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REPORT

ON

REVIEW OF JURISDICTION

PART 2

OFFICE OF THE OMBUDSMAN
NOVEMBER 2007

1

INTRODUCTION

BACKGROUND

1.1 There have been calls from time to time from legislators and the public to extend The Ombudsman's jurisdiction to cover more organizations and subject matters. Meanwhile, given the years of experience, The Ombudsman also considers it desirable to resolve some uncertainties and difficulties encountered in the administration of The Ombudsman Ordinance, Cap 397.

1.2 Against this background, a jurisdictional review was initiated to cover both operational issues relating to The Ombudsman Ordinance and other more philosophical issues relating to recent developments in ombudsman institutions in other parts of the world. Accordingly, this review has been prepared in two parts. In **Part 1**, we examined:

(a) the criteria for bringing organizations within The Ombudsman's jurisdiction and possible additions to the list of organizations in Schedule 1 to The Ombudsman Ordinance;

(b) the scope for relaxing some restrictions on The Ombudsman's investigative powers, as set out in Schedule 2 to the Ordinance; and

(c) the apparent conflict between the secrecy requirements in The Ombudsman Ordinance and other ordinances.

Part 1 of the Review was submitted to Government on 21 November 2006.

1.3 This report is **Part 2** of The Ombudsman's jurisdictional review and deals with a few broader issues exercising ombudsmen worldwide.

AMBIT

1.4 Recent trends in ombudsmanship have focused on human rights protection and other specialized interests. In this light, The Ombudsman has examined possible developments for Hong Kong, taking reference from overseas practices in respect of:

(a) protection and promotion of human rights;

(b) access to official information;

(c) protection of whistleblowers; and

(d) specialized ombudsmen.

1.5 The Ombudsman is mindful that these are essentially policy matters within the responsibility of Government, and the Legislative Council where legislative and funding support is required. The Ombudsman, therefore, has not advocated any particular course of action. Instead, this review offers a snapshot impression of recent developments in these areas and some pointers to possible implications for the ombudsman system if such developments were to be pursued in Hong Kong.

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PROTECTING AND PROMOTING HUMAN RIGHTS

2.1 Human rights are basic rights with which human beings are born and without which they cannot live in dignity. The Universal Declaration of Human Rights ("UDHR"), proclaimed by the United Nations ("UN") in 1948, contains 30 Articles setting out a common standard of achievement for all peoples and all nations. The nature of rights covered by UDHR is wide-ranging and include, among other things, **personal rights** of life, liberty, personal security, non-discrimination, freedom from slavery, torture and degrading treatment; **freedom** of thought, speech, movement, conscience and religion, peaceful assembly and association; **citizenship rights** to nationality, enter and leave his country; **civil rights** to vote, access to public service and governance of his country; **political rights** to seek and enjoy asylum from persecution; **economic rights** to property, education, employment, and a certain standard of living adequate for health and well-being etc.. Every person, regardless of race, religion, colour and sex is entitled to these rights.

2.2 The UN proclaims the UDHR as *"a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society …. shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observances, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction"*. As benchmark for compliance, a number of UN treaties have been developed, 14 of which have been extended to apply to Hong Kong. Of these, the following six require regular reporting to the UN:

- International Covenant on Civil and Political Rights ("ICCPR")
- International Covenant on Economic, Social and Cultural Rights ("ICESCR")
- Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child

2.3 These treaties are enforced by different UN committees. In so far as the ICCPR is concerned, the Human Rights Committee is responsible for enforcement. That Committee has expressed various concerns about human rights in Hong Kong and consistently urged for the establishment of a

human rights institution to oversee the implementation of such rights.

HUMAN RIGHTS IN HONG KONG

Basic Law

2.4 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("the Basic Law") sets out the rights and freedoms of Hong Kong residents and other persons in Hong Kong. These include:

- equality before the law (Article 25)

- right to vote and to stand for election (Article 26)

- freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and right and freedom to form and join trade unions and to strike (Article 27)

- freedom of the person; freedom from arbitrary or unlawful arrest, detention or imprisonment; prohibition of torture, unlawful search or arbitrary or unlawful deprivation of life (Article 28)

- right against arbitrary or unlawful search of or intrusion into home (Article 29)

- freedom and privacy of communication (Article 30)

- freedom of movement and of emigration (Article 31)

- freedom of conscience; freedom of religious belief and freedom to preach, conduct and participate in religious activities in public (Article 32)

- freedom of choice of occupation (Article 33)

- freedom to engage in academic research, literary and artistic creation, and other cultural activities (Article 34)

- right to confidential legal advice, access to the courts, choice of lawyers, judicial remedies and right to institute legal proceedings against the acts of executive authorities (Article 35)

- right to social welfare (Article 36)

- freedom of marriage and right to raise a family freely (Article 37)

- any other rights and freedoms safeguarded by the laws of Hong Kong (Article 38)

- rights provided in ICCPR and ICESCR (Article 39)

The Courts

2.5 Human rights are safeguarded by law. Individuals whose rights have been infringed upon may seek remedy through the courts, either by judicial review or civil action. The courts, therefore, constitute the most fundamental line of defense against the infringement of human rights.

2.6 However, courts cannot proactively protect, far less promote human rights. Court proceedings can only be commenced by an application or a motion. Furthermore, rules on justifiability also circumscribe the Court's role in judicial intervention.

Government and Legislative Council

2.7 Until 1 July 2007, the Home Affairs Bureau ("HAB"), as the responsible policy bureau, acted as coordinator for assessing the implementation of human rights in Hong Kong. That Bureau submitted reports under UN treaties applicable to Hong Kong and attended hearings of the relevant UN Committees (para. 2.2), while the Legislative Council ("LegCo")'s Panel on Home Affairs monitors the submission of such reports

to UN and Government's progress in following up on UN's recommendations.

2.8 Despite their mandate for human rights issues, HAB and LegCo's Panel on Home Affairs have played only a policy formulation and monitoring role in these matters. With responsibilities for a wide range of other public policies and activities, and with Government itself as the object of scrutiny for breach of human rights, it is probably unrealistic to expect either HAB or the LegCo Panel to be too proactive in human rights protection and promotion, however well-intended they may be.

2.9 Since 1 July 2007, the Constitutional and Mainland Affairs Bureau ("CMAB") has taken over the human rights portfolio from HAB. However, a change in stewardship does not necessarily bring changes in policy direction.

Public Bodies

2.10 Hong Kong does not have a dedicated human rights commission ("HRC"). Various public bodies have been charged with different functions concerning the protection and promotion of citizens' rights. They include, in no particular order of significance, the Equal Opportunities Commission ("EOC"), the Privacy Commissioner for Personal Data ("PCO"), Independent Police Complaints Council ("IPCC"), Independent Commission Against Corruption ("ICAC") Complaints Committee, Commissioner on Interception of Communications and Surveillance, Women's Commission, Elderly Commission, Commission on Poverty and the Office of The Ombudsman.

Meanwhile, the Committee on the Promotion of Civic Education endeavours to enhance civic awareness including respect for human rights.

2.11 Each of these organizations is charged with protecting and/or promoting certain aspects of human rights, but none is empowered to discharge the full scope of functions envisaged for a HRC. Of these, the EOC is perhaps the closest to the notion of a HRC, but its remit is currently limited to three areas of discrimination only, namely sex, disability and family status. Government is committed to legislating against a fourth, racial discrimination, and a draft Bill is now with the LegCo.

2.12 Given their specialized remit, these bodies have only limited scope for human rights protection and promotion as dictated by their respective establishment instruments, with or without statutory backing. As a result, these bodies "share" the following shortcomings:

(a) restrictive mandate or jurisdiction, resulting in only partial coverage of certain rights;

(b) not every one is charged to promote proactively those specific rights with which they have been tasked to safeguard or empowered to enforce compliance. Most fall short of the requirements expected of a HRC, in terms of functions and powers;

(c) some (e.g. the Women's Commission and the Commission on

Poverty) are only advisory in nature, with neither remit nor administrative capability to ensure implementation of their recommendations;

(d) all are subjected to varying degrees of budgetary and other administrative controls that may impinge on their independent status or operation.

Other Non-governmental Organizations

2.13 Apart from the above public bodies, there are many non-governmental, charitable and minority rights organizations concerned generally or specifically with various aspects of human rights issues in Hong Kong. The former includes organizations such as Amnesty International Hong Kong, the Hong Kong Human Rights Monitor, the Hong Kong Human Rights Commission and Society for Community Organization. Charitable organizations include humanitarian aid providers like the Red Cross, Oxfam, Medecins Sans Frontieres. There is also a wide spectrum of minority rights groups advocating the rights of racial minorities, people with disabilities and other sectors of the community. It is not the purpose of this paper to evaluate the effectiveness of these organizations, save to observe that in the absence of any official status or legal powers, these organizations are at best more effective in agitating for and promoting, rather than protecting human rights.

Government's Stance

2.14 Article 4 of the Basic Law provides that Government shall safeguard the rights and freedoms of Hong Kong residents and other persons in Hong Kong. There have been calls from time to time for Hong Kong to establish a centralized body for human rights, to provide a mechanism for the monitoring of domestic implementation of Hong Kong's international human rights obligations and to strengthen human rights protection within the territory. So far, Government has not supported such an idea.

2.15 Government's public stance is that it sees no additional benefits from having a HRC, with The Ombudsman, the EOC and the PCO jointly discharging functions intended for such a body. Together with an independent Judiciary, a watchful Legislature and a vocal media, Government considers that Hong Kong has no need for a HRC. In the final analysis, whether Hong Kong should establish a HRC is a policy decision, requiring political will, popular support and adequate resources.

2.16 In so far as the Office of The Ombudsman is concerned, while not explicitly charged with human rights responsibilities, the essence of The Ombudsman's function is to ensure the protection of individual rights by the public administration. Thus, The Ombudsman holds a watching brief for human rights, by safeguarding citizens' rights in their dealings with Government officials and public servants. In scrutinizing official action, The Ombudsman takes account of all relevant laws, policies as well as

international treaties applicable to Hong Kong.

2.17 The Ombudsman has no brief to argue the case for a HRC in Hong Kong. In past meetings with legislators, discussions had focused on a possible jurisdictional expansion and The Ombudsman agreed to study and report on recent developments relating to overseas ombudsman offices, particularly as regards the trend for their taking the form of human rights commissioners or assuming human rights responsibility.

2.18 In this regard, it is relevant to point out that the Hong Kong Human Rights Monitor released in August 2007 a report on "Establishment of a Human Rights Commission in Hong Kong"[1] and invited public comments by 1 September 2007. The report canvassed in detail many human rights-related issues, examining the effectiveness of the existing framework, arguing the case for a HRC in Hong Kong, and exploring possible options. It also alluded to overseas practices it considered appropriate for adoption in Hong Kong. Given the detailed research that had gone into preparing that document, we see no need to duplicate efforts. Our study, therefore, does not cover background issues, and will focus instead on human rights developments as they relate to the ombudsman institution.

[1] This report had been prepared for the annual meeting of the **Asian Pacific Forum** (APF) of ***National Human Rights Institutions*** (NHRIs) in late September 2007.

3

OMBUDSMAN AND HUMAN RIGHTS

Western Democracies

3.1 The establishment of rights protection mechanisms in Western democracies has evolved over a very long time, starting with Sweden in 1809. In these countries, the State essentially acknowledges the link between the protection of individual rights and the mechanism providing for state accountability. Creation of ombudsman institutions being accorded constitutional recognition as independent authorities constitutes an important milestone in the wider evolutionary process relating to the consolidation of political democracy and the substantial implementation of the rule of law.

3.2 It is not possible to classify the different types of ombudsman institutions. Each ombudsman's office reflects the legal and political basis of its country, and has been set up in response to a particular historical situation rooted in that country's constitutional or administrative system. Ombudsman

offices are “judged” on certain substantive and functional standards, covering their field of responsibility, institutional and operational independence and powers.

3.3 The “basic model” of ombudsman is characterized by his competence over the entire administrative system, with powers to investigate complaints on maladministration, inquire into official actions, recommend remedial actions and be subject to a public reporting requirement. Typically, action by The Ombudsman does not have any binding force.

3.4 However, there are also divergences from the classical Ombudsman model, particularly as regards:

(a) Authority to challenge laws (e.g. Poland, Portugal, Romania, Estonia) and regulations (e.g. Austria, Czech Republic) before the constitutional court;

(b) Authority to request an authentic interpretation of laws by the constitutional court (e.g. Hungary, Macedonia, Moldova);

(c) Authority to deliver a report or complaint to the public prosecutor or the authority responsible for disciplinary action against civil servants or even to institute criminal prosecution (e.g. Greece, Finland, Bosnia, Poland, Lithuania);

(d) Broadening the sphere of competence to embrace the oversight of private entities which fulfill certain criteria, e.g. if they hold public authority or at least are vested with a public service function (e.g. Austria, Albania, Norway, France, Portugal). If implementation of international treaties is relevant, sometimes oversight even extends to the action of other private entities;

(e) In some countries, ombudsmen have direct oversight of justice (e.g. Sweden, Finland, Poland; and to some extent Slovenia and Albania). However, in these legal systems, different measures are taken to ensure respect for the independence of the Judiciary. Normally, oversight is confined to aspects of procedural law;

(f) A considerable number of institutions are empowered to challenge legislative acts before the constitutional courts (e.g. Albania, Armenia, Estonia, Poland, Portugal, and Spain). Various institutions are assigned the task of ensuring that national legislation as a whole complies with human rights and international obligations (e.g. Kazakhstan);

(g) Some have explicit power to introduce proposals for legislation (e.g. France, Greece, Andorra, Poland). None has real initiative to move the enactment of laws, as this is primarily the responsibility of the Executive. There are sound reasons for this: to guard against the politicization of the institution. However,

virtually all variety of ombudsmen can put forward proposals for reform to existing laws in their annual reports, which may effectively alert public opinion.

3.5 In some cases, the ombudsman has the right to intervene in certain judicial processes, such as:

(a) Right of *individual petition before the constitutional court* (e.g. Poland, Spain, Hungary, Bosnia);

(b) Power to *request that proceedings be instituted* before the civil or administrative courts (e.g. Poland, Latvia);

(c) Right to demand *joinder to pending proceedings* (e.g. Bosnia, Moldova, Kazakhstan);

(d) Right to *appeal against rulings* (e.g Finland, Croatia, Poland, Latvia);

(e) *Extraordinary appeals against already enforceable judgments* with a specific time limit for the ombudsman (e.g. Finland, Poland, Romania, Azerbaijan);

(f) Right to participate in a procedure as *observer at trials* (e.g. UK, Uzbekistan, Moldova)

3.6 While lacking explicit human rights mandate, many classical Ombudsmen have adopted various means to highlight human rights issues in their countries, for example, through:

(a) special reporting (Austria);

(b) empowering the Ombudsman to oversee compliance with human rights obligations (Finland);

(c) engaging heavily in cases relating to education, social welfare, police action, treatment of offenders, unemployment benefits and asylum (Sweden); and

(d) assessing organizations under complaint with criteria stemming from human rights issues such as freedom from discrimination, protection against unlawful deprivation of liberty and right to privacy.

New Democracies

3.7 In recent years, national and international initiatives for the establishment and promotion of ombudsman-type institutions have proliferated, particularly in Central and Eastern Europe as well as South America. New democracies place special emphasis on human rights protection, particularly where ombudsman institutions were set up after the fall of an authoritarian regime and the new regimes want to manifest their

intention to establish the principles of democracy and rule of law. In the new democracies of Southeastern Europe, this development largely came about in consequence of explicit preconditions for admission of candidate states to align their legislation with the body of law of the Council of Europe. Thus, as part of the democratization process, some countries have created ombudsman institutions as an independent authority acting as a mechanism of external control and of accountability vis-à-vis the State. Many of these have clear human rights mandates with a primary focus of handling human rights-related complaints.

3.8 Such an office, whether called an Ombudsman or a Commissioner for Human Rights, (hereinafter referred to as "the Human Rights Ombudsman") will typically model itself on an ombudsman institution, by adopting examination of complaints and elaboration of corresponding recommendations as its main accent of work**.** However, their principal task is protection of human rights (e.g. Spain, Poland, Latvia, Hungary, Romania, Armenia). These ombudsman institutions are often bodies which comply with the "Paris Principles" of the United Nations and are accredited as "national institutions" for the purpose of protection and promotion of human rights.

3.9 The Human Rights Ombudsman checks the facts on violation of human rights and freedoms not only on the basis of complaints but also by his own initiative, if he gets information on such violation from official sources or the mass media**.** Depending on the powers conferred by domestic legislation, the functions and powers of the Human Rights Ombudsman may vary.

Functions performed by the Human Rights Ombudsman may include:

(a) protect human rights with an explicit mandate through dealing with reports of alleged violation of rights;

(b) initiate promotion activities or campaigns to raise awareness of human rights issues, with a view to preventing violation;

(c) keep the public informed of human rights issues through information, education and research;

(d) intervene in judicial proceedings in respect of human rights and apply to courts or the State Prosecutor's Office with petition on re-examination of a court decision (sentence, ruling or resolution) that has entered into legal force. Some may even bring cases against the Government to constitutional courts; and

(e) call for implementation of international treaties.

HONG KONG SITUATION

3.10 The Ombudsman system in Hong Kong follows the classical ombudsman model. The Ombudsman is empowered to investigate alleged acts of maladministration, by Government departments and certain public organizations, in response to complaints from individual citizens or on The

Ombudsman's own initiative in the absence of any complaint. Classical ombudsmen have no express human rights mandate. As a result, human rights issues in the public sector not arising from administrative actions and those involving private entities are outside a classical ombudsman's jurisdiction. However, The Ombudsman in Hong Kong deals with complaints across the entire spectrum of public services, including complaints about housing, education, medical and health care, social welfare and legal aid. Those against the Correctional Services Department ("CSD") generally focus on the treatment of prisoners. Such complaints at times raise human rights-related issues covered by ICESCR, ICCPR as well as the Basic Law.

3.11 The following are some examples of human rights issues dealt with by The Ombudsman through complaint handling:

(a) complaint against the Immigration Department about detention of asylum seekers: protection from arbitrary arrest and detention under Article 9 of ICCPR;

(b) complaint against CSD for personal search of a prisoner against departmental guidelines: protection from torture under Article 7 of ICCPR;

(c) complaint against the Civil Aviation Department for denying an ex-convict an opportunity to work in airport restricted areas: right to work under Article 6 of ICESCR;

(d) complaint against the Marine Department for lack of protection for workers in a pier from second-hand smoking: right to safe and healthy working conditions under Article 7 of ICESCR;

(e) complaint against the Housing Department for not allowing the transfer of a handicapped tenant to a more spacious public housing unit: right to adequate standard of living (including housing) under Article 11 of ICESCR; and

(f) complaint against the Hospital Authority for refusing to provide renal dialysis services on public holidays to patients admitted for other conditions: right to health and medical services under Article 12 of ICESCR.

(g) complaint against the Registration and Election Office for inadequate procedures resulting in voters losing their tight to vote at the polling station in the area of their residence: right to vote in elections under Article 25 of ICCPR.

(h) complaints against the Mandatory Provident Fund Schemes Authority for inadequate surveillance of employers' payment to the fund and delay in following

up reports of incidents of default: right to social security under Article 9 of ICESCR.

3.12 Apart from complaints received, The Ombudsman has also initiated the following direct investigations[2] into matters concerning human rights:

(a) the enforcement of universal basic education (completed in May 2003): right to education under Article 13 of ICESCR;

(b) the monitoring of legal aid services (completed in January 2006): right to legal assistance under Article 14 of ICCPR;

(c) the processing of disability allowance applications (completed in November 2006): right to social security under Article 9 of ICESCR; and

(d) the assessment of and educational support to children with specific learning difficulties (ongoing): right to education under Article 13 of ICESCR.

[2] Direct Investigations are investigations initiated by The Ombudsman in the absence of complaints to examine systemic issues and procedural deficiencies.

3.13 It is evident from the above that although lacking an express mandate, The Ombudsman, under the existing framework, already deals with human rights issues as they arise.

PRISONERS' RIGHTS

3.14 One of UN's basic principles for the treatment of prisoners is that except for limitations necessitated by incarceration, prisoners retain the human rights and fundamental freedoms set out in UDHR, ICCPR, ICESCR and other UN treaties. In particular, Article 10 of ICCPR provides that an essential aim of the treatment of prisoners in a penitentiary system shall be their reformation and social rehabilitation.

3.15 In confinement, prisoners are particularly vulnerable to potential abuse such as victimization, denial of treatment or medication, threats to personal safety and encroachment on the right to observe religious rites. As CSD is subject to The Ombudsman's jurisdiction, this provides prison inmates with access to The Ombudsman where they are aggrieved by the administrative actions on the part of CSD and its staff. By arrangement with CSD, all CSD prisons and institutions display signs informing prisoners of their right to complain to The Ombudsman. For this purpose, postage-free complaint forms are available for prisoners' use.

3.16 Under Prison Rules, letters to or from a prisoner may be opened, searched and read by prison authorities. But this does not apply to any letter

to a prisoner from The Ombudsman, or from a prisoner to The Ombudsman. The same exemption also applies to letters to or from the Chief Executive, members of the Executive Council, the LegCo, District Councils, visiting Justices of the Peace and the Commissioner of ICAC.

3.17 One has to be mindful that in lodging complaints, prisoners are somewhat more handicapped than ordinary members of the public, particularly as regards the production of evidence and personal contacts to the Office of The Ombudsman. Dedicated ombudsman offices have been set up in some countries (e.g. England and Wales) to deal with prisoners' complaints. In Hong Kong, prisoners are treated the same as other citizens when lodging complaints with The Ombudsman and they have to comply with the requirements of The Ombudsman Ordinance regarding:

(a) the nature of the complaint (administrative actions);

(b) status as the person aggrieved; and

(c) provision of ***prima facie*** evidence.

3.18 However, we are mindful that prisoners are not in an equal relationship with their jailers. Being in confinement, they are vulnerable to potential abuses and infringement of their rights. With a mandate to investigate maladministration only, this means that some complaints about prisoners' treatment may be outside The Ombudsman's authority. Depending on the nature of the complaint, this can sometimes be

circumvented by looking at the system for dealing with certain issues.

3.19 In some jurisdiction, the Ombudsman is an office of last resort. This is not the case in Hong Kong. There is also no opportunity cost in complaining to The Ombudsman. In the case of prisoners' complaints, very often they are about discipline and prison management issues. In these areas, The Ombudsman has to be careful in balancing the rights of prisoners as well as the authority of CSD to manage prisons and prisoners.

3.20 As a general rule, there are certain matters that we pay special attention to and if there is a choice, we would opt to err on the side of doing more rather than less. These matters are:

(a) complaints about access to treatment and medication;

(b) victimization by prison staff;

(c) denial of rights to outside contact;

(d) likely threats to personal safety;

(e) encroachment on the right to observe religious rites or participate in religious activities.

Prerequisites for a Human Rights Commission in Hong Kong

3.21 For reasons explained in para. 2.17 above, it is not the purpose of this paper to debate whether or not Hong Kong should establish a HRC, nor to consider how this should be achieved. This paper seeks to examine the implications for the ombudsman system should the Paris Principles be "applied" to modify the existing classical ombudsman framework adopted in Hong Kong.

3.22 The Paris Principles relating to the Status of National Institutions, adopted in 1993, spell out a number of criteria governing responsibilities, composition and methods of operation of national human rights institutions ("NHRIs"). Some features are similar to the existing ombudsman framework, such as independent funding and operation, particularly as regards investigating complaints, reporting findings and making remedial recommendations. However, there are also a number of areas of significant departures, as explained below.

(a) ***Functions.*** A NHRI is charged specifically "*to promote and protect human rights*" through activities such as –

(i) ensuring implementation of applicable international human rights instruments through harmonization of laws, regulations and practices;

(ii) formulation of teaching and research programmes for schools, universities and professional circles;

(iii) undertaking public awareness activities to publicize human rights and anti-discrimination;

(iv) reporting to and cooperating with the UN and its committees.

(b) ***Composition.*** A NHRI's composition targets the pluralist representation of the community in the protection and promotion of human rights, including:

(i) non-governmental organizations, e.g. trade unions and professional organizations (such as associations of lawyers, doctors and journalists);

(ii) trends in philosophical or religious thought;

(iii) universities and qualified experts;

(iv) parliament and Government representatives in advisory capacity.

(c) ***Methods of Operation.*** Given its multi-member composition, NHRIs operate in committee and may establish working groups from among its members. NHRIs also have to maintain consultation with other bodies responsible for the promotion and

protection of human rights, and develop relations with non-governmental organizations *"devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas"*.

(d) ***Effects of NHRI findings.*** Where NHRIs are authorized to hear and consider complaints and petitions brought by "*individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations*", they may "*seek amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions"*.

Essential Features of the Ombudsman System in Hong Kong

3.23 If Hong Kong were to have a HRC, building this around the Ombudsman system is one possible option. Indeed, appointing human rights ombudsmen appear to be a popular approach in newly democratized countries in Europe and elsewhere. If this approach were to be adopted in Hong Kong, what would be the impact on the classical ombudsman system that we now have? In this regard, this paper will focus on the criteria listed in the foregoing paragraph.

3.24 As with other classical ombudsmen, The Ombudsman in Hong Kong functions as an independent observer and commentator, scrutinizing administrative actions by Government departments, 18 public bodies (as at July 2007), their employees and agents. Hong Kong adopts a single office holder model. In discharging functions under The Ombudsman Ordinance, the buck stops with The Ombudsman. The law stipulates that *"In determining whether to undertake, continue or discontinue an investigation, the Ombudsman shall, subject to the provisions of this Ordinance, act in accordance with his own discretion; and any question whether a complaint is duly made under this Ordinance shall be determined by the Ombudsman"*[3]. Thus, the law ensures that The Ombudsman can act fully independently in discharging his investigative functions.

3.25 Apart from the Executive, The Ombudsman is also independent of the Legislature. This has not always been the case. When the Ordinance was first enacted in 1988, Hong Kong's citizens did not have direct access to the then Commissioner for Administrative Complaints ("COMAC")[4]. Complaints of maladministration from the public had to be lodged with members of LegCo, who would then refer them to COMAC for investigation. The Ombudsman Ordinance was amended in 1994 to give direct public access to COMAC. For better communication and understanding of The Ombudsman's work, The Ombudsman and members of the Legislative Council meet at least once a year to discuss matters of mutual interest.

[3] Section 9 of The Ombudsman Ordinance
[4] COMAC's title was changed to "The Ombudsman" in 1996

3.26 The legality and reasonableness of The Ombudsman's findings are ultimately subject to scrutiny by the Court through judicial review.

3.27 The Ombudsman's independence from the Executive is enshrined in law. The Ombudsman Ordinance provides that The Ombudsman is not and *"shall not be regarded as a servant or agent of the Government or as enjoying any status, immunity or privilege of the Government"*[5]. Since 2001, with appropriate legislative amendments, the Office of The Ombudsman severed links with the administrative and financial systems and practices of Government. Operating under subvention by a one-line vote system and with the ability to accumulate a reserve of savings, The Ombudsman has ultimate financial and administrative responsibility for the operation of the Office.

3.28 To emphasize this independent, arm's length relationship between The Ombudsman and the organizations being investigated, the Ordinance further provides that *"an investigation (by The Ombudsman) shall not affect any action taken by the head of the organization affected, or his power or duty to take further action with respect to any decision which is subject to the investigation"*[6].

3.29 Upon completing an inquiry or investigation, The Ombudsman may make recommendations for remedy and/or other administrative improvements. However, these recommendations have persuasive authority only. The Ombudsman has no power to intervene directly in the work of

[5] Section 6B of The Ombudsman Ordinance
[6] Section 19 of The Ombudsman Ordinance

Government or scheduled organizations or, as some complainants mistakenly believe, to force them to take remedial action or implement recommendations against their wishes. Where a head of organization, in the absence of acceptable reasons, refuses to act on The Ombudsman's recommendations within a reasonable period of time, the latter has no power of direct intervention. In such circumstances, The Ombudsman may ultimately submit a report to the Chief Executive, together with such further observations as he thinks fit to make, and such report shall be laid before the LegCo within a month of receipt[7], thereby exposing the matter to scrutiny and debate by the LegCo and the public.

3.30 Confidentiality is a cornerstone of the ombudsman system. The law requires The Ombudsman and her staff to maintain secrecy "in respect of all matters that ... arise from any investigation or complaint to the Ombudsman; and … come to their actual knowledge in the exercise of their functions"[8]. Any person who fails to comply with this requirement commits an offence and is liable to a fine of $50,000 and to imprisonment for 2 years[9].

3.31 The secrecy provision ensures that complainants, complainee organizations and other witnesses can provide information to assist the Ombudsman's investigation without fear of unauthorized disclosure and the consequences, real or imaginary, of such disclosure. In this regard, it is relevant to note that the law empowers The Ombudsman to obtain information and documents from any person; and to summon and examine under oath, any

[7] Section 16 of The Ombudsman Ordinance
[8] Section 15(1) of The Ombudsman Ordinance
[9] Section 15(4) of The Ombudsman Ordinance

person whom The Ombudsman thinks is able to give any information about any investigation.

Implications for the Ombudsman system

3.32 If a HRC were to be built around the Ombudsman system, this would give rise to a number of essential differences from the current system, as outlined below:

(a) ***Composition.*** HRCs are multiple-member bodies, often working through committees, while an office of the Ombudsman is headed by a single individual acting on his own discretion and initiative.

(b) ***Promotion.*** The Ombudsman is essentially an independent observer and commentator, whereas HRC have an express mandate to protect and promote human rights, with the objective of ensuring that the laws and regulations concerning the promotion and protection of human rights are effectively applied. This is often done through reviewing proposed legislation for compliance, and undertaking public awareness activities to promote human rights.

(c) ***Modus operandi.*** HRCs achieve their objectives through investigating and conciliation or arbitration. In its investigative mode, a HRC performs similar functions as the Ombudsman in investigating complaints and suggesting improvement where

appropriate. However, a HRC also has a function primarily geared towards conciliation or arbitration. Meanwhile, The Ombudsman generally does not arbitrate. With the parties' consent, The Ombudsman mediates in complaints that involve no, or only minor, maladministration; or he investigates complaints and reports his findings (i.e. adopting independent observer approach).

(d) ***Yardstick***. HRCs base their jurisdiction specifically on human rights norms, while the prime concern for The Ombudsman is the investigation of complaints from individual members of the public or initiating direct investigations into matters suggesting maladministration by public officials whereby the complainant or a sector of society has been or could have been aggrieved by the alleged maladministrative official action.

(e) ***Impartiality.*** The Ombudsman acts completely independently of all institutions. The perception of impartiality may be questioned if The Ombudsman were to assume human rights promotion functions, as this argues for a bias in whatever The Ombudsman does. Furthermore, if The Ombudsman were to be subjugated to some "central mechanism", this will also impinge on the perception of independence of the office.

(f) ***Public and private sector.*** The Ombudsman has jurisdiction only over the public sector. On the other hand, a HRC may have

jurisdiction over both the public and the private sector, particularly if it were to oversee ICESCR rights in respect of key areas such as education, employment and healthcare.

(g) ***Secrecy provision.*** Confidentiality is the cornerstone of the ombudsman system, to ensure that information can be provided to The Ombudsman without fear of unauthorized disclosure or risk of victimization. Some HRCs are mandated to refer abuse cases to tribunals and courts for settlement, such referrals could be seen as undermining the confidentiality of the Ombudsman system.

(h) ***Effect of recommendations.*** Classical ombudsmen do not have the power to make legally binding decisions, but rely instead on persuasion and publicity to bring pressure to bear on agencies that fail to implement recommendations made. HRCs, however, seek resolution and settlement. Some HRCs are empowered by their establishment legislation to enforce decisions.

4

FREEDOM OF INFORMATION

4.1 "Open government" is a fundamental doctrine in a democratic society. It promotes public accountability by ensuring that the public is fully informed about government processes and decision-making. Citizens want government agencies to be more accountable for their decisions; they also want more say in decisions. Freedom of Information ("FOI") legislation is an important element of "open government".

4.2 FOI legislation, sometimes called "sunshine laws", exists in many countries. Sweden's Freedom of the Press Act of 1766 is thought to be the oldest of such laws. FOI legislation gives members of the public a right of access to documents held by governments and their agencies. It also provides a means for individuals to obtain access to personal records held by government agencies.

4.3 A fundamental principle underlying FOI legislation is that official information shall be made available unless there is good reason to withhold it. The legislation itself seeks to strike a balance between public interest

considerations favouring the disclosure of information and public interest considerations favouring the withholding of information. FOI legislation, therefore, recognizes that even in an open and transparent system of government, it may be necessary, in the public interest, to withhold information in order to allow the system of government to function in an effective and orderly fashion or to protect the privacy of individual citizens.

4.4 In determining whether there is good reason to withhold information, FOI legislation may adopt an outcome-based approach or a class-based approach. The class-based approach exempts certain classes of official documents. An outcome-based approach focuses essentially on the predicted prejudicial effect of release rather than the nature of the information on its own. In short, the key question for holders of information is "what is the harm if we make this information available?" This requires an intelligent value judgment in each case, with the bias in favour of release, if there is doubt about whether the "harm" will actually occur.

4.5 FOI legislation exists in many countries. This includes most established democratic countries where governmental transparency ranks as an essential element in developing effective democratic governance; and there are well established rules, in some cases enshrined in the constitution, defining the rights of individuals and private entities. In recent years, many new democracies have also adopted present-day FOI laws; but in reality there may be substantial gaps between implementation and the theoretical framework of the law.

4.6 While the objectives and main thrust of most FOI regimes are similar, legislative details vary from country to country. The Council of Europe, which promotes human rights, parliamentary democracy and the rule of law, is attempting to standardize FOI regimes in its member states. It is currently drafting a treaty on access to official documents. After a process of ratification, the treaty may enter into force as early as 2009.

4.7 The legislative models adopted in Australia and New Zealand can perhaps best illustrate two fundamentally different approaches to FOI legislation. While the main thrust of the FOI regimes is similar, they are different in the following major respects:

(a) The Australian model targets official "documents", whereas the New Zealand model targets official "information" with much wider coverage.

(b) Australia adopts a class-based approach which defines the classes of exempted documents (e.g. cabinet documents), whereas New Zealand adopts an outcome-based approach which identifies a series of values or interests that may require protection (e.g. national interest considerations).

(c) Avenues of review are also different: appeals in Australia go to an Administrative Appeals Tribunal, whereas the Ombudsman is the review authority in New Zealand.

The Australian FOI Regime

4.8 Australia's 1982 Freedom of Information Act[10] applies to all "ministers, departments and public authorities" of the Commonwealth, and there is similar legislation in all states and territories applicable to state and local government agencies. Any person can seek information access without demonstrating a prior need. Government decisions on access are governed by fixed and objective criteria and it bears the onus of justifying non-disclosure.

4.9 The Act expressly empowers the Commonwealth Ombudsman to investigate complaints about the actions of Australian Government agencies in response to FOI requests. The Act also requires agencies to inform applicants of their right to complain to the Ombudsman about FOI matters. The Ombudsman's role under the Act reflects the more general role of the office in promoting transparency in government administration. This includes ensuring that agencies implement sound document management procedures, provide clear and accessible information, and are open and responsive to complaints about issues to do with access to information.

4.10 One area of difficulty is the interaction between FOI and Privacy legislation. Both deal in a similar way with disclosure of personal records and the protection of personal information against inappropriate disclosure. But the theme of protecting information – of non-disclosure – is more strongly reflected in privacy legislation. In Australia, at the Federal level, there is an

[10] Freedom of Information Act 1982. Together with three other key legislative developments reinforced the concept of "open government". The three laws are the *Administrative Appeals Tribunal Act 1975, Ombudsman Act 1976, and Administrative Decisions (Judicial Review) Act 1977.*

office of Privacy Commissioner, with responsibility for the oversight and enforcement of the *Privacy Act 1988* and the power to carry out audits, investigate complaints, conduct "own motion" investigations and to make determinations enforceable through the Federal Court. At the time of writing, there is no such equivalent office with similar responsibilities for overseeing FOI matters and for emphasizing the importance of freedom of information, although the Opposition Party has made this an election platform.

The New Zealand FOI Regime

4.11 New Zealand's Official Information Act ("OIA") was also enacted in 1982. The underlying principle of the OIA is that official information shall be made available unless there is good reason to withhold it. The OIA strikes a balance between public interest considerations favouring the disclosure of information and public interest considerations favouring the withholding of information to the extent consistent with the public interest and the preservation of personal privacy. In principle, any official information held by those subject to the OIA, is open to request. A wide definition of what constitutes "official information" has ensured that the principle of open government becomes a central feature of New Zealand's public administration and has had a profound effect upon the quality of the information and documents generated by public officials.

4.12 Instead of providing exemptions for particular classes of information, the OIA identifies a series of values or interests that may require

protection. It takes an outcome-based approach to determine whether there are good reasons to withhold information.

4.13 The law has charged the Ombudsmen to investigate and review decisions which have been made in response to requests for official information. This fits comfortably and sensibly with the Ombudsmen also being the review body for complaints arising from the operation of the OIA. Many administrative wrongs arise from the improper use of information or the lack of access to information or an explanation. More citizens are using the OIA not only to obtain information about specific issues of concern to them but also as a method of determining the reasons for the decisions of government agencies that affect them personally. The outcome of such requests under the OIA can form the basis of complaints under The Ombudsmen Act, either because the information disclosed provides a basis for complaint about the decision or omission or, on occasion, the absence of information raises doubt about whether the decision was justified in the first place.

4.14 In New Zealand, the framework which the OIA establishes for determining access to information continues to work well in most circumstances. OIA has provided a strong impetus for government agencies to release more official information as a matter of course. Much information, which would have been withheld at the time the Act was enacted, is now routinely and proactively made publicly available by government agencies.

Hong Kong's Situation

4.15 Hong Kong does not have FOI legislation. In 1995, the Hong Kong Government introduced an administrative Code on Access to Information ("the Code") to serve as a formal framework for the provision of information by Government bureaux and departments, and the ICAC. The Code sets out what information must be made available to the public routinely and lays down rules for dealing with requests for access to other Government information. The requester does not have to give a reason for his request and the department is to provide the information unless there is a valid reason for refusal under Part 2 of the Code.

4.16 A department may refuse to disclose information, if disclosure would cause actual harm and prejudice or carry the risk or reasonable expectation of harm and prejudice in respect of the following matters:

(a) defence and security, external affairs, nationality, immigration and consular matters;

(b) law enforcement, legal proceedings and public safety;

(c) endanger to the life or physical safety of any person; damage to the environment; result in improper gain or advantage;

(d) management of the economy; management and operation of the public service; internal discussion and advice; public employment and public appointments;

(e) research, statistics and analysis; third party information; business affairs; premature requests and information on which legal restrictions apply.

4.17 Any person who believes that a department has failed to comply with the provisions of the Code may ask the department to review the situation. Any person who believes that a department has failed to apply any provision of the Code properly may complain to The Ombudsman, who may investigate the complaint with powers under The Ombudsman Ordinance. In this connection, although the Police, the Secretariat of the Independent Police Complaints Council and the ICAC are not subject to the jurisdiction of The Ombudsman, complaints about non-compliance with the Code by these organizations are actionable. However, under the Independent Police Complaints Council Bill, which is being scrutinized by LegCo, the Council will hire its own secretariat. As a consequential amendment, the Bill also provides for removal of the Council's secretariat from The Ombudsman's purview, even just in connection with non-compliance with the Code.

4.18 From time to time, there have been calls for enacting FOI legislation for Hong Kong. Government's stance has been that it sees no need for such legislation. In reality, Government departments handle a

multitude of requests routinely. In so far as the Code is concerned, it would appear that by and large, departments are able to satisfy citizens' requests for information and that only a handful of cases have required The Ombudsman's intervention.

4.19 The following statistics illustrate the extent to which the Code has been used:

	1995[11]	1996	1997	1998	1999
Requests to departments	543	1,175	1,640	1,861	2,234
Complaints to Ombudsman	2	2	1	6	8

	2000	2001	2002	2003
Requests to departments	1,597	1,808	1,914	2,171
Complaints to Ombudsman	5	1	2	8

	2004	2005	2006	2007[12]
Requests to departments	2,010	2,294	2,383	1,217
Complaints to Ombudsman	4	7	5	6

[11] March to December 1995.
[12] January to June 2007

4.20 From the above statistics, it would appear that most requests are processed without difficulty within the time frames envisaged by the Code and that in the great majority of cases, requests for information are satisfactorily handled by Government departments without recourse to the reviewing authority. However, a few cases handled in the past year demonstrated a lack of understanding of the Code by some officials, as reflected from their handling of access requests and the reasons advanced for withholding information having little to do with legitimate grounds under the Code. For example, a department had rejected a request from a researcher for data on railway-related suicides, just because it thought that, with such data, the researcher could identify the deceased, the injured or their relatives by reference to relevant newspaper reports. The Ombudsman considered the department in the wrong, as the Code does not prohibit the disclosure of such anonymized information from which it is not reasonably practicable to ascertain or deduce the identity of individuals. Political inconvenience or the potential embarrassment are not a justifiable basis for withholding information under the Code.

4.21 As the review authority, The Ombudsman appreciates that the office has an important educative role. During the course of investigations, we make our processes as transparent as possible and clearly explain the principles we are applying and the reason for the views we have formed. The aim is to encourage not just “simple compliance” with the Code, but a genuine attitude of openness and transparency in governance. Mere mechanical application of the Code and release of the minimum amount of

information upon request might well increase misunderstanding and mistrust. In the end, this will erode public confidence in government processes. This is the very antithesis of the purposes of a freedom of information regime.

5

PROTECTION OF WHISTLEBLOWERS

5.1 Whistleblower legislation provides a further facet of public accountability, by protecting the disclosure of illegal, immoral or illegitimate practices committed by an organization or an employee of that organization. Whistleblowers are increasingly being recognized as playing a vital role in healthy and effective management in public administration, as in the private sector. In October 2005, The Ombudsman initiated a direct investigation into the medical fee waiver system, on the basis of information from a social worker of the Social Welfare Department. The investigation led to The Ombudsman severely criticizing the deficiencies of the system and making recommendations for improvement.

5.2 In cases like this, insider information has proved useful in pinpointing perceived problems that may not be obvious or readily understood by outsiders. Where problems exist, whistleblowers can provide the catalyst for improvement. However, there are also inherent dangers:

(a) Not all whistleblowers have altruistic motivations. Some may be disgruntled employees with personal agenda or grudges. Others may disagree with the management of their organization on certain policies or developing issues, and try to bring outside pressure to influence the outcome of those issues.

(b) Where the public interest in disclosure is obviously significant, the community at large will inevitably take ownership of the issue and champion the cause, thereby conferring a degree of protection on the whistleblower. However, where the issues are not so cut and dried, the matter becomes a question of value judgment. In such situations, in the absence of whistleblower legislation, the whistleblower can be highly vulnerable and liable to persecution.

(c) Persecution can lead to serious consequences for the whistleblower, such as victimization and dismissal.

The New Zealand Model

5.3 In New Zealand, whistleblowers are protected by the Protected Disclosures Act ("PDA"), which came into force in 2001. The purpose of the Act "is to promote the public interest:

(a) by facilitating the disclosure and investigation of matters of serious wrongdoing in or by an organization; and

(b) by protecting employees who, in accordance with this Act, make disclosures of information about serious wrongdoing in or by an organization".

5.4 In broad terms, the PDA protects an employee of an organization who discloses, in accordance with the Act, "*serious wrongdoing*" in that organization from retaliatory action by the employer and from civil or criminal action in respect of the disclosure. "*Serious wrongdoing*" is defined in the Act and is limited to matters such as criminal acts; corrupt or irregular use of funds or resources of a public sector organization; acts which pose a serious risk to public health or safety, to the environment, or to the maintenance of law; and acts by public officials that are oppressive, improperly discriminatory, grossly negligent or constitute gross mismanagement.

5.5 The PDA applies to employees in both public and private sector organizations and the definition of "employee" is wide, including former employees, a person seconded to an organization and contractors. The general approach of the PDA is to require disclosure to be made first within the organization concerned so that the organization has an opportunity to address the serious wrongdoing itself. If the organization fails to deal with the matter, or the employee is not satisfied with the way it has been dealt with, the employee can report the matter to one of the "*appropriate authorities*" listed in the Act, such as the Ombudsmen, the Police or the Serious Fraud Office.

5.6 The Ombudsmen in New Zealand are required by the Act to provide an employee who has made, or is considering making, a protected disclosure, with information and guidance on the following matters:

(a) kinds of disclosure protected by the Act;

(b) manner in which and person to whom information may be disclosed under the Act; and

(c) protection and remedies available.

In practice, the PDA has not been used often.

5.7 So far, there has been little public demand for whistleblower legislation in Hong Kong. In the absence of huge political pressure arising from a scandal that cannot be dealt with through existing channels, it is highly unlikely that Government would consider similar arrangements for Hong Kong.

6

Specialized Ombudsmen

6.1 The concept of “ombudsman” has received universal acceptance as a fundamental ingredient of a governmental system based on pluralism and citizens’ rights. As the institution has become widely accepted in the public sector, pressure also grew for “ombudsman-like” institutions to be replicated in non-traditional areas and the private sector. As these other agencies have developed, some have used the title “ombudsman”; others without such designation have borrowed some of the features associated with an ombudsman institution.

6.2 From the classical ombudsman model has since developed various divergences in many parts of the world. The following are some industries or areas of activities where the concept has taken hold:

Public Sector Interests:

(a) privacy;

(b) freedom of information;

(c) health care;

(d) legal services;

(e) tax;

(f) pensions;

(g) prisons;

(h) complaints against the Police;

(i) anti-corruption;

(j) enforcement of Leadership Code

Hybrid and Private Interests:

(k) specific industries (e.g. insurance, telecommunications, credit institutions);

(l) universities and/or student affairs;

(m) special interest groups e.g. children, minorities, defense forces/solders' complaints.

6.3 In an ideal situation, a specialist ombudsman model should conform to the following principles that govern the classical ombudsman model:

(a) adoption of the basic ombudsman characteristics of independence in appointment, funding, operation and accountability;

(b) direct access by those affected personally and without cost;

(c) observance of non-adversarial complaint investigation techniques designed to emphasize an informal and speedy resolution of grievances;

(d) Readiness to recommend changes to practices to avoid repetition of actions giving rise to grievances;

(e) public reporting on a regular basis.

The objective must be to achieve fairness of outcome in the often unbalanced relationship between the complainant and the organization under complaint.

6.4 The development of ombudsman-like institutions has raised various issues, which impact on the classical model:

(a) The name “ombudsman” has attained worldwide recognition and status because of the manner in which classical ombudsmen are appointed and function. These attributes include being a defender against abuse - independent, impartial and non-adversarial. A member of the public can turn to an ombudsman without cost to investigate a grievance and recommend a resolution. It is in the interest of those who have come to adopt and so, effectively use the classical ombudsman

model and the societies they service, that the success of the model must not be diminished or weakened. Such diminution or weakening would likely follow a process of copying without adherence to the now well-established principles by which the model is recognized.

(b) It is important that the ombudsman, whether classical or specialized, be seen to have an impartial, non-adversarial investigatory and recommendatory role rather than a determinative role. The concept of "ombudsman" requires that it has a systemic difference from the courts for the resolution of disputes. Otherwise, the ombudsman would become just an alternative court based on traditional adversarial techniques and dispositive outcomes.

(c) Access should be at no cost to those with a grievance which personally affects them.

(d) Nothing will push the ombudsman concept towards demise faster if either the ombudsman does not conduct himself/herself with the independence and impartiality for which the office is renowned;

(e) or the organization under complaint gets a reputation for successfully ignoring the ombudsman's recommendations.

6.5 Arising from the development of specialized ombudsmen, an issue has arisen relating to the use of the name "ombudsman" itself. This name has acquired such common usage that there is no way in which it could now be universally trademarked and its use thereby controlled. New Zealand is probably the only country which has legislated on the use of the name "ombudsman", subjecting it to approval by the Chief Parliamentary Ombudsman. Guidelines have been developed which emphasize recognizing the features of independence of appointment and functional capacity, impartiality in the review procedures and accountability through public reporting on a regular basis. By doing so, New Zealand has established a legislative framework for ensuring a significant measure of harmonization with the classical model and its name by those who would seek to use its credibility for their grievance resolution procedures.

6.6 In Hong Kong, separate offices have been established to perform three of the functions mentioned in para. 6.2 above, namely the Independent Commission Against Corruption, the Privacy Commissioner for Data Protection and the Independent Police Complaints Council which will soon be conferred statutory status.

6.7 In its consultancy study on "Improving Hong Kong's Health Care System: Why and For Whom?", the Harvard Team[13] concluded that "although

[13] In November 1997, the Health & Welfare Bureau of HKSARG commissioned a study into health

evidence about the ineffectiveness of professional self-regulation is not sufficient on its own to lead to the conclusion that technical quality has suffered in Hong Kong, combined with other evidence, this ineffectiveness should be seen as a major concern. Lack of consumer knowledge coupled with professional self-regulation by physicians, lack of internal checks, external accountability, and oversight and lack of organized information indicate a strong need for *external* and *enforceable* ways to maintain and improve the quality of care"[14]. Targeting this, the Harvard Team recommended, inter alia, setting up a medical ombudsman office. This recommendation was not pursued by Government. Instead, in its Consultation Document on Health Care Reform, the then Health and Welfare Bureau proposed setting up a Complaint Office in the Department of Health to assist patients in lodging complaints relating to patient care. The idea was that this Complaints Office will "conduct investigations into the complaints, assist complainants to obtain expert advice, and brief complainants as much as possible of the facts of the case as known. The Office will try to mediate between the complainant and the complained; and if that fails, the Offie will, at the request of the complainant, forward its findings to the relevant regulatory body." In the event, nothing came out of this proposal.

6.8 Other than this, there has been no suggestion in the community of developing other ombudsman-like institutions. Nevertheless, forewarned is forearmed, knowledge of other countries' would provide insight into the strength and potential pitfalls of this particular aspect of development.

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care in Hong Kong. This study was led by Professors William Hsiao and Winnie Yip of the Harvard School of Public Health, and included a comprehensive assessment of the current system and a proposal for alternative options to improve financing and delivery of health care.

[14] Extracted from page 60 of the Harvard Report.

7

CONCLUSION

7.1 This paper is simply an attempt to outline recent developments with ombudsman offices in other parts of the world. In this context, we have been at pains to keep only to facts and not to advocate any particular course of action. We have, however, focused on the implications for The Ombudsman's Office should a particular course of action be pursued. Any such determination is a matter for Government, and LegCo where legislative and funding support is needed, in the light of community considerations.

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Office of The Ombudsman

22 November 2007