

立法會 *Legislative Council*

立法會CB(2)1384/08-09(09)號文件

檔 號：CB2/PL/AJLS

司法及法律事務委員會

立法會秘書處為2009年4月27日會議擬備的背景資料簡介

檢討申訴專員公署的職權範圍

目的

本文件旨在提供資料，述明立法會議員過往就檢討申訴專員公署的職權範圍所作的討論。

背景

申訴專員的職權範圍

2. 《申訴專員條例》(第397章)("該條例")第7(1)條賦權申訴專員可調查下述行動——

- (a) 附表1第I部所列任何機構在行使該機構的行政職能時採取或由他人代其採取的任何行動；或
- (b) 附表1第II部所列任何機構在就政府所頒布的《公開資料守則》而行使該機構的行政職能時採取或由他人代其採取的任何行動。

3. 附表1第I部現時涵蓋大部分政府部門及19間公共機構。該條例第8條訂明，申訴專員不得展開或繼續與附表2所指明的行動或事項有關的調查。該條例附表1及2分別載於**附錄I及II**。

檢討申訴專員的職權範圍

4. 鑒於不時有人提議擴大申訴專員公署的職權範圍，以包括更多機構，申訴專員在2005年決定進行檢討。申訴專員亦認為，申訴專員公署在調查過程中遇到的若干不明確情況及／或困難，應予解決。

5. 申訴專員的檢討包括兩部分：第一部分關乎該條例的執行情況，第二部分則關乎申訴專員制度的發展這更為廣泛的範疇。檢討的第一部分涵蓋以下事項——

- (a) 應否把更多機構納入該條例附表1所列的申訴專員職權範圍，若然，應納入哪些機構；
- (b) 應否放寬該條例附表2所訂有關申訴專員調查權力的若干限制；及
- (c) 應否解決該條例與其他條例的保密規定有明顯牴觸的問題。

6. 申訴專員分別於2006年11月及2007年11月向政府當局提交申訴專員公署職權範圍檢討報告("檢討報告")的第一及第二部分。

有關海外司法管轄區申訴專員權限的研究報告

7. 立法會秘書處資料研究及圖書館服務部應法律及司法事務委員會("事務委員會")的要求，擬備了有關"選定地方申訴專員制度的職權範圍"的研究報告("研究報告")。事務委員會曾於2006年6月26日的會議上考慮該報告。該項研究涵蓋英國、新西蘭、加拿大不列顛哥倫比亞省及澳洲等地申訴專員制度的職權範圍，並集中探討申訴專員的服務安排、所涵蓋的機構，以及申訴專員的調查權力及權限。研究報告摘要及撮述香港及上述研究地區申訴專員制度的特點的多個列表，分別載於**附錄III及IV**。

提出的事項

申訴專員職權範圍檢討報告第一部分

對附表1所列機構的檢討

8. 在2006年6月26日的事務委員會會議上，大律師公會提出，申訴專員現時的權限範圍過於狹窄。該公會指出，作為一般規則，某些機構如受司法覆核所管轄，亦可因行政失當而受申訴專員調查。申訴專員亦認為該條例現行條文所設的限制過多。委員要求申訴專員考慮將資助機構的公共職能納入申訴專員職權範圍。部分委員察悉，研究報告所涵蓋的部分地方，其申訴專員獲賦予權力，可調查某些機構，如校務會、諮詢團體及選舉機構等，他們促請申訴專員在檢討過程中考慮應納入申訴專員職權範圍的機構及事項時，考慮研究報告的結果。

9. 事務委員會曾於2007年12月13日及2008年2月25日，討論政府當局對申訴專員在檢討報告第一部分所提建議的初步回應。檢討報告第一部分及政府當局的初步回應分別載於**附錄V**及**VI**。就擴大申訴專員的職權範圍而言，事務委員會察悉，申訴專員考慮到下列8間機構的行政權力，與公眾有廣泛的接觸或對公眾的影響，以及主要經費來源，建議將該等機構納入該條例附表1第I部。該8間機構是 ——

- (a) 醫療輔助隊；
- (b) 民眾安全服務隊；
- (c) 華人永遠墳場管理委員會；
- (d) 華人廟宇委員會；
- (e) 消費者委員會；
- (f) 地產代理監管局；
- (g) 選舉管理委員會("選管會")；及
- (h) 區議會。

10. 部分委員支持將上述機構納入申訴專員職權範圍的建議。事務委員會察悉，政府當局雖然會就建議諮詢上文第9(a)至(f)段所列的6間機構，但認為鑒於選管會及區議會並無行政權力，實無需要將其納入該附表。政府當局解釋，選舉相關活動的行政及地區設施的日常管理工作均由相關的政府部門負責，而由於該等部門已屬於申訴專員的職權範圍，故無須再將選管會或區議會納入申訴專員的職權範圍。就選管會而言，政府當局亦強調，為維護選舉的公信力，確保選管會的工作無論實際上或觀感上均不受任何影響，至為重要。

11. 事務委員會察悉，香港大律師公會關注到選舉事務處(選管會的執行部門)、民政事務總署和康樂及文化事務署("康文署")(兩者同屬區議會的執行部門)會否因為種種原因獲得豁免，而不受申訴專員監察。例如，申訴專員或會因選舉事務處按照選管會的指示行事此論據，而無法調查有關選民登記效率欠佳的投訴；以及申訴專員亦可因康文署辯稱該署是按有關區議會的決定運用公帑，而無法調查有關地區社區活動撥款運用的投訴。

12. 政府當局表示，據其所知，在過去的選舉中，並無任何與選舉行政工作有關而涉及選舉事務處或民政事務總署行政失當的

投訴，未能由申訴專員處理的。區議會的撥款於2008年1月起，由於區議會的職能擴大而大幅增加。民政事務總署已於諮詢財經事務及庫務局、廉政專員公署、律政司、審計署等部門後，公布有關運用區議會撥款的新指引。新指引旨在確保公帑的運用符合恰當、具透明度及問責的原則。區議會撥款的管制人員仍為民政事務總署署長。

13. 政府當局再告知事務委員會，待整理第9(a)至(f)段所列6間機構的意見後，當局可更適切地定出其對檢討報告第一部分所提建議的最後回應。

檢討報告第二部分

14. 檢討報告第二部分討論世界各地申訴專員制度的發展趨勢，例如申訴專員負責人權保障的工作，以及有關趨勢對香港申訴專員制度的影響。申訴專員於2007年11月向政府當局提交檢討報告的第二部分。政府當局尚未告知事務委員會其對此部分檢討的意見。

人權保障

15. 於2007年12月11日由立法會秘書處申訴部籌備的立法會議員與申訴專員的周年會議上，有議員提出申訴專員的角色應否擴大至涵蓋人權保障的問題。申訴專員認為此事屬政策決定，應由政府當局作出，她不宜置評。根據檢討結果，一些新近成立的申訴專員機構已將申訴專員的監察範圍擴及人權保障。然而，新西蘭、英國、澳洲及香港等地仍實行傳統的申訴專員模式。香港雖然並無明文訂定申訴專員負責保障人權，但申訴專員的工作本質就是確保公共行政機關保障個人權利。在香港的現行人權保障機制下，多個不同法定組織，包括申訴專員、平等機會委員會、私隱專員公署，均根據所屬的條例擔當監察人權保障的角色。至於應否設立單一機構負責監督所有涉及香港人權保障的事項，這問題屬政策事宜，須由政府當局研究。申訴專員又表示，檢討報告的第二部分內重點探討建立此制度所帶來的影響。不過，政府當局認為香港已有一個廣泛的人權保障機制，並無明顯需要建立另一人權機構，重複或取代現有的機制。

專責申訴專員的發展

16. 於2008年12月9日立法會議員與申訴專員舉行的周年會議上，有議員就香港若要成立金融申訴專員公署，這公署與申訴專員公署合併，會否是理想做法此問題，徵詢申訴專員的意見。申訴專員表示，此事歸根到底關乎政策決定。在一些國家，公營申

訴專員亦兼任某些服務的申訴專員(如英國的國會申訴專員便兼任醫護服務申訴專員)。然而，部分國家則成立多個不同的專責申訴專員，負責不同範疇的服務。她強調，香港申訴專員制度的運作模式會由有關政策決定。

公眾諮詢

17. 在2006年6月26日的事務委員會會議上，有委員認為，申訴專員公署的職權範圍是廣大市民所關注的事項，政府當局應發出諮詢文件，就申訴專員提出的有關結論及建議諮詢公眾，而申訴專員進行檢討時，亦應諮詢公眾。

18. 申訴專員表示，申訴專員公署每天都可從接到申訴人提交的通訊函件，得悉公眾的意見及期望。但由公署進行公眾諮詢並不恰當。適當的渠道，是公署將檢討報告提交政府研究。若政府接納某些建議，便會就該條例提出法例修訂，將建議付諸實行。

19. 政府當局曾於2006年7月以書面告知事務委員會，若申訴專員的建議涉及政策或法例上的修訂，當局會在有需要時諮詢有關各方。至於事務委員會要求當局就該報告發出公眾諮詢文件一事，政府當局認為，要視乎檢討報告的內容及報告內公眾所感興趣的範疇，再決定採取何種措施。

最新情況

20. 政府當局已定於2009年4月27日的下次會議上向事務委員會匯報其對檢討報告第一部分所提建議的最後回應。

相關文件

21. 相關文件一覽表載於**附錄VII**，該等文件可於立法會網頁(<http://www.legco.gov.hk>)取覽。

立法會秘書處
議會事務部2
2009年4月21日

* 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

公務員敘用委員會秘書處。

投訴警方獨立監察委員會秘書處。

香港輔助警察隊。 (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)

選定地方申訴專員制度的職權範圍的研究報告摘要

1. 英國有多個申訴專員計劃。國會事務專員處理有關政府部門的申訴、醫療服務專員處理有關醫療服務的申訴，而地方行政事務專員則處理有關地方主管當局的申訴。近年由於權力下放，蘇格蘭及威爾斯都設立了單一的綜合公共服務申訴專員。
2. 在新西蘭，申訴專員是國會人員，負責調查針對中央、地區及地方政府機構或機關的申訴。加拿大不列顛哥倫比亞省("卑詩省")的申訴專員為省立法機關人員，負責處理有關省政府各部及地方機構的申訴。
3. 澳洲設有聯邦申訴專員，負責處理針對聯邦政府所作決定的申訴，而各州和北領土亦設有申訴專員，負責處理地方事務。聯邦申訴專員亦擔任國防申訴專員、入境事務申訴專員、郵務業申訴專員及稅務申訴專員的職務。
4. 在選定地方中，申訴專員與警方的關係各有不同安排。在英國、新西蘭和卑詩省，警方不屬於這些地方申訴專員的職權範圍。然而，這 3 處地方均設有獨立的法定機構，負責監督處理投訴警方的制度。英國的投訴警方獨立監察委員會及新西蘭的投訴警察監察局，都有權對嚴重投訴進行獨立調查。卑詩省投訴警方專員是省立法機關人員。
5. 在澳洲，對於針對警方的投訴，申訴專員一般肩負重新調查的職能。雖然在一些司法管轄區，投訴可直接向申訴專員或向警方提出，但初步的調查通常由警方進行。申訴專員的角色是監察警方的內部調查，確保調查工作妥善進行。申訴專員只在不信納警方內部調查的結果時，方可作出調查，惟新南威爾士州是個例外。新南威爾士州申訴專員有權對警方使用權力事宜進行直接調查，並有權監督警方進行的初步調查。。
6. 在作為研究對象的地方中，針對人權及兒童權利的申訴並非透過申訴專員制度處理。新西蘭及澳洲都有設立人權委員會。英國正籌備成立平等及人權委員會。在卑詩省，有關人權的申訴由該省的人權審裁處處理。

7. 就保護兒童權利而言，英國各司法管轄區及新西蘭均設有獨立的兒童及青年事務專員。卑詩省有兒童及青年主任，並正考慮設立新的兒童及青年專責代表。在澳洲，保護兒童權利屬國家人權委員會的管轄範圍，在某些州亦屬兒童事務專員的管轄範圍。在新南威爾士州，申訴專員有權調查涉嫌虐待兒童的個案。
8. 除了繼續履行傳統職能調查有關行政失當的申訴外，在選定地方的公營機構申訴專員亦獲委以新職能，調查因服務欠妥而引起的申訴，監察資訊自由與受保障披露等範疇，並確保政府承辦商向公眾提供服務的質素。
9. 在英國、新西蘭和卑詩省，在申訴專員的賦權法例載列了屬其職權範圍內的機構。當局須明確把新的機構列入申訴專員的職權範圍，申訴專員才可處理針對這些機構的申訴。在澳洲，屬於聯邦申訴專員的職權範圍的機構，以"政府部門或指明主管當局"等較廣義用語列明。
10. 在選定地方中，不屬各地申訴專員調查範圍的事宜大致相同，包括影響下列事宜的行動：外交、罪案調查、保衛國家安全和民事或刑事法律程序。大部分在英國的申訴專員禁止對公務員人事管理及列明機構商業上交易的事宜進行調查，但新西蘭和卑詩省的申訴專員不受這種限制。在澳洲的昆士蘭州和維多利亞州，申訴專員亦可處理與公務員的人事管理有關的事宜。

表1 —— 委任程序

地方	申訴專員	設立年份	主要的有關法例	委任程序
英國	國會行政事務專員("行政事務專員")	1967	《1967年國會專員法令》	行政事務專員由君主委任，若"品行良好"可一直任職至65歲。在實行上，行政事務專員是經諮詢反對黨領袖及公共行政專責委員會主席後，由女皇按首相的建議委任。
	英格蘭醫療服務專員("醫療服務專員")	1973	《1993年醫療服務專員法令》	醫療服務專員由君主委任，可一直任職至65歲。
	英格蘭地方行政事務專員("地方行政事務專員")	1974	《1974年地方政府法令》	地方行政事務專員由君主按國務大臣的推薦委任，若"品行良好"可一直任職至65歲。
	蘇格蘭公共服務申訴專員	2002	《2002年蘇格蘭公共服務申訴專員法令》	蘇格蘭公共服務申訴專員及副申訴專員由君主按蘇格蘭國會的提名委任。他們的任期由蘇格蘭國會法團決定，不得超過5年。他們有資格再獲委任為第二任申訴專員。至於第三任則只在特殊情況下並符合公眾利益，才獲批准。
	威爾斯公共服務申訴專員	2006	《2005年威爾斯公共服務申訴專員法令》	威爾斯公共服務申訴專員由君主按國務大臣的推薦委任。國務大臣在作出推薦前須諮詢威爾斯國家議會。威爾斯公共服務申訴專員的任期為7年，只可服務一任。

表1 —— 委任程序(續)

地方	申訴專員	設立年份	主要的有關法例	委任程序
新西蘭	負責調查的國會人員及專員	1962	《 1975 年 申 訴 專 員 法 令 》	所有申訴專員均由總督按眾議院的推薦委任，其中一人獲委任為首席申訴專員。所有申訴專員的任期均為5年，可以再獲委任。
加拿大不列顛哥倫比亞省	申訴專員	1979	《 申訴專員法令 》	申訴專員由副總督按不列顛哥倫比亞立法議會的推薦委任。申訴專員的任期為6年，可再獲委任多6年。
澳洲	聯邦申訴專員	1977	《 1976 年 申 訴 專 員 法 令 》	聯邦申訴專員及聯邦副申訴專員均由總督按總理的推薦委任。他們的任期不超過7年，有資格再獲委任。
香港特別行政區	申訴專員	1988	《 申訴專員條例 》	申訴專員由行政長官委任，任期5年，有資格再獲委任。

表2 —— 受調查的事宜

地方	申訴專員	受調查的事宜
英國	國 會 行 政 事 務 專 員 ("行政事務專員")	如有公眾人士聲稱，在指明政府部門或主管當局所採取或由他人代該政府部門或主管當局採取的任何行動中，他因與該行動相關的行政失當而遭受不公平待遇，行政事務專員可對該行動作出調查。
	英 格 蘭 醫 療 服 務 專 員 ("醫療服務專員")	醫療服務專員可因有關國民保健署或相關機構未能提供服務、服務欠妥或行政失當所造成的困境或不公平待遇而提出的申訴進行調查。
	英 格 蘭 地 方 行 政 事 務 專 員 ("地方行政事務專員")	地方行政事務專員可調查因地方主管當局及多個其他公共機構行政失當所引致的不公平待遇而提出的申訴。
	蘇 格 蘭 公 共 服 務 申 訴 專 員	蘇格蘭公共服務申訴專員可調查因任何列明主管當局服務欠妥及其在履行行政職能時所採取的行動而引起的申訴。
	威 爾 斯 公 共 服 務 申 訴 專 員	威爾斯公共服務申訴專員可調查因任何列明主管當局服務欠妥及其在履行行政職能時所採取的行動而引起的申訴。
新西蘭	負責調查的國會人員及專員	如遭投訴的行動屬行政事宜，並影響任何有關人士，則申訴專員可調查任何指明部門或機構的任何決定、建議、作為或不作為。申訴專員亦有特別責任處理有關資訊自由與受保障披露範疇所提出的申訴。

表2 —— 受調查的事宜(續)

地方	申訴專員	受調查的事宜
加拿大不列顛哥倫比亞省	申訴專員	就行政事宜而言，申訴專員可調查指明主管當局令人感到受屈或有此可能的決定、所作的作為或所用的程序。
澳洲	聯邦申訴專員	聯邦申訴專員獲授權調查任何政府部門或指明主管當局所採取的任何與行政事宜有關的行動，亦可調查包括政府承辦商的行動。申訴專員亦有特殊職責，處理關乎軍方、聯邦警察、資訊自由、入境、郵務及稅務的申訴。
香港特別行政區	申訴專員	凡任何指明機構在行使其行政職能時採取或由他人代其採取任何行動，則申訴專員在有投訴人聲稱因與該行動相關的行政失當，以致他遭受不公平待遇的情況下，可調查該行動。申訴專員亦可調查與《公開資料守則》有關的申訴。

表3 —— 受調查的機構

地方	申訴專員	受調查的機構
英國	國 會 行 政 事 務 專 員 ("行政事務專員")	中央政府部門、諮詢團體、行政機關、選舉委員會、某些非政府部門的公共機構及審裁處。
	英 格 蘭 醫 療 服 務 專 員 ("醫療服務專員")	國民保健署機構 — 包括替國民保健署提供服務的私營服務提供者。
	英 格 蘭 地 方 行 政 事 務 專 員 ("地方行政事務 專員")	地方議會、地方警察當局、發展公司及水務委員會。
	蘇 格 蘭 公 共 服 務 申 訴 專 員	蘇格蘭國會、蘇格蘭行政機關、蘇格蘭公共主管當局、醫療服務機構及地方主管當局。
	威爾斯公共服務申訴 專員	威爾斯國家議會、地方政府機構、醫療和社會護理院及學校管治團體。
新西蘭	負責調查的國會人員 及專員	總理及內閣署、各政府部門、教育當局、選舉委員會、公營醫療機構及地方機構。

表3 —— 受調查的機構(續)

地方	申訴專員	受調查的機構
加拿大不列顛哥倫比亞省	申訴專員	省政府各部、國營公司、校務會、選舉劃界委員會、醫院及地方衛生機關、學院和大學、專業紀律團體及縣市機關。
澳洲	聯邦申訴專員	任何政府部門及指明主管當局，包括澳洲選舉委員會。
香港特別行政區	申訴專員	所有政府部門(香港警務處及廉政公署除外)及17個主要法定機構。

表4 —— 不列入職權範圍的事宜

地方	申訴專員	不列入職權範圍的事宜
英國	國 會 行 政 事 務 專 員 ("行政事務專員")	影響下列事宜的行動：外交、罪案調查、保衛國家安全、民事或刑事法律程序、公務員的人事管理(包括薪酬、紀律及免職)及合約和商業上的交易。
	英 格 蘭 醫 療 服 務 專 員 ("醫療服務專員")	人事問題、合約或商業上的交易(為病人提供服務而作出者除外)、受法定研訊的事宜及在法律上可作出補救的個案。
	英 格 蘭 地 方 行 政 事 務 專 員 ("地方行政事務專員")	與學校的內部管理有關的事宜、人事問題、有關展開法律程序及刑事調查的行動，以及商業和合約事宜。
	蘇 格 蘭 公 共 服 務 申 訴 專 員	與不受行政事務專員、醫療事務專員及地方行政事務專員調查的事宜相若。
	威 爾 斯 公 共 服 務 申 訴 專 員	與不受行政事務專員、醫療事務專員及地方行政事務專員調查的事宜相若。
新西蘭	負責調查的國會人員及專員	與法律程序、警方及軍方有關的事宜。
加 拿 大 不 列 顛 哥 倫 比 亞 省	申訴專員	針對銀行、法院、醫生、市警隊及私立學校的申訴。

表4 —— 不列入職權範圍的事宜(續)

地方	申訴專員	不列入職權範圍的事宜
澳洲	聯邦申訴專員	部長採取的行動、構成國會程序的行動、各司法人員採取的行動(行政措施除外)及某些與政府僱用人員有關的行動(包括委任、薪酬、紀律及免職)。
香港特別行政區	申訴專員	有關保安、防衛或國際關係的行動；法律程序或檢控決定；行使赦免罪犯的權力；合約或商業交易；公共機構的人事問題；政府頒賜勳銜、獎賞或特權；行政長官親自作出的行動；土地批出條件的施加或更改；與"香港公司收購、合併及股份購回守則"有關的行動；以及警方或廉政公署就防止和調查刑事罪所作的行動。

表5 —— 調查權力

地方	申訴專員	經立法者篩選	直接調查	傳召證人	取閱文件(包括機密文件)	對調查期間不合作的懲罰
英國	國會行政事務專員("行政事務專員")	是。	不可。	可以。	可以。	有。
	英格蘭醫療服務專員("醫療服務專員")	否。	不可。	可以。	可以。	有。
	英格蘭地方行政事務專員("地方行政事務專員")	否。	不可。	可以。	可以。	有。
	蘇格蘭公共服務申訴專員	否。	不可。	可以。	可以。	有。
	威爾斯公共服務申訴專員	否。	可以。	可以。	可以。	有。

表5 —— 調查權力(續)

地方	申訴專員	經立法者 篩選	直接調查	傳召證人	取閱文件(包括 機密文件)	對調查期間不 合作的懲罰
新西蘭	負責調查的國 會人員及專員	否。	可以。	可以。	可以。	有。
加拿大不列 顛哥倫比亞 省	申訴專員	否。	可以。	可以。	可以。	有。
澳洲	聯邦申訴專員	否。	可以。	可以。	可以。	有。
香港特別行 政區	申訴專員	否。	可以。	可以。	可以。	有。

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 -----

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Schedule: 1	Heading: ORGANIZATIONS TO WHICH THIS ORDINANCE APPLIES	Version Date: 07/07/2006

[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)
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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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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.

二零零七年十二月十三日
資料文件

立法會司法及法律事務委員會

檢討申訴專員公署的職權範圍

目的

本文件旨在告知委員有關申訴專員公署職權範圍檢討的第一部分提出的建議。

背景

2. 由於申訴專員不時接獲擴大其職權範圍至包括更多機構的建議，她遂就申訴專員公署的職權範圍進行檢討。此外，申訴專員認為，該署在調查過程中遇到的若干不明確情況及／或困難應予解決。檢討的第一部分¹涵蓋以下範圍：

- (a) 應否把更多機構納入《申訴專員條例》附表 1 的申訴專員職權範圍，若然，應納入哪些機構；
- (b) 應否放寬《申訴專員條例》附表 2 所訂有關申訴專員調查權力的若干限制；以及
- (c) 應否解決《申訴專員條例》與其他條例的保密規定似乎有所牴觸的問題。

3. 申訴專員在檢討後提出的建議及當局對建議的初步意見，載於下文各段。

¹ 申訴專員剛把檢討的第二部分提交當局考慮。該部分涵蓋海外地區申訴專員制度的發展及其對香港申訴專員制度的影響。

申訴專員的建議及當局對建議的初步意見

(A) 擴大申訴專員的職權範圍

4. 《申訴專員條例》第 7(1)(a)條授權申訴專員調查附表 1 第 I 部所列任何機構在行使該機構的行政職能時採取或由他人代其採取的任何行動。該部現時涵蓋大部分政府部門和 18 間公共機構(例如市區重建局和醫院管理局)。

5. 考慮到下列八間機構的行政權力，與公眾人士有廣泛的接觸或影響，以及所涉主要資助來源²，申訴專員建議將這些機構納入附表 1 第 I 部：

- (a) 醫療輔助隊；
- (b) 民眾安全服務隊(民安隊)；
- (c) 華人永遠墳場管理委員會；
- (d) 華人廟宇委員會；
- (e) 消費者委員會(消委會)；
- (f) 地產代理監管局；
- (g) 選舉管理委員會(選管會)；以及
- (h) 區議會。

6. 當局已就這項建議進行內部諮詢，初步認為上述八間機構中，有些可以適合納入附表，有些則因為缺乏行政權力等理由而未必適合。當局會透過相關決策局徵詢第 5(a)至(f)段所載六間機構對這項建議的意見(至於選管會和區議會，當局的意見載於下文第 7 至 12 段)。政府在收到他們的意見後，才可決定對這項建議的回應。

7. 在現時的情況下，當局認為無需將選管會納入附表 1。選管會的設立是確保選舉公平、公開、誠實，最重要的是確保選管會工作獨立和不偏不倚。因此，選管會根據《選舉管理

² 有關機構的經費是否主要來自政府一般收入或法定收費或特別預留給公共服務的捐款(但由政府或公務人員負責管理或監督)。

委員會條例》而設立，屬獨立法定機構，其主席由高等法院法官擔任。選管會的成員組成亦受到其他嚴格的法定準則規管，以確保選管會是一個獨立、公正和非政治性的組織，有能力舉行及監督選舉。

8. 根據法例，選舉事務處向選管會提供履行法定職能所需的行政支援，民政事務總署則支援選管會舉行村代表選舉。選舉事務處及民政事務總署均已納入附表 1，因此屬於申訴專員的職權範圍。選管會的工作亦受既定的監察機制規管。舉例說，選管會須按照法例規定，就選舉指引的制訂及地方選區和區議會選區範圍分界的建議徵詢公眾意見。在作出該等建議時，選管會須遵從若干法定準則。此外，選管會亦有法定責任向行政長官提交報告，由行政長官安排把報告提交立法會。有關報告須載述公眾的意見書或意見摘要。地方選區和區議會選區範圍分界的相關法例，以及選管會制訂的規例，均須提交立法會審議。每次選舉結束後，選管會須按照法例規定在三個月內向行政長官提交總結報告，而有關報告會公開發表，以提高選管會工作的透明度。

9. 此外，利益最受選管會運作影響的人士(即選民和候選人)亦受到法例保障。舉例來說，候選人可向原訟法庭提交選舉呈請書，提出申訴。選民如對選民登記冊內作出和遺漏登記的決定不滿，可向選管會提交反對或申索，由審裁官(由高等法院司法常務官或首席法官委任的裁判官或律政人員擔任)進行聆訊。

10. 正如上文所述，現時已有周詳的法律及程序保障，確保選管會工作具透明度及妥善履行職責，並提供申訴途徑。當局仍然認為，把選管會納入附表 1，既無必要，亦不恰當。

11. 《區議會條例》第 61 條訂明，區議會就影響有關地方行政區內的人的福利的事宜、公共設施及服務的提供和使用，以及撥給地區公共工程和社區活動的公帑的運用，向政府提供意見。鑑於這些法定職能，根據區議會的意見進行的地區小型工程和社區建設計劃，會由地區組織、民政事務處或其他負責在區內提供相關公共服務的政府部門執行。區議會秘書處屬民政事務處編制的一部分。因此，上述條例並無條文訂明區議會可自行簽訂合約或僱用員工。

12. 由二零零八年一月起，我們將會在現行法律架構下提升區議會的職能。區議會將會參與管理部分地區設施，有關執行部門仍會繼續根據其職權範圍行使法定及管理權（包括有關設施的日常管理），但部門會在實際可行的情況下盡量聽取區議會的意見。換言之，有關部門會繼續負責執行設施的日常管理行政工作，因此，把區議會納入申訴專員的職權範圍內，並不適當。

(B) 放寬限制及其他事宜

(a) 刪除第 10(1)(db)條—由“非香港居民³”提出的申訴

13. 《申訴專員條例》第 10(1)(db)條訂明，除非申訴所針對的行動是就在香港產生或出現的權利或義務而採取的；或在採取有關行動時，申訴人居住於或身在香港，否則，申訴專員不得對申訴進行調查。申訴專員認為這項條文令人質疑她可否調查由“非香港居民”就香港境外的政府辦事處⁴（例如經濟貿易辦事處）採取的行動提出的申訴，因此建議刪除第 10(1)(db)條。

14. 根據第 10(1)(db)條，“香港居民⁵”可不受限制地就任何行政失當行為向申訴專員提出申訴。就“非香港居民”而言，如採取申訴所針對的行動時，申訴人身在香港⁶或有關行動是就在香港產生或出現的權利或義務⁷而採取的，申訴專員可就其申訴進行調查。這種“分別”，旨在確保申訴專員公署優先處理由“香港居民”提出的申訴，從而更有效運用該署的資源，我們認為無需對此作出更改。我們亦關注到，完全取消現時對由“非香港居民”提出申訴的“有限度”限制，可能會在資源方面造成意料不到及重大的影響。

³ “非香港居民”指在採取申訴所針對的行動時，並非在香港居住的人。

⁴ 二零零二年，某申訴人就香港駐北京辦事處職員態度惡劣提出申訴。該宗個案最初因為第 10(1)(db)條而不獲受理，其後申訴人提交文件證明自己是香港居民，個案獲申訴專員處理。

⁵ “香港居民”指在採取申訴所針對的行動時，在香港居住的人。

⁶ 例如，遊客提出申訴，指香港某政府部門對其查詢處理失當。

⁷ 例如，“非香港居民”提出申訴，指香港政府有關部門沒有妥善處理他就香港某個牌照遞交的申請。

(b) 修訂附表 2 第(5)項—人事問題

15. 《申訴專員條例》附表 2 列載不受申訴專員調查的行動。附表 2 第(5)項訂明，任免及薪酬等人事問題不屬申訴專員的職權範圍。申訴專員雖然認同她不應調查屬於員工管理範疇的人事問題，但認為有充分理由放寬第(5)項的限制，即授權申訴專員調查有關人事問題的行政事宜的申訴。

16. 當局認為不應授權申訴專員調查有關人事問題(包括行政事宜)的申訴。現時，僱員(不論是否屬於公務員編制)已有足夠的行政及法定途徑就人事問題提出申訴。現行架構多年來一直行之有效。即使在某些方面需要作出改善或補救，亦應根據現行架構處理有關問題。此外，要區分人事問題本身與有關人事問題的行政事宜兩者之間的細微差異，亦非常困難。舉例來說，晉升準則是否恰當的問題可能涉及兩方面的論據。要區分這些細微差異，實際上並不可行，而且可能令申訴專員的職權範圍引起混淆及不必要的爭議。

(c) 附表 2 第(4)及(8)項的詮釋—土地事宜

17. 附表 2 第(4)及(8)項訂明申訴專員在調查土地事宜方面受到的限制。第(4)項規定，申訴專員不得調查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)。第(8)項亦清楚指出，有關限制應涵蓋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。

18. 申訴專員注意到，政府不時就第(4)項是否適用於有關地政的申訴，以及第(8)項中有關批出土地的“條件”的詮釋，對其調查提出異議⁸。申訴專員認為，第(4)項應狹義地詮釋為只指有別於土地契約的商業合約，而第(8)項只禁止申訴專員就“決定”本身進行調查，但不包括引致該等決定的情況和過程。

⁸ 例如，有關聲稱錯誤詮釋某地段原有契約條款的申訴，是否屬於申訴專員的職權範圍。

19. 迄今為止，申訴專員已在有關政府部門自願協助下完成所有這類申訴的調查。鑑於上述問題經常引起爭議，申訴專員建議當局澄清其對第(4)及(8)項的詮釋的立場。

20. 由於涉及的問題頗為複雜，當局需要更多時間研究此事，才可提出確實意見。

(d) 與其他條例的抵觸

21. 申訴專員提請當局注意一項法律問題，即個人資料私隱專員公署(私隱專員公署)和平等機會委員會(平機會)在行使其行政職能時均受申訴專員監管；同樣，申訴專員亦受私隱專員公署和平機會所執行的條例⁹ (有關條例)規管。

22. 《申訴專員條例》第 15 條規定，除非有若干例外情況(例如在法律過程中披露資料及舉報刑事罪行等)，否則，申訴專員及其職員須將調查過程中取得的所有資料保密。有關條例亦載有同樣的保密規定。因此，私隱專員公署和平機會有權取得資料，但同時亦被禁止披露有關資料。雖然有關條例載有例外情況，但並無明文規定申訴專員的調查包括在內。申訴專員認為，如有人向上述三間機構其中一間提出針對另外一間機構的申訴，則難免會引起抵觸。申訴專員建議應解決這種情況。

23. 我們注意到，事涉的保密規定條文在香港法例並非獨有。其他條例亦有相類的條文處理保密事宜。再者，據申訴專員提供的意見，向申訴專員、私隱專員公署或平機會就另外其中一間機構提出申訴的個案數目很少，而且全部均以務實的方法得到解決。因此，似乎沒有迫切需要透過法例解決有關問題。我們認為，有關當局應繼續以務實和實際的方法處理這個問題。

⁹ 即《個人資料(私隱)條例》、《性別歧視條例》、《殘疾歧視條例》及《家庭崗位歧視條例》。

下一步工作

24. 當局會就建議將該六間機構(即醫療輔助隊、民安隊、華人永遠墳場管理委員會、華人廟宇委員會、消委會和地產代理監管局)納入申訴專員公署職權範圍一事，諮詢有關機構的意見。

政務司司長辦公室行政署
二零零七年十二月

檢討申訴專員公署的職權範圍

相關文件

會議	會議日期	文件／質詢
司法及法律事務委員會	2006年6月26日	"選定地方申訴專員制度的職權範圍"研究報告 [RP05/05-06] 會議紀要 [立法會CB(2)3001/05-06號文件]
立法會議員與申訴專員舉行的會議	2007年12月11日	會議紀要 [CP 286/07-08]
司法及法律事務委員會	2007年12月13日	政府當局就"檢討申訴專員公署的職權範圍"發出的文件 [立法會CB(2)559/07-08(08)號文件] 《申訴專員條例》(第397章)附表1及2 [立法會CB(2)559/07-08(11)號文件] 會議紀要 [立法會CB(2)927/07-08號文件]
立法會	2008年1月30日	涂謹申議員就"法定機構的管治事宜"提出的書面質詢
司法及法律事務委員會	2008年2月25日	立法會秘書處就"檢討申訴專員公署職權範圍"擬備的背景資料簡介 [立法會CB(2)1144/07-08(02)號文件] 申訴專員職權範圍檢討報告(第一部分) [立法會CB(2)961/07-08(01)號文件] 政府當局就"檢討申訴專員公署的職權範圍"發出的文件 [立法會CB(2)1146/07-08(04)號文件]

<u>會議</u>	<u>會議日期</u>	<u>文件／質詢</u>
		會議紀要 [立法會CB(2)1697/07-08號文件]
立法會議員 與申訴專員 舉行的會議	2008年12月9日	會議紀要 [立法會CP 451/08-09號文件]

立法會秘書處
議會事務部2
2009年4月21日