

For information

**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 of the Administration's position in respect of the remaining sections of the *Report on Review of Jurisdiction* (the Review) prepared by the Office of The Ombudsman.

BACKGROUND

2. In the light of calls received from time to time to extend its jurisdiction to cover more organisations, The Ombudsman has conducted the Review, which comprises two parts. Part 1 contains proposals on operational aspects that The Ombudsman recommends the Government to take up. Part 2 offers a snapshot impression of recent developments of ombudsman institutions in other parts of the world for the Government's reference.

3. We briefed Members on the Administration's position in respect of certain sections of Part 1 of the Review in December 2007 and February 2008. We undertook to consult six bodies, i.e. Auxiliary Medical Service (AMS); Civil Aid Service (CAS); Consumer Council (CC); Estates Agents Authority (EAA); Board of Management of Chinese Permanent Cemeteries (BMCPC); and Chinese Temples Committee (CTC) on the recommendation to subject them to The Ombudsman's jurisdiction.

4. After consulting the relevant public bodies and deliberation within the Administration, we set out below the Administration's consolidated responses to the remaining sections of Part 1 and Part 2 of the review.

REMAINING SECTIONS OF PART 1 OF THE REVIEW

Extension of The Ombudsman's jurisdiction

5. Section 7(1)(a) of The Ombudsman Ordinance (TOO) empowers The Ombudsman to investigate any action taken by or on behalf of an organisation set out in Part I of Schedule 1 to TOO in the exercise of its administrative functions. At present, most government departments and 19 public bodies are covered.

6. After consulting the relevant bureaux and public bodies, we agree that AMS, CAS, CC and EAA may come under The Ombudsman's jurisdiction. However, for the remaining two (BMCPC and CTC), we consider that they should be excluded for the following reasons –

For BMCPC

- (a) BMCPC provides burial lots and niches for persons of the Chinese race. In terms of service provision, it is no different from other ethnic or religious groups which operate private cemeteries for a segment of the community, such as the Catholic Diocese of Hong Kong which manages the Roman Catholic Cemetery, the Hong Kong Buddhist Association which manages the Buddhist Cemetery, and the Incorporated Trustees of the Islamic Community Fund Hong Kong which manages the Muslim Cemetery. Putting BMCPC under The Ombudsman's jurisdiction would have read-across implication on such organisations;
- (b) BMCPC derives its major income from investment (over 70% in the year ending December 2008) rather than from General Revenue, statutory fees or earmarked donations. The four cemeteries under BMCPC are fully occupied and it is unlikely that a new site can be allocated to BMCPC for new cemetery development in the near future. As a result, investment income is expected to constitute an even larger portion of BMCPC's overall income. While it is valid to argue that the principal from which investment income originates is from certain public source because BMCPC derives its primary income from burial services based on land granted by the Government, it should be noted that a large number of non-government organisations are likewise granted government land at reduced or nominal premium;

For CTC

- (c) Judging from CTC's mode of income generation, executive function and interface with worshippers, CTC arguably operates like any other religious bodies which operate places of worship in Hong Kong. There are also non-religious charitable organisations in Hong Kong that run temples of their own. Subjecting CTC to The Ombudsman's jurisdiction would have read-across implication on such organisations.

7. We consider it vital to ensure that BMCPC and CTC, like other ethnic or religious bodies as well as non-religious charitable organisations, are allowed to continue with their current mode of operation in accordance with the prevailing legislative and regulatory framework. We do not consider it appropriate for BMCPC and CTC to be brought under The Ombudsman's jurisdiction.

Clarification of the interpretation of two provisions in TOO concerning land matters

8. Items (4) and (8) of Schedule 2 to TOO set out the restrictions on The Ombudsman's investigation into land 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.

9. The Ombudsman notes that from time to time, there has been contention by the Government on its 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 that item (8) only precludes The Ombudsman from investigating only the "decisions" themselves, but not the circumstances and processes leading to such decisions. The Ombudsman recommends that the Government clarify its stance on the interpretation of these two provisions.

10. The issue at stake is mainly a legal interpretation one. Having consulted the Department of Justice and the Development Bureau, our view is as follows –

- (a) 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 tenderer. In the context of item (4), the expression “contractual or other *‘commercial transactions’*” should be construed to mean commercial transactions, irrespective of whether they are contractual or not.
- (b) In transactions concerning any interest in Government land, the Government generally acts in the capacity as a private landlord. Being a landlord, the Government’s decisions in most, if not all, such transactions involve commercial considerations such as the rent, the duration, the terms and conditions to be imposed, the premium payable, waiver fee or any other payment that may be levied by a private landlord in the market, though non-commercial considerations such as social consideration may incidentally be involved. Whether a land transaction is a commercial transaction or not is a question of the relative degree of commercial considerations vis-à-vis non-commercial considerations involved when making the decision. As such, all land transactions conducted through public auction, tender, lease modification or land exchange should generally be considered as “*commercial transactions*” and thus would be covered by the restriction in item (4).
- (c) However, certain land leases granted, such as a private treaty grant at a nominal premium to a charitable body, may arguably be considered as “non-commercial transactions” and thus would not be covered by the restriction in item (4). To address this uncertainty, item (8) was added to provide that any decision concerning the imposition or variation of any condition of granting, extending or renewing any interest in Government land should not be subject to The Ombudsman’s jurisdiction.
- (d) As regards the scope of “*variation of condition*” in item (8), “lease modification” is indeed a form of variation of lease condition even though the variation involved may be more

extensive in scope. The terms “variation” and “modification” are synonyms. When a lease condition is varied, the lease is modified and vice versa.

11. On the basis of the above, the overall effect of items (4) and (8) is that any decision concerning the imposition or variation of any condition in all land transactions including the modification of the terms of any land transactions should be excluded from The Ombudsman’s jurisdiction. However, administrative aspects surrounding such decisions (e.g. delay in handling land grant applications) are not covered by the restrictions in items (4) or (8), and hence are subject to The Ombudsman’s jurisdiction.

PART 2 OF THE REVIEW

12. Part 2 of the Review examines possible developments of the ombudsman system for Hong Kong, taking reference from overseas practices in respect of the following four areas –

- (a) protection and promotion of human rights – with ombudsmen also assuming the role of the human rights commission to protect and promote human rights;
- (b) access to government information – with the enactment of freedom of information legislation to give members of the public a right to access documents held by the government;
- (c) protection of whistleblowers – with the enactment of whistleblower legislation to protect the disclosure of illegal or immoral practices; and
- (d) specialised ombudsmen – with the establishment of ombudsmen specifically charged to deal with particular issues like healthcare complaints.

13. The Ombudsman indicates that it is mindful that these are essentially policy matters within the responsibility of the Government. The Ombudsman is, therefore, **not** advocating any particular course of action in Part 2 of the Review, but offering a snapshot impression of recent developments in the four areas and providing some pointers to possible implications for the ombudsman system if such developments were to be pursued in Hong Kong.

14. We agree with The Ombudsman that these are essentially policy matters within the responsibility of the Government. All issues covered touch on fundamental Government policies, and there are no compelling reasons to suggest that dramatic changes should be taken at this stage. We have taken note of The Ombudsman's observations which have provided us useful information of overseas experience. We will keep in view the experience of policy developments overseas and the special circumstances of local environment in formulating and implementing a policy suitable to Hong Kong. Detailed responses are set out below.

Protection and Promotion of Human Rights

The Ombudsman's observations

15. The Ombudsman notes that there are a number of different models of ombudsman around the world. On the one hand, the basic model of the ombudsman, which Hong Kong adopts, is characterised by its competence over the entire administrative system, with powers to investigate complaints on maladministration, inquire into official actions, recommend remedial actions and be subject to a public reporting requirement. Classical ombudsmen have no express human rights mandate. Human rights issues in the public sector not arising from administrative actions and those involving private entities are outside a classical ombudsman's jurisdiction. However, The Ombudsman in Hong Kong deals with complaints across the entire spectrum of public services, including complaints about housing, education, medical and health care, social welfare and legal aid, and these complaints at times raise human rights-related issues covered by relevant international conventions and the Basic Law.

16. On the other hand, certain ombudsmen overseas are given greater powers and responsibilities, including to act as a *human rights commission* to protect and promote human rights. Depending on the powers conferred by domestic legislation, the functions and powers of these ombudsmen may include –

- (a) protecting human rights with an explicit mandate through dealing with reports of alleged violation of rights;
- (b) initiating promotion activities or campaigns to raise awareness of human rights issues, with a view to preventing violation; and

- (c) intervening in judicial proceedings in respect of human rights and apply to courts or the state prosecutor's office with petition on re-examination of a court decision that has entered into legal force.

Government's considerations

17. In Hong Kong, human rights are fully protected by law. The legislative safeguards are enshrined in the Basic Law, the Hong Kong Bill of Rights Ordinance and other relevant ordinances. They are buttressed by the rule of law and an independent judiciary. Hong Kong has an existing institutional framework of organisations which help promote and safeguard different rights, including, for example, the legal aid services, the Equal Opportunities Commission, the Privacy Commissioner for Personal Data and The Ombudsman. The Government's performance in promoting and safeguarding human rights is open to scrutiny through regular reports to the United Nations and is constantly watched over by the legislature, the media and various human rights NGOs. From a policy point of view, the Administration considers the existing mechanism to have worked well and does not see an obvious need for establishing another human rights institution to duplicate or to supersede the existing mechanism. The Administration therefore has no plans or timetable for the establishment of such.

Access to Government Information

The Ombudsman's observations

18. The Ombudsman notes that in a number of overseas jurisdictions there exists *freedom of information legislation* that gives members of public a right to access documents held by governments and their agencies. A fundamental principle underlying such legislation is that official information shall be made available unless there is a good reason to withhold it.

19. There is no freedom of information legislation in Hong Kong. An administrative *Code on Access to Information* is in place to serve as a formal framework for the provision of information by bureaux and departments (B/Ds). The code sets out what information will be made available to the public routinely and lays down rules for dealing with requests for access to other government information. The requester does

not have to give a reason for his/her request and B/Ds are to provide the information unless there is a valid reason for refusal as set out in the code.

20. The Ombudsman further observes that from statistics, it would appear that most requests for information in Hong Kong are processed without difficulty within the time frames envisaged by the code and that in the great majority of cases, requests for information are satisfactorily handled by B/Ds without recourse to the reviewing authority. However, a few cases handled in the past year demonstrated a lack of understanding of the code by some officials.

Government's considerations

21. As an open and accountable government, the Administration's policy is to make available as much information as possible so that the public can better understand how policies are formulated and implemented. The Code on Access to Information enshrines the principle that information will be made available unless there are valid reasons related to privacy, public or commercial interests to withhold the information.

22. Experience so far demonstrates that the code provides an effective framework to provide access for members of the public to a wide range of information held by the Government. Overall, B/Ds are able to satisfy the public's requests for information. To further promote awareness of and compliance with the code, training on the code within the civil service is being stepped up to enhance Government colleagues' understanding of the interpretation and application of the code. Publicity on the code will also be stepped up in due course to promote public awareness of the code. In addition, the Constitutional and Mainland Affairs Bureau (CMAB) has stepped up compliance monitoring and, where necessary, instituted remedial actions, such as clarifying any misunderstanding/grey areas in the application of the code. CMAB will continue to closely monitor the effectiveness of the code, and there is no plan to enact freedom of information legislation in Hong Kong.

Protection of Whistleblowers

The Ombudsman's observations

23. The Ombudsman points out that *whistleblower legislation* provides a further facet of public accountability, by protecting the disclosure of illegal, immoral or illegitimate practices committed by an organisation or an employee of that organisation. However, The Ombudsman notes that there has been little public demand for whistleblower legislation in Hong Kong.

Government's considerations

24. We consider that there are sufficient and well-established channels, administrative or statutory, for staff to make known their views or lodge complaints about matters affecting them or business practices in their offices. In addition, there are well-established channels for the Government to communicate with staff and to proactively seek their views over a wide range of matters. There are also adequate safeguards under the staff redress mechanism and disciplinary procedures to ensure that no one will be penalised for making a complaint or a suggestion for improvement in good faith. The existing systems have been working effectively. We also note that the identity of those who make a report of any serious wrongdoings of an organisation relating to criminal acts or corruption are already protected under the existing reporting system.

25. The Administration therefore does not see a practical and justified need for whistleblower legislation in the area of public administration.

Specialised Ombudsmen

The Ombudsman's observations

26. The Ombudsman notes that from the classical ombudsman model has developed various types of watchdogs, or specialised ombudsmen, in many parts of the world to deal with specific areas like privacy, health care, legal services, tax, prisons, complaints against the Police and anti-corruption.

27. The Ombudsman observes that in Hong Kong, separate offices have been established to perform three of the functions mentioned above,

namely the Privacy Commissioner for Personal Data for privacy, the Independent Police Complaints Council on complaints against the Police, and ICAC on anti-corruption. The Ombudsman highlights the idea of establishing a *medical ombudsman office*.

Government's considerations

28. Specifically on a medical ombudsman office, it is noted that the medical and health care professions are regulated by respective statutory registration systems based on the principle of “professional self-regulation”. In addition, the Hospital Authority, as a major health care provider in Hong Kong, is required by law to establish and maintain a system for providing a proper consideration of complaints from users of public hospital services. All private hospitals are required by the Department of Health, the licensing authority, to appoint a patient relations officer to receive, investigate and resolve complaints.

29. The Administration considers that the existing system is well established and does not see a need to establish a specialised ombudsman to handle complaints on medical care matters. Besides, complaints against other disciplines, such as lawyers, accountants and architects, are also handled by their respective professional bodies.

30. To ensure the quality and the professional standards of medical services, the Medical Council of Hong Kong has improved credibility, transparency and user-friendliness of its complaint handling mechanism. The Hospital Authority will also implement a pilot scheme for hospital accreditation to improve service quality and patient safety.

WAY FORWARD

31. We will proceed to work on the legislative amendments to bring the four public bodies (namely AMS, CAS, CC and EAA) under The Ombudsman's jurisdiction.

Administration Wing
Chief Secretary for Administration's Office
April 2009