

**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
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