

REPORT

ON

REVIEW OF JURISDICTION

PART 1

OFFICE OF THE OMBUDSMAN

November 2006

TABLE OF CONTENTS

CHAPTER		Paragraph
1	INTRODUCTION	
	<i>Background</i>	1.1
	<i>Functions and Powers</i>	1.2 - 1.4
	<i>Need for Review</i>	1.5 - 1.8
	<i>Methodology</i>	1.9
2	SCHEDULE 1 ORGANIZATIONS	
	<i>Policy</i>	2.1 - 2.5
	<i>Criteria for Inclusion in Schedule 1</i>	2.6 - 2.8
	<i>Reasons for Inclusion</i>	2.9 - 2.32
	<i>Organizations outside The Ombudsman's Jurisdiction</i>	2.33 - 2.51
3	SCHEDULE 2: ACTIONS NOT SUBJECT TO INVESTIGATION	
	<i>Introduction</i>	3.1
	<i>Personnel Matters (Item 5)</i>	3.2 - 3.9
	<i>Lands Matters (Items 4 and 8)</i>	3.10 - 3.20
4	CONFLICT WITH OTHER ORDINANCES	4.1 - 4.8
5	RECOMMENDATIONS	5.1

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 ("BMCP") and Chinese Temples Committee ("CTC")

2.13 The function of BMCP 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).**

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Office of The Ombudsman

November 2006

Individual Section Mode

Previous section of enactment	Next section of enactment	Switch language	Back to the List of Laws
----------------------------------	------------------------------	--------------------	-----------------------------

Contents of Section

Chapter: 397 Schedule: 1	Title: THE OMBUDSMAN ORDINANCE Heading: ORGANIZATIONS TO WHICH THIS ORDINANCE APPLIES	Gazette L.N. 168 of Number: 2006 Version Date: 07/07/2006
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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)
 *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.
 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.

[Previous section of
enactment](#)

[Next section of
enactment](#)

[Switch
language](#)

[Back to the List
of Laws](#)

Individual Section Mode

Previous section of enactment	Next section of enactment	Switch language	Back to the List of Laws
----------------------------------	------------------------------	--------------------	-----------------------------

Contents of Section

Chapter: 397	Title: THE OMBUDSMAN ORDINANCE	Gazette Number: 25 of 1998 s. 2; 29 of 1998 s. 105
Schedule: 2	Heading: ACTIONS NOT SUBJECT TO INVESTIGATION	Version Date: 01/07/1997

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.