ombudsman Ordinance, she considered it more appropriate for her to provide the review findings to the Administration for consideration first. She would also expect the Administration to provide a response to her before putting it to Members for discussion.

26. At Members' request, The Ombudsman provided information on the recent trends and developments of the Ombudsman offices in other parts of the world. For the newly established Ombudsman institutions, the scope of the Ombudsman's activities had been expanded beyond the traditional Ombudsman functions to cover human rights protection. As for the existing ombudsman system in Hong Kong, it basically followed the British system in that The Ombudsman appointed by the Chief Executive was responsible for investigating complaints concerning maladministration in the public service, and that the traditional Ombudsman did not have the responsibilities of overseeing human rights protection.

27. Regarding the existing mechanism for protection of human rights in Hong Kong, The Ombudsman said that various statutory bodies and institutions, including The Ombudsman, Equal Opportunities Commission (EOC), the Privacy Commissioner's Office (PCO) and other local bodies had a role to play as provided for under the respective ordinances. The question of whether one single institution should be set up to oversee all issues on human rights protection in Hong Kong was a policy issue to be examined by the Administration. In her review, she had highlighted the implications for putting in place such a system for the Administration's consideration. The Ombudsman further said that the Administration had held a view that there was already an extensive mechanism for the protection of human rights in Hong Kong, and the Administration did not see an obvious need for establishing another human rights institution to duplicate or supersede existing mechanisms.

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28. Ms Emily LAU asked The Ombudsman whether, in her view, the role of The Ombudsman should be expanded to cover human rights protection, having regard to overseas experience. The Ombudsman said that she did not consider it appropriate for her to comment on this as it should be a policy decision to be made by the Administration. However, she had provided some basic factual information in Part 2 of her review regarding access to official information and protection of whistleblowers.

29. Regarding access to public information, The Ombudsman informed Members that Government had issued a Code on Access to Information which specified the scope of information to be provided to the public. It was observed that Government officials did not have sufficient knowledge about the application of the Code, and members of the public were also not sufficiently aware of their rights for access to public information.

30. On protection of whistleblowers, The Ombudsman said that the concern was focused on the perceived need to allow "whistleblowers" to disclose wrongdoing or illegal acts in the public interest. The issue had been discussed a few years ago, and the Administration considered that there was no need to introduce legislation in this regard, given the existence of other safeguards.

31. Ms Emily LAU enquired whether any overseas ombudsmen included Police under their jurisdiction. The Ombudsman said that some overseas ombudsmen institutions also handled complaints about Police. She undertook to provide her research findings in this respect for Members' information.

The
Ombudsman

(Post-meeting note: The Ombudsman has subsequently provided information on the practice of some overseas ombudsmen in respect of their handling of complaints against Police. The information was circulated to Members and copied to the Clerk to the Panel on Administration of Justice and Legal Services for reference.)

Other issues

32. Dr YEUNG Sum expressed concern about the present position of the administrative moratorium to restrict building development in Mid-Levels to ease traffic congestion.

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He said that the High Court recently ruled that the Town Planning Board had been wrong to impose restrictions on a site in Mid-Levels, which was proposed to be developed into a high-rise residential complex by a private developer. He hoped the Ombudsman's Office would follow up on its investigation on administration of the Mid-Levels Moratorium.

33. Members noted that the MTR Corporation Limited (MTRCL) was deleted from Part I of Schedule 1 to the Ordinance upon its transformation from a statutory public corporation to a private company in 2000. Nevertheless, with the rail merger, MTRCL would become the legal entity of the post-merger corporation (MergeCo), and Part I of Schedule 1 to the Ordinance would not cover MergeCo.

II. Any other business

34. There being no other businesses, the meeting ended at 12:35 pm.

Legislative Council Secretariat
6 February 2008

**For information
on 13 December 2007**

**Legislative Council
Panel on Administration of Justice and Legal Services
Review of the Jurisdiction of the Office of The Ombudsman**

PURPOSE

This paper informs Members on the recommendations made in Part 1 of a review of the jurisdiction of the Office of The Ombudsman.

BACKGROUND

2. In the light of calls received from time to time to extend her jurisdiction to cover further organizations, The Ombudsman has conducted a review of the jurisdiction of the Office of The Ombudsman. The Ombudsman also considers it desirable to resolve some uncertainties and/or difficulties encountered by her Office in the investigation. Part 1¹ of the review covers the following aspects -

- (a) whether more, and if so which, organizations should be brought within The Ombudsman's jurisdiction under Schedule 1 to The Ombudsman Ordinance (TOO) ;
- (b) whether some restrictions on The Ombudsman's investigative powers, set out in Schedule 2 to TOO, should be relaxed; and
- (c) whether the apparent conflict between the secrecy requirements in TOO and other ordinances should be resolved.

3. The Ombudsman's recommendations arising from her review and the Administration's initial views on the recommendations are set out in the subsequent paragraphs.

¹ Part 2 of the review, which covers developments in overseas ombudsman jurisdiction and their implications for Hong Kong's ombudsman system, has just been submitted by The Ombudsman to the Administration for consideration.

THE OMBUDSMAN'S RECOMMENDATIONS AND THE ADMINISTRATION'S INITIAL VIEWS

(A) Extension of The Ombudsman's Jurisdiction

4. Section 7(1)(a) of TOO empowers The Ombudsman to investigate any action taken by or on behalf of an organization set out in Part I of Schedule 1 in the exercise of its administrative functions. At present, this part comprises most government departments and 18 public bodies such as the Urban Renewal Authority and Hospital Authority.

5. The Ombudsman has recommended the inclusion of the following eight bodies in Part I of Schedule 1 after taking account their executive powers, extensive interface with or impact on the public and main source(s) of funding² -

- (a) Auxiliary Medical Service (AMS);
- (b) Civil Aid Service (CAS);
- (c) Board of Management of Chinese Permanent Cemeteries (BMCPC);
- (d) Chinese Temples Committee (CTC);
- (e) Consumer Council (CC);
- (f) Estate Agents Authority (EAA);
- (g) Electoral Affairs Commission (EAC); and
- (h) District Councils (DCs).

6. We have consulted internally within the Administration. Among these eight bodies, some may be considered suitable for inclusion while the same consideration may not be the case for some others in view of their lack of executive powers, etc. The Administration will proceed to consult the six bodies listed in paragraph 5(a) to (f) through the relevant bureaux on the recommendation (As for the EAC and DCs, our position is explained in paragraphs 7 – 12 below). With the benefit of their views, the Government

² Whether the organization is substantially funded by the General Revenue or statutory fees or charges; or by donations specifically earmarked for a public service or services, the administration of which is undertaken or supervised by the Government or public officials.

will be in a better position to formulate its final response to the recommendation.

7. As things stand, the Administration does not see a case for including the EAC in Schedule 1. The EAC is established to ensure that elections are conducted openly, fairly and honestly. It is of utmost importance to ensure that the EAC's work is independent and impartial. The EAC is thus established as an independent statutory body under the Electoral Affairs Commission Ordinance with a Judge of the High Court appointed as its chairman. There are other stringent statutory criteria governing its membership to ensure that it is an independent, impartial and apolitical body capable of conducting and supervising elections.

8. Under the law, the Registration and Electoral Office (REO) provides administrative support to the EAC in discharging its statutory functions and Home Affairs Department (HAD) supports the EAC in the conduct of Village Representatives elections. Both REO and HAD have already been included in Schedule 1 and are thus subject to The Ombudsman's jurisdiction. The work of the EAC is also subject to a well-established oversight mechanism. For example, the EAC is required under law to conduct public consultation on the making of electoral guidelines, and the making of recommendations on the delineation of geographical constituencies and District Council constituencies. In making such recommendations, the EAC has to observe certain statutory criteria. It also has a statutory obligation to submit a report to the Chief Executive (CE), who shall cause the report to be tabled in the Legislative Council (LegCo). Such a report has to contain the public representations or a summary of them. The relevant legislation on the delineation of geographical constituencies and District Council constituencies and the regulations made by the EAC are also subject to the vetting by the LegCo. For each election, the EAC is required under law to submit a report to the CE within three months of its conclusion and such reports have been made public to enhance the transparency of the EAC's work.

9. In addition, the interests of the persons most affected by the operation of EAC, i.e. electors and candidates, are protected by law. For example, a candidate may file an election petition with the Court of First Instance of the High Court for seeking redress. If an elector is dissatisfied with a decision concerning an entry or omission from a voter register, he can lodge an objection or claim to the EAC, which will be heard by a revising officer (who is the Registrar of the High Court, or any magistrate or legal officer appointed by the Chief Justice).

10. As illustrated above, elaborate legal and procedural safeguards are in place to ensure transparency and the proper discharge of responsibilities by the EAC as well as to provide redress. The Administration maintains the view that it is neither necessary nor appropriate to add the EAC to Schedule 1.

11. Section 61 of the District Councils Ordinance provides that DCs advise the Government on district matters affecting the well-being of the people; the provision and use of public facilities and services; and the use of public funds allocated for local public works and community activities. Consistent with these statutory functions, those district minor works and community building projects initiated on the advice of DCs are executed either by district organizations, District Offices, or other government departments responsible for the provision of the relevant public services in districts. DC secretariats are part of the District Office establishment. As such, there is no provision under the Ordinance for DCs to enter into contracts or employ staff on their own.

12. From January 2008 onwards, the role of DCs will be expanded within the existing legislative framework. DCs will be involved in the management of some designated district facilities, while the executive departments concerned will take into account the views of the DCs as far as practicable in continuing to exercise their statutory and administrative powers under their respective purview, including the routine management of the facilities concerned. In other words, the day-to-day management of the facilities will continue to be handled by the relevant departments. Hence, it is not appropriate to place the DCs under The Ombudsman's jurisdiction.

(B) Relaxation of Restrictions and Others

(a) To rescind section 10(1)(db) – complaints lodged by “non-Hong Kong Residents”³

13. Section 10(1)(db) of TOO provides that The Ombudsman shall not investigate a complaint unless the action which is subject to complaint was taken in relation to a right or obligation which accrued or arose in Hong Kong; or that when the action took place, the complainant was resident in Hong Kong or was in Hong Kong. The Ombudsman considers that this provision casts doubt on whether she can investigate a complaint from a “non-Hong Kong resident” about an action taken by a government office⁴ outside Hong Kong,

³ A “non-Hong Kong resident” refers to a person who is not resident in Hong Kong when the action which is subject to complaint took place.

⁴ In 2002, a person complained against the Beijing Office for poor staff attitude. The complaint was initially screened out because of section 10(1)(db) but was subsequently processed by The Ombudsman when the complainant provided documents to prove that he was a Hong Kong resident.

such as the Economic and Trade Offices. It is therefore recommended that section 10(1)(db) should be rescinded.

14. Under section 10(1)(db), a “Hong Kong resident⁵” is free to lodge a complaint with The Ombudsman in respect of any act of maladministration. For a “non-Hong Kong resident”, his complaint is subject to The Ombudsman’s investigation where the action subject to complaint took place while he was in Hong Kong⁶ or is related to a right or obligation⁷ accrued or arose in Hong Kong. We do not consider it necessary to make any change to this “distinction” which aims to ensure a better use of the resources of the Office of The Ombudsman with priority accorded to complaints lodged by “Hong Kong residents”. We are also concerned about the complete lifting of the existing “limited” restriction on complaints lodged by “non-Hong Kong residents”, which could have unintended and significant resources implications.

(b) To amend item (5) of Schedule 2 – personnel matters

15. Schedule 2 to TOO sets out those actions which are not subject to The Ombudsman’s investigation. Item (5) of the Schedule provides that personnel matters, such as appointment, removal and pay are not subject to The Ombudsman’s jurisdiction. While The Ombudsman agrees that she should not investigate personnel matters within the realm of staff management, she considers that there are good grounds to relax the restriction in item (5), i.e. to empower The Ombudsman to investigate complaints about the administrative aspects surrounding personnel matters.

16. The Administration is of the view that The Ombudsman should not be empowered to investigate complaints concerning personnel matters (including the administrative aspects thereof). There are already sufficient avenues, administrative and statutory, for employees (be they engaged on civil service terms or not) to seek redress in personnel matters. The existing framework has been functioning effectively over the years. Even if there were any specific area requiring improvement or remedial action, it should be tackled in the context of the existing framework. Furthermore, it is also very difficult to draw the fine line between personnel matters per se and the administrative aspect surrounding them. For example, the propriety of promotion criteria could be argued both ways. This fine distinction is impracticable and is likely to lead to confusion and unnecessary disputes on

⁵ A “Hong Kong resident” refers to a person who is resident in Hong Kong when the action which is subject to complaint took place.

⁶ For example, a tourist complains about his enquiry being mishandled by a government department in Hong Kong.

⁷ For example, a “non-Hong Kong resident” complains that his application for a certain licence in Hong Kong has not been properly attended to by the relevant Hong Kong government department.

the boundary of The Ombudsman's jurisdiction.

(c) Interpretation of items (4) and (8) of Schedule 2 – lands matters

17. Items (4) and (8) of Schedule 2 set out the restrictions on The Ombudsman's investigation into lands matters. Item (4) provides that The Ombudsman shall not investigate any action taken in relation to contractual or other commercial transactions (but excluding procedures adopted in inviting tenders, determining the qualification of persons entitled to tender and the selection of the successful tender). Item (8) makes it clear that the restriction should cover any decision concerning the imposition or variation of any condition of granting, extending or renewing any interest in government land.

18. The Ombudsman notes that from time to time, there has been contention⁸ by the Government on her inquiries over the application or otherwise of item (4) to complaints concerning land administration as well as the interpretation of "condition" of land grant in item (8). The Ombudsman considers that item (4) should be interpreted narrowly to refer only to commercial contracts as distinct from land leases; and the item (8) only precludes The Ombudsman from investigating only the "decisions" themselves, but not the circumstances and processes leading to such decisions.

19. So far, The Ombudsman has completed the investigation into all relevant complaints, with the assistance of the relevant government department on a voluntary basis. In view of this on-going dispute, The Ombudsman recommends that the Administration should clarify its stance on the interpretation of items (4) and (8).

20. Owing to the complexity of the issues involved, the Administration needs some more time to look into the subject before it is in a position to formulate its views.

(d) Conflicts with other ordinances

21. The Ombudsman draws the Administration's attention to a legal conundrum that both the Office of the Privacy Commissioner for Personal Data (PCPD) and Equal Opportunities Commission (EOC) are made subject to The Ombudsman's jurisdiction of administrative overview, and likewise The Ombudsman is subject to the operation of those ordinances⁹ administered by PCPD and EOC (relevant ordinances).

⁸ For example, whether a complaint concerning an alleged misinterpretation of the original lease conditions of a site is within The Ombudsman's jurisdiction.

⁹ Namely, the Personal Data (Privacy) Ordinance, the Sex Discrimination Ordinance, the Disability Discrimination Ordinance and the Family Status Discrimination Ordinance.

22. Section 15 of TOO requires The Ombudsman and her staff to maintain secrecy in respect of all information obtained in the course of investigation etc., with a few exceptions such as disclosure in court proceedings and crime reporting. Identical secrecy provisions are also found in the relevant ordinances. Thus, the PCPD and EOC have power to obtain information but are also prohibited from disclosing such information. Although the relevant ordinances contain exceptions, The Ombudsman's investigation is not explicitly stated to be one of them. The Ombudsman holds the view that conflict inevitably arises when a complaint is filed with one of the three organizations against each other. The Ombudsman recommends that this conflict should be resolved.

23. We note that the secrecy provisions in question are by no means unique in Hong Kong laws. There are similar statutory provisions dealing with secrecy and confidentiality in other legislation. They do not appear to have given rise in practice to problems so far. Moreover, according to The Ombudsman, there have only been a handful of cases where complaints have been filed with The Ombudsman, the PCPD or the EOC against one of the others and that all these cases have been sorted out in a pragmatic way. As such, there does not appear to be an imminent need to address the perceived problem by resorting to legislation. We consider that a pragmatic and practical approach should continue to be applied by the relevant authorities.

NEXT STEP

24. The Administration will consult the six bodies, i.e. AMS, CAS, BMCPC, CTC, CC and EAA on the recommendation to subject them to The Ombudsman's jurisdiction.

Administration Wing, Chief Secretary for Administration's Office
December 2007

Review of the jurisdiction of the Office of The Ombudsman

Relevant documents

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Question</u>
Panel on Administration of Justice and Legal Services	26 June 2006	Research report on "Jurisdiction of Ombudsman Systems in Selected Places" [RP05/05-06] Minutes of meeting [LC Paper No. CB(2)3001/05-06]
Legislative Council Members' meeting with The Ombudsman	11 December 2007	Questions raised by Hon Emily LAU Wai-hing on "Review of The Ombudsman's jurisdiction" [CP 131/07-08(03)] Questions raised by Dr Hon Fernando CHEUNG Chiu-hung on "The Ombudsman's follow-up with the Administration on the implementation of her recommendations" [CP 131/07-08(04)] Minutes of meeting [CP 286/07-08]
Panel on Administration of Justice and Legal Services	13 December 2007	Administration's paper on "Review of the jurisdiction of the Office of the Ombudsman" [LC Paper No. CB(2)559/07-08(08)] Schedules 1 and 2 to the Ombudsman Ordinance (Cap. 397) [LC Paper No. CB(2)559/07-08(11)] Minutes of meeting [LC Paper No. CB(2)927/07-08]
Legislative Council	31 January 2008	Written question raised by Hon James TO on the governance of statutory bodies