

立法會 *Legislative Council*

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Panel on Administration of Justice and Legal Services

Background brief prepared by the Legislative Council Secretariat for the meeting on 27 April 2009

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.

Background

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. At present, Part I of Schedule 1 comprises most government departments and 19 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.

Review of The Ombudsman's jurisdiction

4. In the light of calls received from time to time to extend the jurisdiction of the Office of The Ombudsman 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 the Office.

5. The Ombudsman's review consists of two parts: Part 1 is an operational review of TOO, and Part 2 a more generalized review of developments in ombudsmanship. Part 1 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 as 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.

6. The Ombudsman submitted Part 1 and Part 2 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.

Research report on purviews of ombudsmen in overseas jurisdictions

7. At the request of the Panel on Administration of Justice and Legal Service (the Panel), the Research and Library Services Division of the LegCo Secretariat prepared a research report on "The Jurisdiction of Ombudsman Systems in Selected Places" (the Research Report), which was considered by the Panel at its meeting on 26 June 2006. The research examined the jurisdiction of the ombudsman systems in the United Kingdom (UK), New Zealand, the Province of British Columbia in Canada and Australia, focusing on the arrangement of ombudsman services, the organizations covered, and the investigative powers and purviews of the ombudsmen. An executive summary of the Research Report and various tables summarizing the features of the ombudsman systems in Hong Kong and the places under study are in **Appendices III and IV** respectively.

Issues raised

Part 1 of the Review Report on The Ombudsman's jurisdiction

Review of Schedule 1 organizations

8. At the Panel meeting on 26 June 2006, the Hong Kong Bar Association expressed the view that the existing scope of The Ombudsman's purview was too restrictive. It pointed out that as a general rule, agencies that were amenable to judicial review should also be amenable to the jurisdiction of The Ombudsman as regards maladministration. The Ombudsman had also expressed the view that the present provisions of TOO were too restrictive. Members requested The Ombudsman to consider bringing subvented agencies within the remit of The

Ombudsman insofar as their public functions were concerned. Noting that the Ombudsmen in some places covered in the Research Report had been given jurisdiction to investigate organizations such as school boards, advisory groups and electoral bodies, some members urged 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 the review.

9. On 13 December 2007 and 25 February 2008, the Panel discussed the Administration's initial response to the recommendations made by The Ombudsman in Part 1 of the Review Report. Part 1 of the Review Report and the Administration's initial response are in **Appendices V** and **VI** respectively. In respect of the extension of The Ombudsman's jurisdiction, the Panel noted that The Ombudsman had 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(s) of funding. The eight bodies were -

- (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).

10. Some members expressed support for the recommendation to include the above eight bodies under the purview of The Ombudsman. The Panel noted that while the Administration would proceed to consult the six bodies listed in paragraph 9(a) to (f) on the recommendation, it did not see a case for including EAC and DCs in the Schedule in view of their lack of executive powers. The Administration explained that as the administrative work of election-related activities and day-to-day management of district facilities were handled by the relevant executive departments which were already subject to the jurisdiction of The Ombudsman, it was not necessary to place EAC or DCs under The Ombudsman's jurisdiction. In respect of EAC, the Administration also stressed that to safeguard the credibility of the elections, it was of utmost importance to ensure that EAC was able to conduct its work free from any influence, whether real or perceived.

11. The Panel noted the Bar Association's concern on whether the Registration and Electoral Office (REO) (an executive arm of EAC), the Home Affairs Department (HAD) and the Leisure and Cultural Services Department (LCSD) (both the executive arms of DCs) would be exempted from The Ombudsman's jurisdiction for various reasons. For example, The Ombudsman might be unable to investigate into a complaint about the inefficiency of voter registration due to the argument that REO was acting on the instruction of EAC, and The Ombudsman might be unable to investigate into a complaint about the use of funds for local community activities because LCSD argued that it had followed the decision of the DC concerned on the use of public funds.

12. The Administration advised that it was not aware of any incident in which The Ombudsman could not deal with a maladministration complaint brought against REO or HAD in relation to their election-related administrative work in past elections. As regards the use of DC funds, the amount of which had significantly increased following the expansion of the role of DCs from January 2008 onwards, HAD had promulgated a new set of guidelines on the use of DC funds after consulting the Financial Services and the Treasury Bureau, Independent Commission Against Corruption, the Department of Justice, the Audit Department, etc. The guidelines were to ensure that public funds would be used in a proper, transparent and accountable manner. The Director of Home Affairs remained the vote controller of these DC funds.

13. The Administration further informed the Panel that after collating the views from the six bodies listed in paragraph 9(a) to (f) above, it would be in a better position to formulate its final response to the recommendations made in Part 1 of the Review Report.

Part 2 of the Review Report

14. Part 2 of the Review covers trends for development in ombudsmanship worldwide, such as the Ombudsman's involvement in human rights protection, and their implications on Hong Kong's ombudsman system. The Ombudsman submitted Part 2 of the Review Report to the Administration in November 2007. The Administration has yet to inform the Panel of its views on this Part of the review.

Human rights protection

15. At the annual meeting between LegCo Members and The Ombudsman organized by the Complaints Division of the LegCo Secretariat on 11 December 2007, the question of whether the role of The Ombudsman should be expanded to cover human rights protection was raised. The Ombudsman considered it inappropriate to comment on the question as it should be a policy decision to be made by the Administration. Based on the review findings, the scope of the ombudsman's activities had been expanded to cover human rights protection for some newly established ombudsman institutions. However, places such as New Zealand, UK,

Australia and Hong Kong followed the classical ombudsman model. In Hong Kong, while The Ombudsman was not explicitly charged with human rights responsibilities, the essence of the Office's work was to ensure the protection of individual rights by public administration. Under the existing mechanism for protection of human rights in Hong Kong, various statutory bodies, including The Ombudsman, the Equal Opportunities Commission, the Privacy Commissioner's Office, 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. The Ombudsman further advised that the implications for putting in place such a system were highlighted in Part 2 of the Review Report. However, the Administration held the view that there was an extensive mechanism for the protection of human rights in Hong Kong and did not see an obvious need for establishing another human rights institution to duplicate or supersede the existing mechanism.

Development of specialized ombudsmen

16. At the annual meeting between LegCo Members and The Ombudsman held on 9 December 2008, a Member sought the Ombudsman's view that if Hong Kong was to establish an Office of Financial Ombudsman, whether it would be desirable for such Office to merge with the Office of The Ombudsman. The Ombudsman advised that it was ultimately a matter of policy decision. In some countries, the public sector ombudsmen also doubled up as ombudsmen for specific services (e.g. in UK, the Parliamentary Ombudsman was also the Health Service Ombudsman), whereas in some other countries, separate specialized ombudsmen were established to oversee services in particular areas. She stressed that policy would dictate the mode of operation of the ombudsman system in Hong Kong.

Public consultation

17. At the Panel meeting on 26 June 2006, a member considered 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 relevant conclusions and recommendations made by The Ombudsman, and The Ombudsman should also consult the public when conducting the Review.

18. The Ombudsman advised that the Office was aware of public views and expectation from correspondence received daily from complainants. It was, however, inappropriate for the Office of The Ombudsman to conduct a public consultation exercise. The appropriate channel was for the Office to submit the 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.

19. The Administration advised the Panel in writing in July 2006 that if The Ombudsman's proposals involved policy or legislative changes, it would 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's view was that the course of actions to be taken would depend on the content of the Review Report and the aspects of the report which the public would be interested in.

Latest position

20. The Administration is scheduled to revert to the Panel on its final response to the recommendations made in Part 1 of the Review Report at the forthcoming meeting on 27 April 2009.

Relevant papers

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

Council Business Division 2
Legislative Council Secretariat
21 April 2009

* 西九文化區管理局 (27 of 2008)

25. 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。

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

本條例適用的機構

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)

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)

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† 《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。

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.

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

ORGANIZATIONS TO WHICH THIS ORDINANCE APPLIES

PART I*

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

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.

* “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)

* 請參閱載於第 517 章第 33(4) 條的保留條文。

* West Kowloon Cultural District Authority (27 of 2008)

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)

第 II 部

公務員絀用委員會秘書處。

投訴警方獨立監察委員會秘書處。

香港輔助警察隊。 (由 1998 年第 25 號第 2 條修訂；由 2007 年第 136 號法律公告修訂)

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*)

附表 1A

[第 3(7)、18(a) 及 24 條]

SCHEDULE 1A

[ss. 3(7), 18(a) & 24]

專員的財務事宜等

FINANCES, ETC. OF OMBUDSMAN

1. 專員的資源

專員的資源計有——

- (a) 經立法會根據本條例第 6(3) 條通過的所有撥款；
- (b) 所有其他款項及財產，包括專員所收的費用、利息及累積的收益。

1. Resources of Ombudsman

The resources of the Ombudsman shall consist of—

- (a) all money appropriated by the Legislative Council under section 6(3) of this Ordinance;
- (b) all other money and property, including fees, interest and accumulations of income received by the Ombudsman.

2. 盈餘資金的投資

(1) 在符合第 (2) 款的規定下，專員可將他非即時需支用的資金投資。

(2) 專員依據第 (1) 款將資金投資的方式，必須得到行政署長經諮詢財經事務及庫務局局長後給予的批准。 (由 2002 年第 106 號法律公告修訂)

2. Investment of surplus funds

(1) Subject to subsection (2), the Ombudsman may invest his funds that are not immediately required to be expended.

(2) The Ombudsman shall not invest funds pursuant to subsection (1) except in such form of investment as the Director of Administration, after consulting with the Secretary for Financial Services and the Treasury, approves. (*Amended L.N. 106 of 2002*)

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)

**Executive Summary of the research report on Jurisdiction of
Ombudsman Systems in Selected Places**

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

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

Table 1 — Appointment procedure

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

Table 1 — Appointment procedure (cont'd)

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

Table 2 — Matters subject to investigation

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

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

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

Table 3 — Organizations subject to investigation

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

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

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

Table 4 — Exclusions from jurisdiction

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

Table 4 — Exclusions from jurisdiction (cont'd)

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

Table 5 — Investigation powers

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

Table 5 — Investigation powers (cont'd)

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

REPORT

ON

REVIEW OF JURISDICTION

PART 1

OFFICE OF THE OMBUDSMAN

November 2006

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1

INTRODUCTION

BACKGROUND

1.1 The forerunner of The Ombudsman Ordinance, Cap. 397 (“the Ordinance”), the Commissioner for Administrative Complaints (“COMAC”) Ordinance, was enacted on 1 February 1989. It was primarily based on New Zealand’s Parliamentary Commissioner (Ombudsman) Act 1962 and the United Kingdom’s Parliamentary Commissioner Act 1967.

FUNCTIONS AND POWERS

1.2 Section 7(1) of the Ordinance 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 Government.

1.3 Schedule 1 is reproduced at **Annex 1**. It can be seen that Part I currently comprises all Government departments (except the Police) and 17 public bodies¹.

1.4 Section 8 of the Ordinance provides that The Ombudsman shall not undertake or continue any investigation that relates to any action or matter specified in Schedule 2, which is reproduced at **Annex 2**.

NEED FOR REVIEW

1.5 The Ordinance has been amended four times since 1989 (see details at **Annex 3**). In brief, the major amendments provided for:

- (a) in 1994, public access to COMAC to replace referral by Legislative Council (“LegCo”) Members; power for COMAC to initiate direct investigation in the absence of complaints and inclusion of more statutory bodies within COMAC’s jurisdiction;
- (b) in 1995, extending The Ombudsman’s jurisdiction to investigate alleged breaches of the Code on Access to Information;

¹ 18 from 1 December 2006, with the Financial Reporting Council coming into operation.

- (c) in 1995, changing the title of “COMAC” to “The Ombudsman”; and
- (d) in 2001, establishing The Ombudsman as a corporation sole to be legally “delinked” from the Administration, with the necessary powers for independent functioning.

1.6 There have been calls from time to time for The Ombudsman to extend her jurisdiction to cover further organizations. The Ombudsman also considers it desirable to resolve some uncertainties and/or difficulties encountered by the Office in its investigation. This jurisdictional review was initiated against this background. In the course of the review, we have examined:

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

This report constitutes Part 1 of the jurisdictional review.

1.7 There have been many developments in ombudsmanship in recent years. The most significant are in respect of human rights protection and in specialized areas of interests. Taking opportunity of the review, The Ombudsman considers it desirable to take reference from overseas practices and the United Nations Human Rights Committee's concern over human rights in Hong Kong. The Ombudsman's proposal to examine possible new areas of activities was supported by LegCo Members. In this connection, the LegCo Panel on Home Affairs has also asked whether The Ombudsman's jurisdiction should include handling complaints on child rights².

1.8 The Ombudsman is mindful that such areas are essentially policy matters, which are the responsibility of the Administration. Nevertheless, given our knowledge of these issues and overseas experience, The Ombudsman believes that this Office is well placed to provide pointers to possible developments for the Administration's consideration. In the final analysis, it is up to the Administration and LegCo to decide whether any, and if so which, new activity should be taken further. To differentiate between these philosophical issues from the operational review of the Ordinance, the study of the former will constitute Part 2 of our review, a report on which will be separately submitted.

² Meeting on 10 January 2006.

METHODOLOGY

1.9 Part I has been carried out through the following process:

(a) Research

Records on the enactment of, subsequent amendments to and the operation of the Ordinance have been consulted. These include Office files, Hansard of LegCo deliberations, media reports, academic/professional papers, legislation and reports of ombudsman institutions in other countries. An important aim of this exercise is to revisit the legislative intent concerning The Ombudsman's jurisdiction to ensure that it continues to apply to current operations, despite changes of circumstances over time.

(b) Review of Schedule 1 organizations

Drawing up "bench-marking" criteria for including suitable organizations in Schedule 1.

(c) Review of Schedule 2

Examining aspects which have given rise to problems or challenges.

(d) Comparative studies

Where appropriate, drawing comparison with ombudsman institutions in other jurisdictions.

(e) Assessment of Public Expectations

Taking into account:

- (i) operational experience;
- (ii) complaints and enquiries received;
- (iii) feedback from complainants and complainee organizations;
- (iv) news reports and editorials;
- (v) comments from academics and professionals;
and
- (vi) views of LegCo and District Council Members.

2

SCHEDULE 1 ***ORGANIZATIONS***

POLICY

2.1 When the Ordinance was enacted in 1989, only Government departments were included in Schedule 1. Nevertheless, it has always been Government policy to add appropriate public bodies to the Schedule, to bring them within The Ombudsman's jurisdiction. In replying to the LegCo Ad Hoc Group on 23 January 1988, the then Deputy Chief Secretary stated that the Administration considered "it important that the Commission begins with a clear and easily manageable mandate, which can be extended at a later stage, if appropriate". The Administration clearly foresaw the inclusion of quasi-government organizations having responsibility for public administration. LegCo Members, the public and the then COMAC also suggested organizations for adding to the Schedule.

2.2 On this matter, in a letter to COMAC on 8 October 1990, the then Chief Secretary said:

“Our view is that in principle major functions which are hitherto performed by the Government, such as hospital services, should remain within the Commissioner’s jurisdiction upon their privatization or corporatization. We are also prepared to consider on a case by case basis the extension of the Commissioner’s jurisdiction to existing statutory bodies.”

2.3 This policy was approved and re-affirmed by the Governor-in-Council on 5 January 1993 and 29 June 1993 respectively. The Administration further stated that priority should be given to including in Schedule 1 those statutory bodies which provide an essential service to the community.

2.4 The Administration’s stance was reiterated in the drafting instructions to amend the Ordinance in 2001:

“It is the Administration policy to keep under review the possibility of further expanding the Ombudsman’s jurisdiction to other major, statutory bodies.”

2.5 By now, there are 17 statutory bodies³ listed in Schedule 1. They have been included in pursuance of the above policy, at the instigation of the Administration or suggestion from this Office.

³ 18 from 1 December 2006, with the Financial Reporting Council coming into operation.

CRITERIA FOR INCLUSION IN SCHEDULE 1

2.6 On the basis of the policy, operational experience and resource consideration, we have established the following criteria for selection of candidates for inclusion in the Schedule:

- (a) the organization exercises executive powers, performs administrative action and is not solely an advisory, adjudicative or appellate body;
- (b) it has extensive interface with or impact on the public or a substantial sector thereof; and
- (c) it is substantially (say more than half of its revenue) funded by 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 Government or public officials.

2.7 Public services being provided by Government should remain subject to The Ombudsman's jurisdiction after corporatization, i.e. taking over by statutory public bodies (as per the then Chief Secretary's reply to COMAC on 8 October 1990). However, we accept not including "privatized" services which involve a transfer of such services to a commercial enterprise, e.g. the divestment of retail and parking facilities under the Hong Kong Housing

Authority to the Link Real Estate Investment Trust in 2005, as the services would then fall outside the realm of public administration.

2.8 Applying the criteria in paragraph 2.6 above, The Ombudsman has identified the following candidates for inclusion in Schedule 1:

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

REASONS FOR INCLUSION

Auxiliary Medical Service (“AMS”) and Civil Aid Service (“CAS”)

2.9 AMS and CAS are publicly funded organizations established under the AMS Ordinance, Cap. 517 and the CAS Ordinance, Cap. 518 respectively (cf. para. 2.6(c)). They provide support to Government regular forces in emergencies: the former by assisting in medical and health and other rescue services⁴, the latter by providing civil support services (such as

⁴ S. 4, AMS Ordinance.

mountain search and rescue, flood rescue and countryside fire protection)⁵.

2.10 In community events such as Walks for Millions and firework displays, AMS provides first aid and CAS helps with crowd control. AMS also assists in the administration of methadone clinics and CAS the Lo Wu immigration checkpoints.

2.11 Both organizations perform executive functions (cf. para. 2.6(a)), provide frontline services, have extensive interface with the public (cf. para. 2.6(b)) and are often the focus of public attention. However, they are not subject to The Ombudsman's scrutiny while the Government departments (known by the same names) which provide them with resources and other logistical support behind the scenes are already in Schedule 1. This has caused much confusion to members of the public who complained to this Office about the services of these two organizations.

2.12 In this light, AMS and CAS are considered candidates for inclusion in Schedule 1.

Board of Management of Chinese Permanent Cemeteries ("BMCPC") and Chinese Temples Committee ("CTC")

2.13 The function of BMCPC is "to provide, maintain and administer cemeteries and burial grounds for persons of the Chinese race permanently

⁵ S. 4, CAS Ordinance.

resident in Hong Kong”⁶. CTC is responsible for the registration, management, control and inspection of Chinese temples, the control and auditing of Chinese temples funds and the management of the duties of temple keepers⁷. It also manages the General Chinese Charities Fund which, at the Committee’s discretion, may be applied to any Chinese charity in Hong Kong. Hence, both organizations exercise executive powers (cf. para. 2.6(a)).

2.14 BMCPCC has been granted Government land to provide burial lots, urn plots and niches for sale to Hong Kong’s Chinese residents. Sale proceeds are the main source of funding for BMCPCC. CTC is funded by public donations from temple visitors, who would expect proper use of their contributions but are not in a position to monitor their utilisation (cf. para. 2.6(c)). These two bodies come under the supervision of the Secretary for Home Affairs, who appoints the members and is their Chairman *ex officio*. A Principal Assistant Secretary of the Home Affairs Bureau works closely with the Executive Secretaries of both BMCPCC and CTC on all administrative and operational matters.

2.15 Many people go to temples. All would eventually need a final resting place. The services of the two bodies, therefore, have extensive impact on the public (cf. para. 2.6(b)). They have also attracted considerable media and public attention. The fact that some BMCPCC and CTC members, including former Executive Secretaries, had been charged with corruption and other criminal offences suggests that the administrative systems of these two

⁶ S. 6, Chinese Permanent Cemeteries Ordinance, Cap. 1112.

⁷ S. 3, Chinese Temples Ordinance, Cap. 153.

bodies have room for improvement and regular monitoring. Apart from internal mechanisms for checks and balance, there should also be a degree of impartial external scrutiny.

2.16 Both BMCPC and CTC, therefore, meet the criteria for being brought within The Ombudsman's jurisdiction.

Consumer Council ("CC")

2.17 The functions of CC are "to protect and promote the interests of consumers of goods and services and purchasers, mortgagors and lessees of immovable property"⁸. This literally means the interests of all members of the public (cf. para. 2.6(b)).

2.18 Funded by Government subvention (cf. para. 2.6(c)), CC carries out its functions by, *inter alia*, collecting and disseminating information on goods⁹ and receiving and examining complaints¹⁰. These are executive powers (cf. para. 2.6(a)).

2.19 CC's work always attracts much media and public attention. From time to time, this Office receives complaints against CC. As the Council is not in Schedule 1, all had to be screened out.

⁸ S. 4(1), Consumer Council Ordinance, Cap 216.

⁹ Ibid, s. 4(1)(a).

¹⁰ Ibid, s. 4(1)(b).

2.20 In view of the above, CC is considered a candidate.

Electoral Affairs Commission (“EAC”)

2.21 From 1995 to 1998, the then COMAC/Ombudsman made a number of unsuccessful attempts to bring EAC within his jurisdiction. The Administration contended that EAC’s main function was to formulate election exercises and to handle election petitions, leaving the administrative duties to the Registration and Electoral Office (“REO”), which was already in Schedule 1. On the other hand, the then COMAC/Ombudsman considered that as an executive arm, REO reported to and carried out directions from EAC, including administrative matters. With EAC outside Schedule 1, investigation against REO would be undermined. The Administration, however, rejected the proposal.

2.22 The work of EAC concerns all voters as well as election candidates (cf. para. 2.6(b)). During elections, many candidates, voters as well as the media closely monitor the process and the outcome. EAC has a general mandate “to take such steps or do such other things as it considers appropriate for the purpose of ensuring that elections and any process ... are conducted openly, honestly and fairly”¹¹. It also has the power to issue guidelines on the conduct or supervision of elections¹² and to provide regulations on the registration of electors, publication of registers and

¹¹ S. 4(h), EAC Ordinance, Cap 541.

¹² Ibid, s. 6(a)(i).

ascertainment of the qualifications of electors¹³. In other words, it ensures that election laws are followed and election policies implemented. These are executive functions (cf. para. 2.6(a)).

2.23 The membership of EAC is small: only a Chairman and two members. The Chief Electoral Officer of REO carries out its directives¹⁴. A similar relationship exists between EAC and the Home Affairs Department (“HAD”) for elections of village representatives¹⁵. EAC and REO, and for rural elections EAC and HAD, are two sides of the same coin and should therefore be taken as one entity for the discharge of administrative functions.

2.24 EAC is fully funded by Government (cf. para. 2.6(c)).

2.25 EAC should, therefore, be included in The Ombudsman’s jurisdiction. Episodes during the LegCo Elections in 2004 evidenced that many of EAC/REO’s arrangements and activities were administrative in nature. The problems that surfaced during the 2004 elections were traced to administrative defects, such as communication breakdown with polling stations, inappropriate preparations and insufficient size or supply of polling boxes. By analogy, EAC’s position may be equated to that of the Housing Authority and the former Municipal Councils, i.e. both the statutory bodies and their executive departments should be included in Schedule 1.

¹³ S. 7(1)(a), EAC Ordinance, Cap. 541.

¹⁴ Ibid, s. 9(1) and (2).

¹⁵ Ibid, s. 9A.

Estate Agents Authority (“EAA”)

2.26 EAA has been set up to protect the interests of property sellers and buyers through regulating and controlling the practice of estate agents and salespersons and promoting integrity and competence amongst, or maintaining or enhancing the status of, estate agents and salespersons¹⁶. EAA performs these functions by holding examinations, carrying out inspections and investigating complaints. These functions have considerable scope for administration (cf. para. 2.6(a)).

2.27 EAA is empowered by section 56 of the Estate Agents Ordinance, Cap. 511 to charge licence fees which constitute over 80% of EAA’s income¹⁷ (cf. para. 2.6(c)).

2.28 The first half of 2006 recorded some 48,000 transactions, involving over \$162 billion. Significant public interest and funds are at stake (cf. para. 2.6(b)). With the rise in public expectations of the professional standard and practice of estate agents and salespersons as well as the proper running of the organization itself, EAA is increasingly under the media’s limelight.

2.29 EAA is therefore another candidate for inclusion in Schedule 1.

District Councils (“DCs”)

¹⁶ S. 5, Estate Agents Ordinance, Cap. 511.

¹⁷ Other sources of income are examination fees and sales of publications.

2.30 The role and functions of DCs have mainly been advisory. However, in his Policy Address of 2005/06, the Chief Executive announced an initiative to empower DCs to participate in the management of some district facilities, such as libraries, community halls, leisure grounds, sports venues and swimming pools, as well as the presentation of recreational and cultural programmes, in collaboration with the Government departments concerned. A pilot scheme involving four of the 18 DCs will be implemented in January 2007. It is expected that eventually all DCs will perform such administrative functions (cf. para. 2.6(a)). Funds will be provided by Government for such purposes (cf. para. 2.6(c)).

2.31 By nature, DCs have extensive interface with the public (cf. para. 2.6(b)) and often attract media attention.

2.32 Given their new administrative functions, DCs should be included in Schedule 1.

ORGANIZATIONS OUTSIDE THE OMBUDSMAN'S JURISDICTION

2.33 **Police and Independent Commission Against Corruption ("ICAC").** In Hong Kong, the Police and ICAC are not subject to The Ombudsman's jurisdiction, whereas in some other jurisdictions, they are. For the sake of completeness of this review, we would include a section on how this had come about.

2.34 Apart from administrative actions taken in relation to the Code on Access to Information, actions by the Police and ICAC are outside The Ombudsman's purview, primarily because when the COMAC Ordinance was enacted, complaint channels were already in place for these two organizations. However, this raised substantial disquiet as early as 1985, when the White Bill for setting up the COMAC Office was introduced. In particular, some legislators, the media and members of the public questioned the effectiveness of "Police investigating Police". They advocated an independent investigating authority on police complaints to avoid possible conflict of roles.

2.35 The then COMAC reviewed this issue in 1990 and again in 1998 and concluded that concerning Police complaints, his Office should be empowered to investigate non-crime related functions and administrative action of civilian staff.

2.36 The Administration's stance remained firm and clear: that the system for Police complaints to be investigated by the Police's own Complaints Against Police Offices ("CAPO"), monitored and reviewed by the Independent Police Complaints Council ("IPCC") has been working well and should continue. Besides, the massive number of complaints against the Police might render the then COMAC's task unmanageable¹⁸. The Administration further argued that there was a fundamental difference in nature between complaints against the Police and those about maladministration: the former are almost all justiciable or matters for disciplinary action.

¹⁸ IPCC endorsed the investigations of some 4,600 Police complaints in 2005: exceeding the total number of complaints received by The Ombudsman in 2005/06 (some 4,200).

2.37 While arguments had centred on the mechanism for investigating Police complaints, the Administration's view on that for ICAC complaints was similar, i.e. such complaints should be dealt with internally for review by the independent ICAC Complaints Committee. The Administration considered the COMAC representative *ex officio* on IPCC and the ICAC Complaints Committee to inject expertise into the monitoring of Police and ICAC complaints¹⁹.

2.38 There is little for reference from other countries as regards the investigation of ICAC complaints, but overseas practices on police complaints vary. In Australia, the Commonwealth Ombudsman and a couple of State ombudsmen (e.g. New South Wales and Northern Territory) have statutory authority to investigate police complaints, while the Ombudsman for Victoria has also been appointed to head the separate Office of Police Integrity. Other countries have set up independent agencies (not necessarily ombudsman offices) for investigating, monitoring or auditing police complaints. The IPCC in the United Kingdom, for instance, has investigative powers.

2.39 The question of whether The Ombudsman should have jurisdiction over Police and ICAC complaints is basically a policy matter. Despite the passage of time, it would appear that the Administration is more comfortable with maintaining the status quo. In this regard, we note that the 1996 IPCC Bill which aimed to make IPCC a statutory body was withdrawn at the beginning of proceedings for Third Reading because the Administration could

¹⁹ In view of perceived role conflicts and other considerations, The Ombudsman has discontinued representation on the two bodies with effect from October 2006.

not accept a Committee Stage amendment to give IPCC investigative power. The Bill was revised for consultation in March 2002 but has not yet been re-introduced to LegCo.

2.40 Contractors. Government services are increasingly being outsourced to commercial and other non-governmental organizations. As they are not in Schedule 1 to the Ordinance, such organizations are themselves not subject to The Ombudsman's investigation.

2.41 In Australia, the Commonwealth Ombudsman is empowered to investigate actions of a "service provider" who is under contract with a government department. Once an investigation has commenced, the Commonwealth Ombudsman may make inquiries of any person, including such contractors. However, he will normally not contact the contractor direct, but through the Government department.

2.42 Similarly, in Hong Kong, The Ombudsman is empowered to investigate any action taken by or **on behalf of** a Government department (para. 1.2).

2.43 When handling complaint cases, The Ombudsman holds the Government department concerned accountable for the action of its contractor. Inquiries focus on Government officials and recommendations for improvement are made to the department, which is expected to require its contractor to make improvement and to supervise the process.

2.44 In practice, The Ombudsman has not experienced any difficulty in scrutinizing contractors' actions in this manner. Government departments and their contractors are usually cooperative in providing the requisite information. Section 13(1) of the Ordinance also empowers The Ombudsman to summon "any person" to provide information and documents relevant to an investigation. As a last resort, The Ombudsman may invoke this power to obtain information from a contractor.

2.45 It is true that The Ombudsman cannot make recommendations directly to contractors. However, contractors have working relationships with Government and hence an incentive to cooperate with The Ombudsman in investigation as well as improving their services in line with The Ombudsman's recommendations made to Government departments.

2.46 We note that the Commonwealth Ombudsman, Australia, who has jurisdiction over contractors, also prefers contacting them through the relevant government departments (para. 2.41).

2.47 The Ombudsman remains of the view that holding the Government department concerned accountable for actions done by contractors on its behalf is sound in principle and working well in practice. Government departments can contract out the work but not the responsibility. Through briefing, training, monitoring and providing due support, Government departments should make sure that their contractors perform. Complaints against contractors' performance in delivering services on behalf of Government departments will, therefore, continue to be regarded by The Ombudsman as

being against the Government departments concerned.

2.48 Government Offices Overseas. Section 10(1)(db) of The Ombudsman Ordinance requires that the action 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 (in case of a body corporate, had a place of business in Hong Kong) or was in Hong Kong. This casts doubt on whether The Ombudsman can investigate a complaint from a non-Hong Kong resident about an action taken by a Hong Kong Government office outside Hong Kong, notably Economic and Trade Offices overseas which are under the Commerce, Industry and Technology Bureau.

2.49 In 2002, a person complained against the Economic and Trade Office in Beijing for poor staff attitude. We considered screening out the complaint as it seemed to fulfill none of the above conditions. The complainant then produced an address in Hong Kong, proving that he was a Hong Kong resident and the complaint was pursued. However, this brings out jurisdictional problems. What if the complainant were not a Hong Kong resident? In which case, should he be denied the right to complain to The Ombudsman against a department of the Hong Kong Government?

2.50 The Ombudsman suggests that consideration can be given to relax the restrictions in section 10(1)(db). Her counterparts in some common law jurisdictions, e.g. New Zealand and Western Australia, have no such restriction. To them, the territory where the action subject to complaint took place and the

location or residence of the complainant are immaterial.

2.51 The suggestion can easily be achieved by rescinding section 10(1)(db) of the Ordinance.

3

SCHEDULE 2: ACTIONS NOT SUBJECT TO INVESTIGATION

INTRODUCTION

3.1 Schedule 2: *Actions not Subject to Investigation* (**Annex 2**) has remained substantially unchanged since the enactment of the Ordinance in 1989. Although a substantial proportion of complaints received each year fall within the restrictions, The Ombudsman considers that broadly speaking, the various headings of restriction are justified. However, it is suggested that two headings, namely, the provisions on personnel (item 5) and lands (items 4 and 8) matters, are worth further examining.

PERSONNEL MATTERS (ITEM 5)

3.2 It was the Administration's view that The Ombudsman was meant to deal with Government-citizen relationship. Personnel matters were

basically employer-employee issues and, therefore, not for Ombudsman intervention.

3.3 The then COMAC suggested in 1991 that in line with the spirit of the law in Victoria, Australia, he be given the power to investigate civil service grievances. He pointed out that the number of civil service complaints received was a reflection of the inadequacy of the system. Considerable negotiations between COMAC and the Administration ensued in 1990 and 1991. The latter maintained its stance, reporting that the Public Service Commission, the Standing Commission on Civil Service Salaries and Conditions of Service and the Civil Service Branch “strongly opposed” to COMAC investigating civil service grievances.

3.4 Over the years, The Ombudsman has continued to receive complaints from civil servants or about specific aspects of the civil service. In principle, all such complaints, whether about management issues, conditions of service, civil service appointments or disciplinary matters, are screened out. However, with the cooperation of the departments concerned, this Office has investigated the odd complaints about maladministration relating to personnel matters, as distinguished from personnel matters *per se*. The following are some examples:

- (a) failure to use large fonts in civil service recruitment examination papers for candidates with feeble eyesight;
- (b) use of “non-standard”, if not “defective”, equipment to

measure candidates' height in recruitment;

- (c) mishandling a civil servant's option for the new pension scheme;
- (d) unreasonableness in drawing up criteria for promotion;
- (e) delay in taking disciplinary action against an officer due to loss of file records; and
- (f) delay in replying to an officer on leave entitlements and long service payment.

3.5 In 2003, The Ombudsman inquired into a complaint from a group of civil servants concerning substantial delays (of up to six years in processing their disciplinary cases). The Civil Service Bureau ("CSB") and the department concerned contended that the issues were not subject to The Ombudsman's investigation. In the event, The Ombudsman accepted that the complaint fell outside her jurisdiction by virtue of the very broadly worded restriction in item 5 of Schedule 2.

3.6 This Office has since consulted the practices of some overseas ombudsmen (**Annex 4**). Three out of eight are not empowered to handle personnel complaints while the remaining five may investigate the administrative aspects surrounding personnel matters. The practices of the latter five may be seen to be similar to the "liberal" approach taken by The

Ombudsman before the CSB challenge of 2003.

3.7 In the absence of specific documentary support, we can only surmise that this restriction has a colonial origin. Historically, item 5 of Schedule 2 was derived from the British position that “Crown servants hold their offices subject to the pleasure of the Crown”. The relevant provision in the Parliamentary Commissioner Act 1967 supports this²⁰.

3.8 The Ombudsman agrees that she should not investigate personnel matters within the realm of staff management. However, there are good grounds for some relaxation to the exclusion clause:

- (a) The primary objective of The Office of The Ombudsman is to enhance the quality of public administration. Personnel matters, although in-house in nature, directly affect the quality and morale of public employees who are key players in public administration. Employer-employee relationship aside, maladministration in processing personnel matters is still maladministration not conducive to good public administration.
- (b) With public bodies included in Schedule 1, the original rationale for item 5 is no longer entirely valid. Employees

²⁰ Paragraph 10 of Schedule 3 to the Parliamentary Commissioner Act 1967 and item 5 of Schedule 2 of the Ombudsman Ordinance, Cap. 397 are almost identical. The only difference is that the former referred to the employer as “the Crown” while the latter, “the Government”.

of public bodies do not enjoy a complaints or appeal system as comprehensive as their civil service counterparts.

- (c) Even for the civil service, it is doubtful whether the existing channel provides redress to civil servants aggrieved by “maladministration” in personnel processes in the same vein as that provided by The Ombudsman to complainants for public administration issues. It is even more doubtful if the channel caters for Non-Civil Service Contract staff who did not come into existence until 1999, ten years after the introduction of item 5.
- (d) By the same token, the parties opposing The Ombudsman’s investigation of personnel-related issues do not provide the full range of services to address the concerns of all civil servants. The Standing Commission’s functions are confined to issues concerning salaries and conditions of services. The Public Service Commission is concerned essentially with the “hire and fire” of civil servants on or above Point 34 on the Master Pay Scale.
- (e) The number and nature of personnel-related cases successfully concluded by The Ombudsman in the past (para. 3.4) indicate that her intervention was fully justified and acceptable to the “employers” and “employees” concerned without encroaching on staff management issues *per se*.

- (f) Not all complainants of civil service matters are civil servants. Prospective candidates (i.e. private individuals) aspiring for appointment to the civil service may not yet have an employer-employee relationship with Government.
- (g) Quite a number of ombudsmen around the world are empowered to investigate the administrative aspects surrounding personnel matters. The Ombudsman's proposal to relax item 5, therefore, would not be out of step with international practices.

3.9 The Ombudsman proposes that she be empowered to investigate complaints about administrative aspects, such as those in para. 3.4, surrounding personnel matters.

LANDS MATTERS (ITEMS 4 and 8)

Background

3.10 From 1990 to 1992, a review of item 4 relating to contractual and commercial transactions was carried out. The then COMAC pointed out that item 4 was so widely drawn that it "could be interpreted to exclude from COMAC's jurisdiction anything relating to Crown leases, which was certainly not the intention". The Administration supported the proposal to clarify

Schedule 2 to the effect that COMAC's jurisdiction should cover action taken in relation to the granting of Crown leases. A new item (now item 8) was subsequently added, with the following explanatory note:

“... the Commissioner's jurisdiction only covers matters relating to the application for the grant of land, such as delay in handling or refusal to the application. The Commissioner's jurisdiction should not cover the content of the land lease or the agreement relating to the grant. Such agreements are binding once they are executed. Any dispute should be determined by a court of law”.

Current Controversies

3.11 From time to time, the Lands Department (“Lands D”) contests The Ombudsman's inquiries over:

- (a) the application or otherwise of item 4 to complaints relating to land administration; and
- (b) the interpretation of “condition” of land grant in item 8.

3.12 The most heated arguments have stemmed from a complaint against Lands D for:

- (a) misinterpreting the original lease conditions of a site, leading

to unreasonable approval of lease modification; and

- (b) adopting without justification the plot ratio for the site, in contravention of the relevant Outline Zoning Plan and the Mid-Levels Administrative Moratorium.

3.13 On legal advice, Lands D has contended that:

- (a) a Government lease is in relation to a contractual transaction, so is the “modification” of a Government lease;
- (b) “Government land” means neither “leased” nor “unleased” Government land. It is a general term used to describe the original status of the land prior to grant. The terms “variation” (in item 8) and “modification” have the same meaning and are usually used interchangeably; and
- (c) as the complaint relates to “modification” of a lease, either item 4 or item 8 (if not both) of Schedule 2 applies and the matter is outside The Ombudsman’s jurisdiction.

3.14 However, two legal advisors have advised The Ombudsman that:

- (a) although a lease is also a form of contract, it does not mean that Government leases come within the ambit of item 4;

- (b) item 4 restricts the category of contracts to “commercial contracts” and should be interpreted narrowly to refer only to commercial contracts as distinct from land leases;
- (c) if leases are to be covered by item 4, why would item 8 exist?
- (d) Lands D’s sweeping categorization of all modification of Government leases as contractual transactions is “unduly simplistic” as there must be cases of land grant which are in essence administrative decisions;
- (e) the complaint points are administrative in nature – not contractual or commercial and are not ousted from The Ombudsman’s jurisdiction; and
- (f) “lease modification” could be more substantive than “variation of a condition” envisaged by item 8.

3.15 Both advisors advised that it was within The Ombudsman’s jurisdiction to investigate the complaint. In the event, while maintaining its stance that the case was outside the scope of the Ordinance, Lands D provided information “voluntarily” to assist The Ombudsman’s investigation.

3.16 Nevertheless, Lands D has consistently continued to raise similar jurisdictional queries²¹. In practice, its stance seems to be to cooperate with

²¹ For example, the complaint cases on: (a) alleged failure on the part of Lands D to provide a right-of-way guarantee in a small house grant, OMB 2004/4385; (b) alleged improper

The Ombudsman's inquiries and investigations while formally contesting her jurisdiction. So far, The Ombudsman has been able to follow up on all lands-related complaints, without having to consider further action to seek clarification on her jurisdiction or interpretation of the relevant sections of the Ordinance.

3.17 However, in view of the ongoing dispute and controversy over the interpretation of item 8, it is suggested that there should be clarity of legislative intention on what aspects of land administration to be excluded from The Ombudsman's jurisdiction.

Observations

3.18 Given the legal advice in paragraph 3.14, it is our view that item 4 should be interpreted narrowly to refer only to commercial contracts as distinct from land leases.

3.19 It is also evident from the explanatory note on item 8 (para. 3.10) that The Ombudsman is precluded from investigating only the "decisions" themselves under that item, but not the circumstances and processes leading to such decisions. Thus, administrative aspects (e.g. delays) surrounding the decision should be subject to The Ombudsman's jurisdiction.

3.20 The Ombudsman suggests that the Administration consider her views and state its stance on the interpretation of items 4 and 8.

granting of a small house licence in front of the complainant's house, OMB 2005/0464.

4

CONFLICT WITH OTHER ORDINANCES

PROVISIONS IN THE OMBUDSMAN ORDINANCE CONFLICTING WITH OTHER ORDINANCES

Power to Obtain Information

4.1 The Ombudsman has investigative powers. She may summon any person to give information (section 13(1) of the Ordinance). Her requirement for information is sufficient authority for disclosure and no obligation to maintain secrecy shall apply (section 13(3)). Non-disclosure is only permitted under section 14(3) in two rare circumstances where the giving of the information:

- (a) is the subject of a certificate by the Chief Executive that it might prejudice security, defence, international relations of Hong Kong; or

(b) is the subject of a certificate by the Chief Secretary for Administration that it might prejudice the investigation or detection of crime; or might involve disclosure, without the consent of the Chief Executive, of deliberations of the Executive Council.

Secrecy Requirement

4.2 The Ombudsman and her staff are required by section 15 to maintain secrecy in respect of all information obtained, with a few exceptions such as disclosure in court proceedings and crime reporting. Non-compliance is an offence punishable by a \$50,000 fine and two-year imprisonment. The intention is clearly to facilitate fact-finding by assuring all parties concerned that they could safely provide information to The Ombudsman without fear of further dissemination, thereby risking reprisal or victimization.

Problem

4.3 A problem subsequently arose with the enactment in 1995 of the Personal Data (Privacy) Ordinance, Cap. 486, administered by the Privacy Commissioner for Personal Data (“PCPD”) and of the three discrimination ordinances²², administered by the Equal Opportunities Commission (“EOC”). Both PCPD and EOC are made subject to The Ombudsman’s jurisdiction of administrative overview, and likewise The Ombudsman is subjected to the

²² The Sex Discrimination Ordinance, Cap. 480, the Disability Discrimination Ordinance, Cap. 487 and the Family Status Discrimination Ordinance, Cap. 527.

operation of PCPD's and EOC's ordinances.

4.4 Like The Ombudsman Ordinance, the four later ordinances contain identical secrecy provisions. Thus, similar to The Ombudsman, PCPD and EOC have power to obtain information and are prohibited from disclosing the information obtained. Although these ordinances contain exceptions, The Ombudsman's investigation is not explicitly stated to be one of them. Conflict inevitably arises when a complaint is filed with one of the three organizations against the other(s). Thus, PCPD's or EOC's statutory power to obtain information from The Ombudsman creates a problem for The Ombudsman under her statutory obligation to maintain secrecy, and vice versa.

4.5 Conventionally, when confronted with two conflicting provisions, the one enacted later is deemed to have implicitly repealed the earlier provision. However, this convention is not conclusive and certainly cannot override legislative intent. In the present case, the Personal Data (Privacy) Bill did once contain an "entrenchment" clause which would have enabled that Bill, when enacted, to override such other conflicting earlier legislative provisions. In the event, the Bill was enacted but the "entrenchment" clause was rejected by the then Provisional Legislative Council. There is therefore clear legislative intent for the Personal Data (Privacy) Ordinance not to override conflicting provisions in The Ombudsman Ordinance and other ordinances.

4.6 Confidentiality - the cornerstone of the Ombudsman institution. The Ombudsman's investigations rely heavily on information provided by the complainants, complainee organizations as well as third parties

who may have relevant information. The secrecy requirement imposed by section 15 assures those assisting with investigations of the confidentiality of their information and sometimes even of their identity. This ensures that information can be provided to The Ombudsman without fear of unauthorized dissemination or risk of reprisal. The secrecy provision is thus the cornerstone of the ombudsman institution, failing which The Ombudsman's work may be hampered because of informants' unwillingness to cooperate.

4.7 There is a second dimension to the secrecy provision. In investigating allegations of maladministration, The Ombudsman can probe the inner workings of Government departments and other agencies. These investigations are conducted at no cost to the complainant. Upon completion of the investigation, The Ombudsman invariably provides the complainant with a detailed account of her findings. The Ombudsman is always cautious in releasing to complainants information about Government actions and internal instructions. She does not wish her investigations to be used by prospective litigants as a means of bypassing the Court's "discovery" process. The secrecy provision is vital to The Ombudsman in keeping a "level playing field" in balancing the (sometimes) conflicting interests of the parties.

4.8 The Ombudsman, PCPD and EOC are, in their own ways, guardians of various civil rights. They are not rivals and all recognize the Catch-22 situation they got caught up in. In the handful of cases affecting them so far, the organizations had been pragmatic in responding to each other's inquiries while mindful of the need to comply with their secrecy provision. Such "pragmatism" cannot be taken for granted, as such depends on the attitude

and decisions of the office-holders and case officers in charge. In view of the desirability to resolve the present legal conundrum, The Ombudsman is bringing this issue to the attention of the Administration, lest it become necessary for one or more of the three organizations to take the matter for a ruling in court one day.

5

RECOMMENDATIONS

5.1 On the basis of the analysis and observations in the foregoing chapters, The Ombudsman makes the following recommendations:

(a) To include in Schedule 1 to the Ordinance:

- i) the Auxiliary Medical Service (paras. 2.9 to 2.12);
- ii) the Civil Aid Service (paras. 2.9 to 2.12);
- iii) the Board of Management of Chinese Permanent Cemeteries (paras. 2.13 to 2.16);
- iv) the Chinese Temples Committee (paras. 2.13 to 2.16);
- v) the Consumer Council (paras. 2.17 to 2.20);

- vi) the Electoral Affairs Commission (paras. 2.21 to 2.25);
 - vii) the Estate Agents Authority (paras. 2.26 to 2.29);
and
 - viii) the District Councils (paras. 2.30 to 2.32).
- (b) **To rescind section 10(1)(db) (paras. 2.48 to 2.51).**
- (c) **To amend item 5 of Schedule 2 to the Ordinance to empower The Ombudsman to investigate complaints about administrative aspects surrounding personnel matters (paras. 3.2 to 3.9).**
- (d) **The Administration to clarify its stance on the interpretation of items 4 and 8 of Schedule 2 to the Ordinance (paras. 3.10 to 3.20).**
- (e) **The Administration to resolve the problems relating to the conflicting provisions of the different ordinances (paras. 4.3 to 4.8).**

----- End -----

Office of The Ombudsman

November 2006

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

PART I#

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

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)
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 Companies Registry. (Added 8 of 1993 s. 28)
 Correctional Services Department.
 Customs and Excise Department.
 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)
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)
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.

(Enacted 1988. 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)

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)

Note:

"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.

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Remarks:

Amendments retroactively made - see 25 of 1998 s. 2; 29 of 1998 s. 105

[section 8]

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. 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)

(Enacted 1988)

ENACTMENT OF AND MAJOR REVISIONS TO THE ORDINANCE

- 1 February 1989** The Commissioner for Administrative Complaints (“COMAC”) Ordinance was enacted.
- 24 June 1994** The COMAC Ordinance was amended :
- To enable the public to lodge complaints directly, instead of through Legislative Council (“LegCo”) Members’ referral
 - To extend the Commissioner’s jurisdiction to some major statutory bodies
 - To empower the Commissioner to publish anonymized investigation reports
 - To empower the Commissioner to initiate direct investigation
- 1 March 1995** Jurisdiction was extended to investigation into alleged breach of Code on Access to information
- 27 December 1996** ● English titles were changed to “The Ombudsman” and “Office of The Ombudsman”
- Jurisdiction was extended to investigation into complaints of non-compliance with the Code on Access to Information against Government departments not included earlier
- 19 December 2001** The Ombudsman (Amendment) Ordinance 2001 came into operation :
- To establish The Ombudsman as a corporation sole with full powers to conduct its own financial and administrative matters
 - To empower The Ombudsman to set terms and conditions of appointment for staff
 - To sever linkage with Government systems and processes
 - To give statutory status to mediation as an alternative dispute resolution method for processing complaints.

OVERSEAS OMBUDSMEN

POWERS TO HANDLE COMPLAINTS RELATING TO PERSONNEL MATTERS

(a) Those with powers

Name	Details
Ombudsman of Ontario, Canada	Can investigate personnel matters where employees have no grievance rights; complaints against an organization's failure to follow policies or systemic employment practices.
Pakistan	Cannot deal with service-related matters, but can deal with delays involved.
Parliamentary Ombudsman, Sweden	No restriction on jurisdiction over personnel matters. Those involving employers/employees are however dealt with by special legal procedures by the Courts.
National Ombudsman, The Netherlands	Can deal with complaints against employers except those which can be brought before an administrative court. Can deal with all complaints concerning delays, whether or not the complainant can appeal to an administrative court.
City Ombudsman of Detroit, U.S.A.	No restriction on investigation of employee complaints except employing agencies with subpoena power, e.g. police. Also cannot deal with terms of employment which are covered by union contract.

(b) Those without powers

Name	Details
Parliamentary Ombudsman, U.K.	(i) The Ombudsman's role is on relationship between the government and citizens and not between employers and employees (ii) Public servants should not be placed in a special position in relation to other employees (who cannot complain to the Ombudsman)
Commonwealth Ombudsman, Australia	The Ombudsman's role is on relationship between the government and citizens and not between employers and employees
Le Mediateur de la Republique, France	Cannot investigate into any complaint associated with personnel matters. Application of this "exclusion" is strict. All cases are referred to Administrative Tribunals and Council of State.

**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	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	30 January 2008	Written question raised by Hon James TO on "Governance of Statutory Bodies"
Panel on Administration of Justice and Legal Services	25 February 2008	Background Brief on "Review of the jurisdiction of the Office of The Ombudsman" prepared by the Legislative Council Secretariat [LC Paper No. CB(2)1144/07-08(02)] Report on Review of the Jurisdiction of the Office of The Ombudsman (Part 1) [LC Paper No. CB(2)961/07-08(01)] Administration's paper on "Review of the Jurisdiction of the Office of The

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Question</u>
		Ombudsman" [LC Paper No. CB(2)1146/07-08(04)] Minutes of meeting [LC Paper No. CB(2)1697/07-08]
Legislative Council Members' meeting with The Ombudsman	9 December 2008	Minutes of meeting [CP 451/08-09]

Council Business Division 2
Legislative Council Secretariat
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