THE GOVERNMENT MINUTE

IN RESPONSE TO

THE 23rd ANNUAL REPORT OF
THE OMBUDSMAN 2011

Government Secretariat
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Introduction

The Chief Secretary for Administration presented the 23rd Annual Report of The Ombudsman to the Legislative Council at its sitting on 6 July 2011. This Government Minute sets out the Administration's response to the Annual Report.

ii. While The Ombudsman's Annual Report reveals that there is room for the Administration to improve in certain areas, our comprehensive responses in this Minute demonstrate our commitment to be an open and efficient government. We will continue our endeavor in this respect.

iii. This Minute comprises three parts – Part I responds generally to issues presented in the section *The Ombudsman's Review* of the Annual Report; Part II and Part III respond specifically to those cases with recommendations made through The Ombudsman's full investigation and direct investigation respectively.

Part I
– Responses to Issues presented in the section *The Ombudsman's Review* of the Annual Report

The Government has taken note of The Ombudsman's remarks. We welcome the recommendations made by The Ombudsman, and appreciate The Ombudsman's continuous efforts in raising the quality of service and standard of governance in the public sector. We have generally accepted the recommendations from The Ombudsman. The Administration will continue to strive for quality public services in a positive, professional and proactive manner.

2. We understand that with social and technological advancement, there is a rising expectation on the quality of public services. Moreover, the Government takes full note on The Ombudsman's concern over the issues about compartmental mentality. We fully agree that the essence for quality public services rests greatly on the effectiveness of inter-departmental coordination. The Administration shall continue to endeavour in this area with an aim to serve the community and respond to requests from the Public in a timely and effective manner.

3. As for cases specifically mentioned in The Ombudsman's Review, we shall set forth our responses in the corresponding chapters of this Government Minute.

Part II
– Responses to recommendations in full investigation cases

Agriculture, Fisheries and Conservation Department

Case No. 2009/2136 : Impropriety in handling a complaint about the misconduct of a member of its staff

Background

4. The complainant lodged a complaint with the 1823 hotline on 20 March 2009 stating that an Agriculture, Fisheries and Conservation Department (AFCD) officer had made a body movement likened to a kick to his dogs while he and his girlfriend were walking them. The officer, not knowing the complainant is Cantonese speaking, expressed his disappointment to his colleague for the dog not biting him, otherwise he could have pocketed a few thousand dollars.

5. During the investigation, the complainant proposed to hold an identification parade in order to identify the implicated officer. He refused to make a statement as his proposal was not accepted by AFCD. After further investigation, AFCD replied to the complainant in writing on 30 April 2009 that the investigation had been concluded with no evidence to substantiate the complaint against the implicated AFCD officer.

6. The complainant then wrote to The Ombudsman in July and August 2009 to complain against AFCD regarding the misconduct of the implicated staff; improper investigation into his complaint about the misconduct, and unreasonable disclosure of his complaint to a third party. The Ombudsman accepted the case and decided to conduct a full investigation.

7. After examining all the information provided by AFCD, The Ombudsman conducted a site visit to the location where the case happened and interviewed two neighbours of the complainant who were involved in a dog bite case that was connected to the case.

8. Since additional information was found during The Ombudsman's investigation of the case, AFCD appointed a team of independent investigation officers to re-investigate the complainant's case in March 2010.

The Ombudsman's observations

9. The Ombudsman observed the following inadequacies of AFCD's initial investigation team in handling the complainant's complaint about staff misconduct –

(a) the investigation team had misinterpreted the statement given by one of the complainant's neighbour;

(b) the investigation team had failed to clarify the discrepancy between information reported by the 1823 hotline to AFCD and information provided by the complainant to AFCD;

(c) the investigation team could have resorted to other means of identification for the complainant to identify the implicated staff; and

(d) the investigation team had inquired into irrelevant matters.

10. The Ombudsman found no concrete evidence to draw conclusion on the alleged misconduct of the implicated AFCD staff, due to the absence of a third party. However, in view of the above inadequacies of AFCD's initial investigation team in its investigation, The Ombudsman considered that AFCD's initial investigation team had jumped to its conclusion too quickly.

11. The Ombudsman found the explanation given by AFCD for making enquiries with one of the complainant's neighbour about the background of the complainant not convincing. Hence, The Ombudsman concluded that AFCD staff had disclosed information about the complainant to a third party unnecessarily.

12. In view of the information obtained, The Ombudsman concluded that the complaint against AFCD was substantiated.

Administration's response

13. AFCD has accepted The Ombudsman's recommendations and has taken the following actions –

(a) AFCD has completed the re-investigation of the complaint lodged by the complainant. The complainant and The Ombudsman were informed of the re-investigation outcome in January 2011;

(b) AFCD has reviewed the departmental complaint handling procedures and reminded supervisors to closely monitor the progress of a complaint investigation and to provide guidance and steer to complaint handling officers during the investigation;

(c) AFCD has arranged a series of quality service workshops for staff in animal management centres since 2010. They have been reminded of the need to behave professionally and properly at all times when dealing with members of the public; and

(d) AFCD has provided a tailor-made complaint handling workshop for staff in animal management centres in January 2011. They have been reminded to maintain strict confidentiality when handling all complaints.

Buildings Department

Case No. 2009/2378 : Mishandling a complaint about an unauthorized structure

Background

14. In August 2006, the complainant complained to the Buildings Department (BD) about Unauthorized Building Works (UBW) in progress in a flat of a certain building. In May 2007, BD confirmed the existence of a UBW item, but did not take any enforcement action. Then in August 2008, BD replied that as the UBW item had been there for some time, the Department would not require its removal immediately. The complainant alleged that it was irresponsible of BD to have delayed its action.

15. Under Section 22 of the Buildings Ordinance, BD staff may enter any premises for inspection. The Department's guidelines, however, state that if entry cannot be gained after three attempts and no UBW item that warrants immediate removal is identified, action on the case would be suspended.

16. In August 2006, the complainant first complained to BD about UBW in progress in the said flat. Up to October 2008, the complainant repeatedly complained to the Department, indicating that the UBW item had extended outwards to the light well. Staff of BD's consultant conducted several visits, but they could only observe from the outside as they were unable to gain entry to the flat. The UBW item extending to the light well was spotted. The staff time and again left a note asking the owner/occupier of the flat to contact them for inspection. However, they did not get any response.

17. In May 2007, BD checked the records of the building. While the records showed that a smaller UBW item had existed since 1980, it was uncertain whether the bigger UBW item spotted by the consultant's staff was a new one. In August 2008, BD decided after re-assessment that without sufficient proof of the UBW item being newly built, it could not be categorized as a "priority case" for immediate enforcement action under current policy. The Department had all along kept the complainant informed of developments.

18. In December 2008, through the complainant's arrangement, the consultant's staff entered the flat below the one in question to inspect the UBW item. They noticed some rust near the bottom of the structure but still could not tell whether it had long been there. Nevertheless, since other UBW items were found in the same building, BD decided in September 2009 to include the whole building in the Department's annual large-scale UBW removal operations. It was expected that all UBW items in the building would be demolished in 2010.

The Ombudsman's observations

19. The Ombudsman opined that BD staff should have actively followed up on complaint cases and collect evidence to ascertain that the UBW items or the works in progress would not threaten the structural safety of the building before deciding to suspend enforcement action. They should not rely merely on external inspection.

20. The Department had assumed a passive role in handling this case and appeared helpless when the owner/occupier of the flat refused to cooperate. BD did not check the records of the building until repeated complaints were received. The Department did not manage to take a closer look at the UBW item until the complainant helped to make that possible. BD took more than three years to reach a decision to include the UBW item in a large-scale removal operation – a clear indication of its tardiness.

21. The Ombudsman, therefore, considered the complaint substantiated.

Administration's response

22. BD has accepted The Ombudsman's recommendation and will revise its internal guidelines on investigation of reported UBW to require staff, when access to the premises concerned could not be gained, to specifically conduct inspection around or from nearby premises and collect full circumstantial evidence where possible to determine whether the building works are existing ones or safe before deciding whether follow-up actions should be suspended. Moreover, the Administration has proposed to amend the Buildings Ordinance to enable BD to apply for warrants from the Court to facilitate its staff to enter individual premises for enforcement actions including inspections and/or carrying out necessary repair works.

Case No. 2009/3854 : (a) Failure to take action against an Owners' Corporation for removing building structures without the Department's prior approval; and (b) Failure to answer the complainant's enquiry properly.

Background

23. The complainant was a flat owner of a residential estate (the "building"). In 2008, the Owners' Corporation (OC) of the building arranged major repair works for the building, during which the contractor appointed by the OC removed all the drying racks from the external walls of the building (including the drying rack of the complainant's flat).

24. The complainant pointed out that since the drying racks were shown on the plan of the building, the OC should not have removed the drying racks without the consent of the complainant and other owners. Therefore, he lodged a written complaint with the Buildings Department (BD) in August 2009.

25. Being dissatisfied with BD's explanation, the complainant accused BD of the following –

(a) allowing the OC to remove on its own accord the drying racks; and

(b) failing to respond to his enquiry on whether the OC was required to submit a revised plan to BD after removal of the drying racks.

The Ombudsman's observations

26. The Ombudsman noted that whilst BD had confirmed its prior approval was necessary for the removal of the subject drying racks, otherwise the demolition works would be unauthorised, it failed to take action to rectify the irregularities on the other hand. This had made the legal requirements seem non-existent. Moreover, after the drying racks had been removed, although BD confirmed that the works neither constituted danger nor contravened other requirements, there was no mechanism to enable the works to be recognised by BD by having the plan amended. This unsatisfactory situation was due to the prevailing legislation and policies.

27. The Ombudsman noted that the Administration had already amended the Buildings Ordinance to introduce the "Minor Works Control System" to be implemented within 2010. By then, the required procedures for carrying out building works would be more reasonable and expeditious, thus avoiding the above situation.

28. Nevertheless, regarding this case, the drying racks are not mandatory facilities and their removal would neither pose danger nor contravene other requirements. Therefore, from a pragmatic point of view, BD had not required the owners to reinstate them or take any further action and only recorded the case. The Ombudsman found this not unacceptable.

29. Although the approach adopted by BD amounted to tolerating the works, no maladministration had been involved. As such, The Ombudsman considered Complaint (a) unsubstantiated.

30. Regarding Complaint (b), the enquiry made by the complainant was simple and straightforward. However, in its reply to the complainant, BD said that the owners were not required to submit any plan for such type of works, which was contrary to the statutory requirement.

31. The Ombudsman took the view that the reply letter issued by BD to the complainant was not only inaccurate and unclear but also misleading, prompting the complainant to repeatedly make further enquiries.

32. Therefore, The Ombudsman considered Complaint (b) substantiated.

Administration's response

33. BD has reminded its staff to fully comprehend salient points of the enquiries/complaints from the public and give appropriate, accurate and clear replies to the enquiries/complaints.

Buildings Department and Food and Environmental Hygiene Department

Case No. 2009/0621-0622 : Mishandling a seepage complaint, thereby prolonging the complainant's misery for some years

Background

34. The complainant complained to the district Joint Office (JO) set up by the Buildings Department (BD) and Food and Environmental Hygiene Department (FEHD) about seepage at the ceiling and walls of her living room. After several inspections, JO identified the cause of seepage to be the waste water inlet at the flat roof area of the flat above as well as the unauthorised connection and disrepair of a communal sewage pipe of the building concerned.

35. Consequently, JO issued a Nuisance Notice to the owner of the flat above while BD issued a repair order to the Owners' Corporation (OC) of the building. The seepage problem, however, persisted. The complainant alleged that BD and FEHD had mishandled her complaint.

36. Since 2006, Government has set up JOs in various districts with staff from FEHD and BD to provide a "one-stop" service to the public for seepage complaints. The JOs have upgraded the technology of seepage tests to enhance Government efficiency in handling seepage complaints. As regards the operations and staff management of JOs, however, FEHD and BD each has its own reporting system and line of command.

37. Upon receipt of the complaint, FEHD sent its staff to the complainant's flat for investigation. Having identified the flat above as the cause of the seepage, FEHD issued a Nuisance Notice to the flat owner in accordance with established procedures. The owner, however, failed to comply with the requirements and so FEHD initiated prosecution. Later, the ownership of the flat above changed, but the seepage problem persisted. The Department of Justice (DoJ) advised that JO should issue a new Nuisance Notice to the new flat owner.

38. However, the FEHD staff concerned failed to take the appropriate follow-up action. He noticed the contradictory results of two separate tests at the same seepage point but did not seek legal advice

from DoJ until five months later. When he realized that the service of Nuisance Notice had not been effected and there was inadequate evidence to prosecute the new flat owner, he took almost another seven months to seek further legal advice when The Ombudsman started an inquiry. FEHD then re-investigated the seepage case and conducted relevant tests on the advice of DoJ. Based on the findings, FEHD subsequently issued a Nuisance Notice to the new flat owner.

39. In this connection, FEHD started a disciplinary investigation and was prepared to discipline the staff concerned if it was confirmed to be his fault. The staff concerned explained that he had tried his best to handle the complaint. It was only because of heavy workload and inadequate manpower that the complaint could not be properly handled.

40. On receipt of the referral from FEHD, BD promptly sent its staff to the flat in question for inspection and tests. When the cause of seepage was identified, BD required the flat owner concerned to arrange necessary repairs. BD also informed the complainant of the result of investigation. As regards the sewage pipe of the building, BD also followed up the complaint quickly on receipt of JO's referral. Subsequently, BD identified that the common sewage pipe connected to the drainage tank at the flat roof of the flat above, and the floor slabs surrounding the drainage tank were the sources of seepage at the ceiling of the complainant's flat.

41. Based on the above findings, BD issued a repair order to OC. After OC had replaced the damaged drainage tank and the sewage pipe, BD conducted several site inspections to run tests and also visited the complainant's flat. As there was no sign of continued seepage, BD revoked the repair order for the sewage pipe.

42. The complainant later informed BD that the seepage problem persisted and queried BD's decision to revoke the repair order. BD explained to the complainant as to why the repair order had been revoked and that persistent seepage at the ceiling was indeed due to the failure of the owner of the flat above to make the repairs. BD then urged JO to conduct a follow-up investigation. In addition, BD issued another repair order, requiring OC to repair all damage and defects of the communal area and sewage pipes of the building.

The Ombudsman's observations

43. As the seepage problem remained unresolved and it involved sewage discharge and serious hygienic nuisance, The Ombudsman requested FEHD and BD to conduct a joint inspection at the complainant's flat to work out a solution.

44. After the joint inspection, FEHD informed the complainant that the owner of the flat above had failed to comply with the Nuisance Notice and prosecution would be brought against that owner. FEHD, therefore, would not take any new follow-up action at that stage. BD, on the other hand, said it had urged OC to start the repairs as soon as possible.

45. In view of the complaint handling process of FEHD and BD, The Ombudsman considered that JO had followed established procedures in pursuing the case at the initial stage and its follow-up action was fairly satisfactory.

46. Subsequently, however, there was obvious delay on FEHD's part. It was reasonable for FEHD to consult DoJ to determine whether it should prosecute the owner of the flat above for non-compliance with the Nuisance Notice, considering the contradictory results of two separate tests. Yet, the FEHD staff concerned had delayed the consultation with DoJ for five months without reviewing the results or conducting any other tests. The Ombudsman considered it unacceptable that on receipt of DoJ's reply, he had delayed another seven months before reverting to DoJ for further consultation and took no follow-up action.

47. Moreover, whilst a change of property ownership was involved in this case, this was not a unique case. JO should have come across the same situation in dealing with other seepage complaints. Nevertheless, JO's current guidelines make no mention of how such cases should be handled and frontline officers had to further consult DoJ, thereby affecting the progress in handling the complaint.

48. FEHD put the blame of the delay in the handling the seepage complaint on an individual staff and has initiated a disciplinary investigation. However, according to the comments by that staff, FEHD had a shortage of staff and there was ineffective internal management. If what he said was true, the oversight and delay revealed in this case might only be the tip of an iceberg. It showed that FEHD had not examined the root of the problem exposed by this case.

49. The Ombudsman considered the complaint against FEHD substantiated.

50. BD had performed its duty to monitor the damage and disrepair of the building's common sewage pipe and it had issued the repair order and checked the repair works. The complainant alleged that BD had failed to monitor the repair works by OC properly, thereby allowing the seepage to persist. The Ombudsman noticed that the owner of the flat above had not complied with the Nuisance Notice to carry out the repairs, while the investigation afterwards stagnated because of the negligence of FEHD staff. As a matter of fact, BD had conducted an inspection before revocation of its repair order and it had received no further referral from JO. As such, there was no evidence to prove that the persisting seepage problem at the complainant's flat was a result of BD's failure to follow up the case properly.

51. Based on the above, The Ombudsman considered the complaint against BD unsubstantiated.

Administration's response

52. FEHD and BD have accepted The Ombudsman's recommendations. Follow-up actions have been taken as follows –

(a) FEHD has enhanced the "Progress Monitoring System (PMS)" of water seepage complaints to keep track on issuance and handling of Nuisance Notices. With a view to further strengthening the monitoring of water seepage complaints, Chief Health Inspectors of district offices are required to conduct monthly check on the PMS and take follow-up action wherever appropriate;

(b) FEHD has revised the relevant guidelines in accordance with legal advice, specifying that if there is any change of ownership of the premises after issue of Nuisance Notice and the seepage problem persists, FEHD/JO will issue a fresh Nuisance Notice to the new owner for action;

(c) FEHD has reminded FEHD/JO staff to serve Nuisance Notices to liable owners of the premises concerned strictly in accordance with legal requirements; and

(d) FEHD and BD have instructed their respective JO staff that in handling similar water seepage complaints which involve repair works of communal facilities by multiple owners, HAD should be invited as necessary to render assistance in coordinating the liable owners to carry out necessary repair works.

Companies Registry

Case No. 2009/1768 : Failing to follow up properly a complaint about the filing of company documents

Background

53. In April 2007, the complainant lodged a complaint to the Companies Registry (CR) against a company for alleged breaches of the Companies Ordinance as the company had failed to file its 2006 Annual Return (Form AR1) and a Notification of Situation of Registered Office (Form R1). In July, CR issued a reply to inform the complainant that CR had issued letters to the directors of the company to remind them to file the outstanding forms. The complainant was of the view that CR had promised in the reply to inform him of the resignation of the directors of the company.

54. In February 2009, the complainant found that CR had registered a Notice of Resignation of Secretary and Director (Form D4) lodged by one of the directors. In April 2009, all directors of the company claimed that they had resigned. However, not all of them had filed Forms D4 with CR. The complainant therefore lodged a complaint to CR again in April 2009.

55. In May 2009, the complainant provided CR with the addresses of two of the directors who could not be reached. However, the complainant considered that CR did not follow up and contact the directors via these addresses.

56. The complainant opined that CR had not followed up his complaints properly and had not honoured its promise to inform him when one of the directors had filed a Form D4 with CR. Moreover, the complainant was not satisfied that CR did not take follow-up action on the company's outstanding Forms AR1 for subsequent years, i.e. 2007, 2008 and 2009.

The Ombudsman's observations

57. The Ombudsman noted that CR had issued 12 reminders to the company in 17 months for the outstanding Form AR1 for 2006.

Although there was no response, no further action had been taken. There was delay in the handling of the case. CR subsequently prosecuted the company in 2009 and the company was convicted.

58. After returning an incomplete Form AR1 for 2006 to the company in August 2007, CR repeatedly reminded the company to file a proper Form AR1 for 2006 with CR. However, it was not until 23 March 2009 that CR reminded the company for the first time to file its Forms AR1 for 2007 and 2008. The Ombudsman commented that CR staff were not proactive enough as they had neglected other outstanding Forms AR1 in following up the complaint.

59. The Ombudsman considered that, given the wording of the reply from CR to the complainant in July 2007, the complainant would expect CR to inform him of any development in the resignation of directors of the company as well. As such, The Ombudsman opined that CR should pay more attention to the clarity in its correspondence in future to avoid any misunderstanding.

60. The two directors' addresses provided by the complainant are not new addresses and cannot help address the complaint. However, The Ombudsman considered that if CR had explained why they could not disclose whether letters addressed to the two addresses had been received, it might have avoided the misunderstanding.

61. On 2 March 2010, the complainant wrote to The Ombudsman again and expressed his dissatisfaction over CR's intention to strike the name of the company off the register of companies. The Ombudsman noted that CR had informed the complainant on 8 April 2010 about the suspension of its striking off action against the company due to the objection of the complainant. The Ombudsman considered that, in this case, CR had properly discharged its duty in its follow-up action against the company.

62. The Ombudsman concluded that the complaint was partially substantiated.

Administration's response

63. CR has accepted The Ombudsman's recommendations and has taken the following actions –

(a) The newly-prepared case summary template has been included in CR's internal processing system to assist staff in the handling of complaints in relation to alleged breaches of the Companies Ordinance;

(b) To enhance the understanding of staff in the procedures for handling complaints in relation to breaches of the Companies Ordinance, a meeting has been held with all Companies Registration Officers I (CROIs) responsible for monitoring complaint cases in relation to breaches of Companies Ordinance to analyse and review the procedures for handling complaints. All staff members responsible for handling complaint cases have been briefed again on the key points of the procedures for handling complaints as well as the rationale and operation of the case summary template. Regular refresher training courses and experience sharing sessions would be arranged for enhancing staff awareness and ensuring proper handling of complaint cases;

(c) CR has upgraded its system for monitoring the handling of complaint cases. Since April 2010, the General Registration Section (GR Section) of CR has prepared a list of complaint cases every month for identifying and reviewing cases which remain outstanding for more than six months. Supervisors of GR Section have also conducted random checking on complaint cases to ensure the proper functioning of the monitoring system; and

(d) For complaints against breaches of the Companies Ordinance, CR's Internal Circular clearly states the need for staff to ascertain if there are any other breaches when they study the subject of the complaints. To ensure that CR staff can handle complaint cases more efficiently, GR Section issued a new internal guideline for the handling of complaint cases in March 2010. Training courses have been arranged to familiarise officers with the new guidelines. CR would review and update the internal guidelines regularly.

Correctional Services Department

Case No. 2008/4834 : (a) Unreasonably forbidding the complainant to take away his diary when released from prison; and (b) Refusing a request by the complainant's wife to pass clothes to him.

Background

Complaint (a)

64. The complainant was an inmate in a Correctional Services Department (CSD) institution. On 18 October 2008, the day of his release, the complainant wanted to take with him the English diary that he had written during his incarceration. However, the request was refused by an officer, who considered two pages of his dairy to contain sensitive information. The complainant was allowed to keep the rest of the diary, only after he had destroyed, as demanded, those two pages. The complainant found the officer's refusal unreasonable as it was a right of inmates to write diaries.

65. The CSD officer concerned said that he had, on that day, indicated to the complainant that written notes to be taken away by inmates upon discharge from prison must be security-checked. While the diary was mainly in Chinese, there were two pages containing English letters and other indecipherable symbols, the meaning of which the complainant refused to explain. Later, another officer told the complainant that the use of symbols or codes was not allowed in inmates' notes. The complainant then agreed to destroy those two pages of his diary.

66. According to CSD, they do not forbid inmates to write diaries. Restrictions on the use of notebook are explained to all new inmates during induction. The Prison Rules also stipulate that all letters to or from an inmate must not contain any message expressed in code. This is to prevent illegal acts such as plotting to escape which may threaten the security and discipline of the institution. Notes written in codes and symbols are similar in nature to letters containing codes. If an inmate's notes contain shorthand symbols for which the inmate fails to give a reasonable explanation, the management of the institution can confiscate the whole notebook or tear away the parts in question before returning the rest to the inmate. Therefore, the officer in this case had handled the

matter in accordance with the established procedures.

Complaint (b)

67. Besides, the complainant claimed that he did not have a belt and shoelaces with him when he was admitted to the institution as he had given them to his family when he was searched in a police station. He therefore asked his family to bring along the above articles and some clothes on the day of his release. In the morning of the day concerned, the complainant's wife arrived and requested to hand in the clothes to the complainant. Her request was refused by an officer who said that the complainant had not applied one month in advance. The complainant's wife then made a phone call to the institution and requested handing in the clothes to the complainant so that he could get changed. The officer who answered the phone said that if the complainant insisted to get changed, he might only leave the institution in the afternoon as it might take a long time for the security officers to conduct security check on the articles concerned. This might also cause a delay to other persons who would be released on the same day. The complaint claimed that he withdrew the request as he did not want his wife and other inmates to wait. He said that he did not know such application procedures beforehand and considered that CSD officers had intentionally made things difficult for him.

68. According to CSD, the Department does not require visitors to apply in advance for handing in clothing items for use by persons in custody upon their discharge. Persons in custody can receive clothing items handed in by relatives/friends before release. However, the management must check all articles handed in from outside parties. The time required for checking would vary, depending on the number and nature of the articles concerned. CSD responded that the officers concerned did not turn down the request of the complainant's wife to hand in clothing items, and they did not mention the time required for handling such items and conducting the security check. They had not deployed the checking time as an excuse to pose difficulties for her either.

The Ombudsman's observations

69. The Ombudsman considered complaint (a) inconclusive and complaint (b) partially substantiated. The Ombudsman's observations and considerations are set out below.

Complaint (a)

70. The Hong Kong Bill of Rights Ordinance stipulates that "everyone shall have the right of freedom of expression". Restrictions by CSD on the content of inmates' notes for security reasons, while understandable, must be fully justified and carefully implemented.

71. The complainant alleged that his diary was written in English and contained no symbols or codes. He presented to The Ombudsman's Office a copy of the remaining part of his diary and managed to reproduce from memory part of the two pages destroyed. It was written in English and contained no symbols or codes. CSD stated that the two pages recorded certain misbehaviour of inmates in the institution. The officer concerned stated that the dairy was mainly in Chinese and the content of the reproduced pages was different from the destroyed version.

72. The Ombudsman considered that if the two pages concerned were just an account of the misbehaviour of some inmates, it would not necessarily pose any substantive threat to the discipline and security of the institution. As the remaining part of the diary as presented by the complainant was written in English (rather than in Chinese) and he could reproduce from memory part of the destroyed pages, his version of the event was more convincing than that of the CSD officer. Nonetheless, as those two pages had already been destroyed, the facts could not be fully established. The Ombudsman, therefore, considered complaint (a) inconclusive.

Complaint (b)

73. Regarding the allegation that CSD staff had made things difficult for the complainant's family in terms of handing in clothing items, The Ombudsman noted that the facts agreed by both CSD and the complainant included: the complainant's wife had requested to hand in clothing items to the complainant but they had not been handed in ultimately; and the complainant did not have a belt and shoelace, etc when he left the institution. The Ombudsman believed that the complainant's wife had encountered some hindrance when she requested

handing in clothing items and thus the complainant withdrew his request. The Ombudsman was of the view that the longer time required for arranging additional ad hoc security check was unconvincing. Even if it was indeed a valid reason, it had posed difficulties for the complainant's wife such that she withdrew the request. The Ombudsman considered that although it might not have been their intention to thwart the complainant's wife, the Department had not provided necessary assistance and had caused inconvenience to the complainant which could otherwise have been avoided. Therefore, The Ombudsman considered complaint (b) partially substantiated.

Administration's response

74. CSD has accepted The Ombudsman's recommendations and taken the following actions –

(a) CSD is reviewing the specific measures with a view to keeping persons in custody better informed of the restrictions on the use of notebook and will inform The Ombudsman of relevant arrangements after the review;

(b) CSD has reminded officers in institutions the correct procedures in handling unauthorized notebooks. Relevant staff should confiscate a notebook with unauthorized content instead of asking the inmate to destroy it;

(c) CSD has reminded all staff to provide necessary assistance to visitors in terms of handing in clothing items to persons in custody, and informing them of the processing time required; and

(d) CSD will inform persons in custody of the procedures of handing-in clothing items during induction courses.

Case No. 2010/0095 : (a) Providing the complainant with misleading information; (b) Delay in submitting the complainant's application under the Pre-release Employment Scheme; and (c) Failing to keep the complainant's case in strict confidence

Background

75. The complainant had been placed under custody of the Correctional Services Department (CSD) since September 2008. In June 2009, CSD informed the complainant that she was eligible to apply for the Pre-release Employment Scheme. The complainant then consulted CSD staff A. The latter informed the complainant that she was not eligible to apply for the Pre-release Employment Scheme (the Scheme) as she was appealing her case.

76. On 11 September 2009, the complainant's appeal went on trial but the judgment was not immediately handed down. On 7 October, the complainant submitted a statement to CSD staff B explicitly expressing her intention to apply for the Scheme and asked staff B to hand in the letter to staff A. In early November, staff A invited the complainant for a meeting and gave an application form to the complainant. Staff A informed the complainant that the application would be submitted to the Release Under Supervision Board (the Board) for consideration two days later and confirmed that no other information was required to be provided by the complainant.

77. On 15 December 2009, CSD staff A informed the complainant that she had not provided the business registration certificate of the employer company. The complainant originally intended that she would be released from the institution and work outside on 5 January 2010 (the earliest date under the Scheme) but could not do so because of the above events. The complainant complained against staff A for –

(a) providing her with misleading information, which caused her delay in submitting the application;

(b) not handling her application statement submitted in October 2009 promptly, nor checking the documents that the complainant needed to submit subsequently and causing further delay; and

(c) failing to keep her application for the Scheme in strict confidence and making her application known to other inmates.

The Ombudsman's observations

78. The Ombudsman considered complaints (a) and (c) unsubstantiated and complaint (b) partially substantiated.

79. Newly admitted inmates would be given a prisoners' handbook (the handbook) relating to the Prisoners (Release Under Supervision) Ordinance. Within two weeks before an inmate is eligible for the Scheme, CSD would arrange him/her to meet the superintendent/chief officer and give him/her the handbook. The person in custody concerned is required to reply in a month whether he would like to join the Scheme and CSD management should record his decision or the reason for deferring his decision in his penal record. An eligible inmate who has decided to apply will be given an application form and the relevant information leaflet. The date of submission of a completed application form by the inmate would be considered as the official date of application. Completed applications, after being confirmed by the management of the institution, will be submitted to the Board for consideration within 7 days.

Complaint (a)

80. On 5 June 2009, the management of CSD met the complainant and informed her that she was eligible to apply for the Scheme. They also provided her with a form which reads "The undersigned declared (wish/do not wish/wish to consider) to apply for the Scheme" and the complainant indicated her intent by choosing the item "wish to consider" in the form. CSD considered that the management had clearly informed the complainant of her eligibility and the handbook she received also stated the eligibility criteria of the scheme concerned. The Ombudsman agreed with CSD that Staff A's comments were indeed not the only reference information available to the complainant. Therefore, The Ombudsman considered complaint (a) unsubstantiated.

Complaint (b)

81. The complainant expressed clearly her wish to apply for the Scheme in her statement dated 6 October 2009. Although CSD did not record the date of receipt of the statement concerned, CSD staff A

admitted that she had received relevant documents including that statement in October 2009. The Ombudsman believed that the complainant had submitted her statement soon after 6 October and considered that there was a delay for staff A in providing an application form to the complainant in early November.

82. Regarding the allegation that staff A had not checked against the documents and the complainant subsequently needed to provide the business registration certificate of the employer in December 2009, which caused further delay in processing her application, CSD clarified that the business registration certificate was not a necessary document for the Scheme. The Board had also sent a letter to the complainant on 16 November 2009 informing her that the application was under processing. Therefore, whether staff A had checked against the documents or the complainant needed to provide further documents subsequently did not affect the progress of processing her application.

83. In this regard, The Ombudsman considered complaint (b) partially substantiated.

Complaint (c)

84. According to the complainant, both CSD staff A and B were aware of her application. In October 2009, the complainant had also asked other staff to pass information to staff A. The Ombudsman therefore considered that staff A was not the only person who might have leaked the information. Staff A also denied complainant's allegation. As there was lack of concrete evidence, The Ombudsman considered complaint (c) unsubstantiated.

Administration's response

85. CSD has accepted The Ombudsman's recommendations and taken the following actions –

(a) CSD has promulgated new guidelines on the procedures of receiving documents in relation to the application for the Scheme. Under the new guidelines, all relevant documents received from applicants should be stamped the date and time of receipt with the signature of the staff who receives the document; and

(b) CSD acknowledges the importance of having detailed records on whether the inmates wish to apply for the Scheme. Should persons in custody subsequently change their decision on the application, relevant information will be recorded in the penal record of the concerned person in custody for management's follow up as appropriate.

Correctional Services Department and Department of Health

Case No. 2010/0304 (Correctional Services Department) : (a) Impropriety in conducting vaginal search on the complainant despite her declaration of virginity; (b) Conducting strip search on the complainant in the presence of other inmates; (c) Failing to entertain the complainant's request to see a doctor; and (d) Delay in transferring the complainant to a hospital outside for hymen examination.

Case No. 2010/0971 (Department of Health) : (a) Providing misleading information to the complainant regarding the physical status of her hymen; and (b) Failing to entertain the complainant's request for hymen examination at a hospital outside.

Background

86. Doctors from the Department of Health (DH) stationed at each institution of the Correctional Services Department (CSD) are to provide medical care for prisoners. According to operational guidelines of CSD, if an inmate is sick, the prison management will make arrangements for them to be seen by doctors stationed at the respective institution. The main responsibility of doctors is to provide medical care to ensure the health of the inmates. In deciding whether to refer an inmate to an outside hospital for medical treatment, doctors would exercise their professional medical knowledge, consider the clinical condition and treatment needs, and consider whether the patient could obtain appropriate medical treatment within the institution hospital, etc. If the attending doctor, upon professional judgment, opines that the inmate cannot be medically treated in the institution, the doctor may refer the inmate to outside hospitals for further investigations or treatment.

87. In general, if an inmate is suspected to have suffered from damage of the hymen related to improper vaginal examination by CSD staff, the attending doctor will assess the clinical condition of the inmate and make professional judgments and recommendations. CSD and DH have no special guidelines on how to handle such situations. From a medical point of view, hymen might be born with defect, and would frequently be torn due to movements or accidents. It may be difficult to ascertain the causes.

88. On 18 September 2009, the complainant was sent to a correctional institution (institution A) after sentencing by the court. She was searched by a CSD Officer A (Officer A) in the searching room. Afterwards, the complainant claimed that she had revealed to the officer before the search that she was a virgin. However, Officer A performed vaginal search on her.

89. On 22 January and 18 March 2010, complaints were made to The Ombudsman against both CSD and DH. The Ombudsman grouped the complaints into six items; the first four were directed to CSD, and the remaining two were directed to DH. The complaint items are listed below –

(a) On 18 September 2009, the complainant returned to correctional institution A from the court to serve sentence. She was searched by Officer A in the searching room. While the complainant declared that she was a virgin before the search, Officer A conducted a vaginal search on her;

(b) When conducting the search, the complainant alleged that Officer A did not pull the curtain of the searching room so that other inmates could see her during the strip search;

(c) On 19 September 2009, the complainant told Officer B who was responsible for distributing drugs in institution A that she felt pain in the genital area and requested to see a doctor. However, Officer B just gave her painkillers but did not arrange her to see a doctor;

(d) On 23 September 2009, the complainant was transferred from institution A to another correctional institution (institution B) to serve the sentence. On 6 November 2009, the medical officer of institution B undertook to arrange the complainant to have check-up in a hospital outside. However, not until the complainant sought assistance from a Justice of the Peace on 30 November that CSD arranged her to have check-up in a hospital on 31 December;

(e) On 21 September 2009, when the complainant attended Doctor (A) from DH stationing at institution A, she told Doctor (A) that Officer A had performed a vaginal search on her. She asked Doctor (A) whether her hymen was damaged or not. She

alleged that Doctor (A) only used a torch to look at her vagina and told her that her hymen was there. During the consultation on that day and also on the following day (22 September 2009), she requested Doctor (A) to refer her to an outside hospital. Doctor (A) rejected her request without specific reason.

(f) On 23 September 2009, the complainant was transferred to institution B. On the next day, she consulted Doctor (B) at the institution. She told Doctor (B) that she suspected that her hymen was damaged during the vaginal search by Officer A on 18 September 2009. She requested examination in an outside hospital but Doctor (B) refused.

The Ombudsman's observations – Correctional Services Department

90. The Ombudsman considered complaints (a) to (c) inconclusive and complaint (d) unsubstantiated.

91. According to Rule 9 of the Prison Rules, every prisoner shall be searched on admission. The Medical Officer or an officer authorized by the Medical Officer may search the rectum, nostrils, ears and any other external orifice of a prisoner. The law also provides that the searching of a prisoner shall be conducted with due regard to decency and self-respect. Furthermore, no prisoner shall be stripped and searched in the sight of another prisoner.

92. On 18 September 2009, the complainant alleged that Officer A conducted a vaginal search on her. However, according to CSD's records, as the complainant declared that she was a virgin, Officer A conducted rectum search on the complainant only. Officer A denied conducting a vaginal search on the complainant. On 21 and 22 September 2009, the complainant requested to see a doctor in the hospital of the institution because of perineum pain and the fear that her hymen was damaged because of the search on 18 September, etc. When Doctor (A) of institution A conducted examination of the complainant's vagina on 22 September 2009, he found that her hymen was incomplete but there was no sign of new injury. The Ombudsman has no concrete evidence to prove that Officer A had conducted a vaginal search on the complainant. The Ombudsman therefore considered complaint (a) inconclusive.

93. According to Officer A, she had closed the curtain of the small room of the searching room before conducting search on the complainant. During the search, there were only her and the complainant in the room. Two persons in custody who were searched on the same day claimed that the curtain of the small room was not closed when they were being searched. They could see that other persons in custody were being searched in the searching room. However, the statements of those two inmates could not prove that at the moment of conducting search on the complainant, Officer A had not closed the curtain. Therefore, The Ombudsman considered complaint (b) inconclusive. However, The Ombudsman considered it likely that the staff might not close the curtain properly every time when they conduct searches on persons in custody. CSD should learn from the incident and request staff to strictly comply with the established procedures. CSD responded that in order to enhance the privacy of the searching room of institution A, the curtain at the entrance of the searching room had been replaced by a sliding door since March 2010 to ensure that no inmate would be strip searched in the presence of other inmates.

94. CSD Officer B who was responsible for the distribution of drugs on 19 September 2009 said that she did not distribute any painkillers to the complainant that day. She said the complainant did not request to see a doctor and the complainant did not claim to be feeling unwell. As there were discrepancies between the account of the complainant and Officer B in the absence of independent evidence, The Ombudsman considered complaint (c) inconclusive.

95. On 6 November 2009, the complainant told Doctor (B) of institution B that she had persistent perineum pain and feared that her hymen might have been damaged during search. Doctor (B) subsequently referred her case on the same day to the department of gynaecology of a hospital to follow up of her perineum pain. On 10 November 2009, the hospital concerned faxed a reply slip to institution B informing that an appointment on 31 December 2009 had been arranged for the complainant. Regarding the time required for arranging appointments, CSD clarified that all the medical appointments of outside hospitals were arranged by the hospital concerned. CSD had arranged the complainant to have check-up in a hospital outside before she sought assistance from the Justice of the Peace on 30 November 2009. The Ombudsman therefore considered complaint (d) unsubstantiated.

The Ombudsman's observations – Department of Health

96. The Ombudsman opined that the immate's suspicion of her hymen being damaged after improper search was an important issue. It was also a very serious allegation to the concerned CSD officer. The prison management should investigate the case carefully and thoroughly as soon as possible. It was inappropriate and unsafe for Doctor (A) to be convinced that vaginal search was not performed based on CSD records. Upon the enquiry from the complainant about the status of her hymen, if necessary, Doctor (A) should immediately examine the integrity of the hymen, and determine whether there was any new trauma. Doctor (A) should immediately refer the complainant to an outside hospital for injury examination. During the consultation on the following day, Doctor (A) found that the hymen of the complainant was not fully intact, but this was not explained to the complainant. Doctor (A) explained that he did not discuss the status of the hymen with her because he considered that virginity is determined by mentality and sexual experience instead of the state of the hymen. He highly considered her belief of being a virgin and therefore reassured her that she was a virgin. The Ombudsman considered the explanation was unacceptable. Whilst Doctor (A) might have intended to make the complainant feel better psychologically, however, The Ombudsman opined that Doctor (A) had deprived the complainant's right to know the details. This act might make people think that the doctor intended to mislead the complainant to believe that her hymen was still intact, so that she would no longer pursue the complaint.

97. The Ombudsman opined that when doctors face conflicting claims between the complainant and CSD record and CSD staff, they should immediately perform a medical examination. The doctor should make an independent and objective assessment on the integrity of the hymen.

98. The Ombudsman also opined that the attending doctors should not purely consider the medical need when making referrals. The main concern of the complainant was not her health. The doctors should consider her request for injury assessment. The Ombudsman further opined that the complainant was not referred to an outside hospital could be related to the mind set of DH doctors.

99. The Ombudsman opined that the complainant was very concerned whether her hymen was intact after the orifice search. In fact,

the complainant had persistently inquired doctors whether her hymen was damaged. Therefore, The Ombudsman considered that the allegation made by the complainant was highly credible.

100. The Ombudsman considered the fact that during both medical consultations, the complainant had expressed to Doctor (A) her concerns about possible damage to her hymen after the vaginal search and the worry about her virginity, reflected that Doctor (A) had not given a clear explanation to address the complainant's concerns.

101. Nevertheless, based on the fact that there was no other independent supportive or opposing evidence, it was difficult for The Ombudsman to determine whether the complainant had requested Doctor (A) for an examination in an outside hospital. However, The Ombudsman opined that this point would concern whether Doctor (A) had appropriately addressed the complainant's worries.

102. The Ombudsman opined that it was not appropriate for Doctor (B) not to examine the complainant but only made reference to her medical records and believed that only anal search was performed on her. However, it was again difficult for The Ombudsman to confirm whether the complainant had requested Doctor (B) for an examination in an outside hospital.

Administration's response

103. CSD attaches great importance to the personal safety of persons in custody. If a person in custody is injured, regardless of the location (including the injury resulting from search on external orifice) and seriousness of the injury, CSD will handle and follow up immediately and seriously. If the case involves criminal elements, CSD will report to the Police. CSD has accepted The Ombudsman's recommendations and taken the following actions –

(a) CSD has reviewed the searching rooms of all correctional institutions and confirmed that they are all equipped with sufficient and appropriate facilities to ensure that search on persons in custody will be conducted out of sight of unauthorized persons to protect the privacy of persons in custody. CSD will also remind all staff from time to time of proper procedures for conducting searches and the need to comply with relevant statutory requirements; and

(b) CSD has established mechanisms and procedures to provide guidance for doctors and staff on how to handle injuries of persons in custody and will review the relevant guidelines from time to time to meet operational and practical needs.

104. DH has accepted The Ombudsman's recommendation, and has already alerted doctors at CSD institutions to inform CSD staff and report to their supervisors if they receive complaints related to vaginal search. The doctors will comply with the measures to be made by CSD in response to the recommendations.

Department of Justice

Case No. 2010/0626 : Delay in handling an application for reduction of prison sentence

Background

105. The complainant lodged a complaint with The Ombudsman against the Security Bureau (SB) on 19 December 2008 and 21 January 2009.

106. The complainant alleged that he submitted a petition to the Chief Executive (CE) asking for a reduction of prison sentence in June 2008, which was referred to SB. Since there was no reply after several months, the complainant applied to the court for judicial review on 6 January 2009, seeking a court order requiring CE to release the outcome of his petition immediately. On the 15th of the same month, his petition for reduction of prison sentence was granted by CE.

107. The complainant was of the view that there was delay on the part of SB in handling his petition as it only processed his application and made recommendations to CE after he applied for judicial review. As a result, he was not granted reduction of prison sentence at an earlier date. He therefore requested a review of the case.

108. Noting that the Department of Justice (DoJ) was very much involved in handling the petition, The Ombudsman conducted an investigation into DoJ at the same time and DoJ was included as a complainee department.

The Ombudsman's observations

109. The Ombudsman was of the view that SB had indeed taken follow-up actions promptly upon receipt of the complainant's petition and there was no delay in seeking the advice of the relevant departments. All the relevant departments with the exception of DoJ gave advice about one month later. The DoJ staff handling the complainant's case was not familiar with the Chinese language and translation was required before the relevant documents, including the written petition prepared by the counsel representing the complainant (124 pages in total, in which a

number of complicated factual and legal issues were raised), Chinese statements submitted by the complainant and other prisoners (nearly 20 pages in total), transcripts of the prison disciplinary hearing, court judgments, etc. could be inspected. In addition, DoJ had to confirm the information with the Correctional Services Department and conduct investigation, verification and assessment of the allegations in the petition. For these reasons, The Ombudsman took the view that there was a practical need for DoJ to spend considerable time on conducting a detailed examination and assessment.

110. The Ombudsman considers that there was no evidence indicating that SB or DoJ had delayed in processing the complainant's petition. Although it took the SB as long as seven months to process the complainant's petition, this was not caused by delay on the part of SB or DoJ. There was also no delay in the complainant's date of discharge. The Ombudsman, therefore, considers that the complaint lodged by the complainant against SB and DoJ not substantiated.

Administration's response

111. Both SB and DoJ accept the recommendations from The Ombudsman.

112. SB has reached a consensus on the target timeframe with DoJ and other government departments, and set the general target timeframe as six months after receipt of a referred petition. SB's responsible staff will keep in view the follow-up actions taken by relevant departments regarding petitions for reduction of prison sentence and issue timely reminders. DoJ will provide legal advice on referred petitions for reduction of prison sentence as soon as possible. If it requires more than six months to process a petition which raises complicated facts and issues, SB will keep the petitioner concerned informed of the progress by the end of the six-month target timeframe. DoJ will maintain close contact with SB and keep it informed of the progress.

Drainage Services Department and Home Affairs Department

Case No. 2010/4011 (Drainage Services Department) and 2010/4896 (Home Affairs Department) : Shirking of responsibility and failure to solve flooding problem in a village

Background

113. The complainant was living in a village. He found that the drains connecting his residence and the access of the village were covered. As a result, part of the access road was flooded during rainy seasons. He claimed that he had made a complaint to the Highways Department (HyD). HyD referred the case to the Drainage Services Department (DSD) after a site visit. DSD then referred the case to the Home Affairs Department (HAD). After a site visit, HAD said that it would contact the complainant again, but the complainant never got any response. The flooding problem persisted.

114. The complainant alleged that DSD, HyD and HAD had shirked their responsibilities.

115. According to the Environment, Transport and Works Bureau Technical Circular (Works) No. 14/2004 (the Circular), the responsibility for the maintenance of natural watercourses within private land within village area should rest with the respective land owners. HAD would follow up coordinating actions on receipt of related complaints, and would refer to other departments for follow up as appropriate. If circumstances warranted, HAD would carry out minor improvement works subject to respective land owners' consent being secured.

116. Very often, natural watercourses encompass both private land and government land. According to the Circular, the complaint-receiving department should take up the administrative responsibility. It should refer the complaint to the responsible maintenance department as stipulated in the Circular and escalate the case to a proper level for handling and resolution. It should also keep on communicating with the complainant and issue an interim reply within ten days until the case is referred to the maintenance department for follow up actions.

117. After investigation, The Ombudsman found that DSD received the complainant's telephone call on 17 June 2008 and conducted a joint site visit on 21 June 2008. As the area concerned fell within private land, DSD referred the case to the local District Office (DO) of HAD for follow up actions on 22 July 2008.

118. DO informed DSD on 27 August 2008 that the case was referred to the Lands Department (LandsD) and the Environmental Protection Department (EPD) as the complaint might involve illegal dumping activity. After inspection, EPD replied to DO and DSD in early September that no illegal dumping or pollution problem was detected. Based on the result of EPD's inspection, LandsD then told DSD a few days later that it would not take follow up action.

119. Since the maintenance department had yet to be identified and the rainy season of 2008 (April – September) was almost ending, DSD decided to collect concrete information and data during the rainy season of 2009 with a view to establishing the need to escalate the case to its headquarters. However, it had not informed the complainant of its planned actions at that time.

120. DSD received a referral from a newspaper regarding the same complaint on 23 September 2009. Two days later, HAD received a similar referral from the Development Bureau and was asked to consider whether it was necessary to follow up the case.

121. When DSD conducted a site visit with the complainant on 25 September 2009, its staff told the complainant that the case would be referred to DO for follow up actions since some private land was involved. DO attended a site visit with the complainant on 29 September but had not promised to issue a direct reply to him.

122. After the joint site visit by DSD and DO on 5 October 2009, both departments noticed that the drains of the concerned village access road encroached on private land. Thus the exact position of the drains and its flow direction could not be established. Moreover, DO was neither responsible for maintaining village access roads falling on private land nor for carrying out desilting work of the drains thereat. DSD also assessed that the concerned village access road was susceptible to localized ponding, but not serious flooding, during heavy rainfalls. DSD and DO agreed to monitor the flow condition of the area together. DSD then gave a coordinated reply to the newspaper on 14 October 2009.

123. To take forward the matter, DO subsequently asked DSD to provide a technical assessment of the hydraulic performance of the concerned drains. DSD advised that a new drainage system should be constructed to facilitate proper collection and discharge of stormwater. DO then conducted a search on the private land owners and wrote to seek their consent for carrying out the proposed improvement works in February 2010. DO also appealed to the district councillor and the village representative concerned for assistance. The proposed works have yet to commence since DO had yet to secure all the necessary owners' consent.

The Ombudsman's observations

124. HyD confirmed that it had not received the complaint after checking its files. It was responsible for the construction and maintenance of public roads and associated road facilities. The location in question was not under its purview. The Ombudsman considered the complaint against HyD unsubstantiated.

125. The Ombudsman observed that HAD had already told DSD about its stance when it received the latter's referral in 2008. It had not followed up the case since no further enquiry was received. When HAD received the referral by the Development Bureau in 2009, it had duly followed up with DSD and had tried to seek consent from the private land owners concerned. The Ombudsman considered that HAD had acted properly and considered the complaint against HAD unsubstantiated.

126. When DSD first received the complaint in 2008, it told the complainant that the case would be referred to HAD. But DSD only made the referral one month later. The Ombudsman considered the delayed referral a bit inefficient.

127. DSD, as the complaint-receiving department, should have sorted out the maintenance responsibility according to the Circular. DSD should have kept the complainant informed of the progress until the responsible department was identified.

128. If DSD considered it necessary to observe the drainage situation and collect more data in the coming rainy season before informing the complainant of the planned actions to address the issue and considering to escalate the case to a senior level, it should have advised the complainant, otherwise the complainant would inevitably consider the case not being followed up. Besides, DSD should have told HAD the planned actions as

well. That notwithstanding, The Ombudsman observed that DSD did take follow up actions on both occasions. As such, The Ombudsman concluded that DSD had not shirked responsibility but had delayed in giving replies.

Administration's response

129. DSD and HAD have accepted The Ombudsman's recommendations and have taken/ are taking the following actions –

DSD

(a) DSD has been working closely with HAD to combat the flooding and observed that the flooding situation has improved after implementing some temporary measures. DSD will install a new drain to eradicate the flooding problem. Despite the failure to contact the complainant by phone, DSD had deposited a letter with contact telephone number to his last known address informing the complainant the latest development of the case and concrete measure to address the issue. DSD would keep the complainant posted when there is further progress in the matter;

(b) DSD and HAD agreed that DSD would report the progress of the case to the complainant; and

(c) DSD has impressed upon all staff concerned that all complaints must be dealt with expeditiously, positively and vigilantly as stipulated in the departmental guidelines. All team leaders concerned were also reminded to provide regular coaching to their subordinates to provide quality services meeting the expectation of the public.

HAD

(d) HAD has already met with DSD and confirmed that the latter would report progress of the case to the complainant. DO has maintained close dialogue with DSD to keep track of the development of the proposed drainage improvement works. DO is also following up on a different alignment on provision of drainage improvement works proposed by DSD by seeking owners' consent on those parts encroaching private land.

130. DSD monitored the flooding situation at the location concerned between March and May 2011 and observed that the overland flow at times of heavy rainfall was normal. No blockage in village drains nor flooding incidents were reported in the period. In the course of monitoring, DSD discovered a road side channel near the location concerned. DSD then contacted DO proactively and a meeting was held on 3 June 2011 to discuss the findings regarding the said road side channel. Based on the observation on site, DSD was of the view that the said road side channel was surrounded earlier by a hoarding which adversely affected its drainage efficiency. As the hoarding has been removed, the said road side channel could serve to alleviate the overland flow under heavy rainfalls. Nevertheless, DSD and DO will continue to take follow up actions on the complaint case and DO will seek the necessary owners' consent for early commencement of the proposed drainage improvement works.

Equal Opportunities Commission

Case No. 2009/3496 : Unreasonably terminating legal assistance to the complainant

Background

131. The complainant, a public officer, considered his department to have discriminated against him on account of his marital status. The department had refused to grant him overnight on-call allowance because he was single. He complained to the Equal Opportunities Commission (EOC) and applied for its legal assistance to seek the department's admission of unfairness in its policy, change of the policy and nominal monetary compensation to him.

132. The department subsequently changed its policy on granting of the allowance, thereby eliminating the alleged discrimination. EOC believed that the "policy objective" of the requested legal assistance had thereby been achieved. The Commission terminated its legal assistance to the complainant. He found EOC's decision unreasonable, as the Commission had not followed up on his demands that the department admit its fault and pay him compensation.

133. The Legal Service Division (LSD) of EOC had circulated a paper on the complainant's application for legal assistance to the Commission's Legal and Complaints Committee (LCC) for consideration. LCC approved the complainant's application with the "policy objective" of motivating the department concerned to implement a new policy so as to eliminate the discrimination promptly.

134. According to the "Agreement of Legal Assistance" signed by the complainant, EOC had the discretion to change its mode of assistance or even terminate its assistance on reasonable grounds. EOC staff had also made clear at a meeting to the complainant that EOC would consider instituting legal proceedings on his behalf only if his department failed to implement the new policy within a reasonable time.

135. The department subsequently implemented its new policy. Instead of continuing to demand the department to admit its fault, the complainant sought substantive monetary compensation from the department. EOC suggested an amount for his claim. However, the

Commission also explained to him that the decision on whether EOC would institute legal proceedings on his behalf rested with LCC. Eventually, LCC decided to terminate the legal assistance to the complainant on the grounds that the "policy objective" had already been achieved, that the department's policy was not directed against individuals and that the complainant could seek compensation through other avenues.

The Ombudsman's observations

136. When the complainant applied for EOC's legal assistance, he not only sought a policy change but also wanted the department to admit its fault and give him compensation. Though the initial amount claimed was nominal, his intention to seek compensation was obvious. LSD's paper to LCC did mention the complainant's three demands. However, its focus was only on his expectation that the policy be changed. The Ombudsman considered that the EOC had not taken his two other demands seriously.

137. EOC argued that it had verbally explained to the complainant the "policy objective" set by LCC. Nevertheless, while knowing that the complainant had asked for compensation, which was not covered in the "policy objective", EOC had never made this clear to the complainant in writing. This amounted to maladministration.

138. The Ombudsman noted that when the complainant subsequently sought substantive monetary compensation, LSD provided legal advice to him and even represented him in an attempt to seek compensation from the department, LSD then passed the case to LCC to decide whether EOC should institute legal proceedings on the complainant's behalf. This could be regarded as a remedy for not having handled his other two demands seriously. It was after thorough consideration that LCC decided to terminate the legal assistance. There was no impropriety from the administrative perspective.

139. In this light, The Ombudsman considered the complaint partially substantiated.

Administration's response

140. The EOC has accepted The Ombudsman's recommendations and reported the findings and recommendations of The Ombudsman to LCC and the EOC Board. In response to the recommendations by The Ombudsman, it was decided at the 97th LCC meeting on 21 June 2010 that with effect from the meeting date –

(a) discussion papers for LCC meetings on applications for legal assistance would give appropriate coverage to all aspects of the demands of applicants, including requests for compensation and apology, if any; and

(b) the applicants would be informed of the purpose and scope of assistance in the notification letter should their applications for legal assistance be granted.

Food and Environmental Hygiene Department

Case No. 2009/2176 : Delay in handling prosecution work concerning a food complaint case

Background

141. The complainant was the person-in-charge of a fast food shop. In June 2008, she was prosecuted by the Food and Environmental Hygiene Department (FEHD) for the suspected sale of a take-away lunch box containing the remains of a mouse to a student. In March 2009, the complainant appeared in the court and entered a plea of not guilty. The case was then adjourned to June.

142. During the period between January and March of the same year, the complainant alleged that staff of FEHD had intimidated her into pleading guilty in two telephone conversations. In May of the same year, the complainant was notified by FEHD of their decision to dispose of the case by way of offering no evidence but she still needed to appear before court on time. It was learnt that FEHD had decided not to charge her because the student concerned had to take an examination and refused to testify in court.

143. The complainant believed that FEHD had brought a charge against her without reasonable grounds and had delayed in handling the case which rendered the case dragged on for almost a year, causing her serious mental stress and the closure of her fast food shop. She considered that if there was sufficient evidence to sue her, FEHD could ask for postponement of trial rather than dismissal of the charge against her based on the reason that the student could not appear in court due to examination. She was aggrieved and decided to lodge a complaint with The Ombudsman on 10 June 2009.

The Ombudsman's observations

<u>Court Proceedings</u>

144. The Ombudsman pointed out that according to The Ombudsman Ordinance, the commencement or conduct of any proceedings, whether civil or criminal, before a court of law in Hong

Kong, including any decision whether or not to prosecute any person for an offence, was an action not subject to investigation by The Ombudsman. Therefore, The Ombudsman had no power to investigate FEHD's decision to take prosecution action against the complainant and would not comment on whether there was reasonable ground to prosecute. Furthermore, proceedings commenced when the court issued a summons on 6 December 2008. Subsequently, the decision to adjourn the case and the setting down of a date for hearing were all court proceedings in which The Ombudsman had no power to intervene.

Intimidation of the complainant

145. The complainant said that staff of FEHD had called to intimidate her between January and March 2009 to make her plead guilty, whereas the officer in question had denied such an allegation. Given that this matter might involve the perversion of the course of justice, which was a criminal offence, The Ombudsman pointed out that they were not in a position to intervene. Should there be any concrete evidence, the complainant should seek assistance from the Police.

Delay in handling the case

146. Generally speaking, FEHD had investigated this food complaint case according to the established policy and guidelines and has initiated prosecution within the six-month statutory time limit for prosecution. However, during investigation, staff of FEHD did not perform perfectly well in respect of file delivery. Despite this, The Ombudsman considered that this had not adversely affected the progress of the investigation. Nonetheless, the staff should handle every prosecution case cautiously and in a timely manner, and must not take it lightly in order not to cause hindrance to the proceedings or worry or anxiety to the parties involved.

147. Regarding the complainant's allegation that the matter had dragged on for almost a year as FEHD delayed in handling the case, the fact is that the case was originally scheduled for trial on 6 January 2009 but the complainant was absent on that day so the court deferred the trial to 17 March 2009 for the complainant's plea. On the plea day, the complainant entered a plea of not guilty and the court adjourned the case to 2 June 2009 for trial. Although FEHD subsequently offered no evidence, the complainant still had to appear in court on 2 June 2009. Such proceedings are consistent with those when a court handles any other cases. FEHD should not be blamed. The Ombudsman

considered the complaint unsubstantiated.

Administration's response

148. FEHD has accepted the recommendation of The Ombudsman. It has incorporated the improved procedures for dispatching documents into the departmental operational guideline, which was issued to all District Environmental Hygiene Offices for adherence via email on 7 June 2010.

Case No. 2009/2412 : Failing to apply for postponement of hearing with regard to a food complaint case such that the complainant's daughter was deprived of the right to testify

Background

149. In June 2008, the complainant's daughter found a dead rodent in a lunch box she had bought from a fast food shop near her school. The school reported this to the Food and Environmental Hygiene Department (FEHD) on her behalf. After investigation, the Department decided to institute prosecution against the fast food shop. However, the complainant's daughter had a public examination on the day scheduled for hearing of the case and would, therefore, be unable to appear in court to give evidence.

150. In April 2009, the complainant's daughter asked over the telephone for postponement of the hearing. The FEHD health inspector who contacted her (Inspector A) told her to provide a written statement with documentary proof so that he could apply to the court for a postponement. In May, Inspector A called the complainant, saying that there appeared no actual clash between the hearing and her daughter's examination and so her need to attend the examination was not a valid reason for not testifying. Upon his advice, the complainant's daughter submitted a statement indicating that in order to focus on her examination, she would rather not attend the court hearing to give evidence.

151. Upon receipt of the statement, Inspector A called the complainant several times, asking her whether her daughter would indeed not testify in court. He further indicated that her daughter might be prosecuted if she failed to appear in court to testify. In the end, FEHD did not apply for a postponement of the hearing. Moreover, it decided to offer no evidence against the owner of the fast food shop. Consequently, the complainant's daughter was unable to testify in the case, and was even alleged to be dodging the duty to appear in court to give evidence. The complainant considered that FEHD was insensitive to her daughter's situation and had mishandled the case.

152. The complainant's daughter initially agreed to give evidence in court when Inspector A took a statement from her upon receipt of the food complaint. Later in April 2009, she informed him that she would not be able to do so because of a public examination and had requested a postponement. However, she only provided a statement but not the

documentary proof required. Inspector A later learned through her school that the examination would only start at 6 pm. Since the hearing was to be held in the morning, he considered that there was no clash of time. He asked the complainant's daughter again in May to clarify her intention. The complainant's daughter then decided not to give evidence in court, but verbally asked him again to apply for a postponement of the hearing. Nevertheless, in the written statement to FEHD afterwards, she just said that she was unwilling to testify in court and did not ask for re-scheduling of the hearing. As the complainant's daughter was a key witness, a conviction would be unlikely without her. FEHD, therefore, decided to offer no evidence against the defendant and the case was closed.

153. Inspector A denied having commented on whether the need to attend the examination was a valid reason for absence from court. Neither had he asked the complainant's daughter to give a misleading statement. Since she had once agreed to testify in court, it was correct for him to seek clarification of her intention and alert her of possible consequences of unjustified absence.

154. FEHD considered the staff to have complied with established procedures and guidelines and handled the case properly, although they might need to pay more attention to their communication skills in dealing with the public.

The Ombudsman's observations

155. Although the complainant's daughter did not make a written request for postponement, she did write down in her April 2009 statement that she was "willing to appear in court to testify". She could not do so only because of the examination. Moreover, she had also verbally asked Inspector A in April and May to apply for re-scheduling of the hearing. Her intention to testify could not have been clearer. As a matter of fact, a written explanation by the witness concerned is not required for such applications. The onus of making such applications to the court actually is on FEHD. Inspector A's decision to offer no evidence upon receipt of her statement in May gave an impression that he was unhelpful and he only wanted to wrap up the case quickly. It also cast doubt on the Department's determination to institute prosecution.

156. To ask a student to testify in court on examination day before taking an examination would indeed create psychological pressure on the

candidate. It was inconsiderate and unreasonable of Inspector A to think that the complainant's daughter could give evidence in court before her examination just because there was no time clash between them.

157. Overall, FEHD failed to discharge its prosecution duty conscientiously and showed little consideration for the complainant's daughter. The Ombudsman, therefore, considered the complaint substantiated.

Administration's response

158. FEHD has accepted The Ombudsman's recommendations and taken the following actions –

(a) FEHD's Training Unit arranged professional training courses in July 2010 for the Health Inspectors of the Food Complaint Unit in order to improve their communication skills and enhance their understanding of their role as law enforcers so as to assist the Court to find out the truth of the cases.

(b) FEHD would re-circulate the procedural guidelines on handling food complaint as well as relevant instructions to staff on a regular basis and closely monitor their performance; and

(c) FEHD would also conduct refresher courses for staff if necessary to ensure that they would protect public interest, maintain justice and also provide good services in discharging their duties.

Case No. 2009/4820 : Failing to give the complainant a specific reply on completion of investigation of her food complaint

Background

159. The complainant reported to the Food and Environmental Hygiene Department (FEHD) that a can of luncheon meat which she had bought from a supermarket contained some unidentified black substances. Suspecting that the food was unhygienic and unfit for consumption, she asked the Department to follow up.

160. The Centre for Food Safety (CFS) under FEHD sent her a reply afterwards, stating that "the black substances were two lumps of black matter… with protein, which was the main component of the food". However, CFS did not confirm whether the luncheon meat was hygienic and fit for consumption.

161. FEHD explained to The Ombudsman that the complainant had not raised doubts, when reporting the case, that the luncheon meat was unhygienic and unfit for consumption.

162. FEHD had sent the food specimen provided by the complainant to the Government Laboratory for analysis of foreign substances. The test report confirmed that the black substances contained protein, which was the main component of the luncheon meat. CFS then wrote to inform the complainant of the test result.

The Ombudsman's observations

163. As to whether the complainant had told FEHD staff her suspicion that the luncheon meat was unhygienic and unfit for consumption when she reported the case, the complainant and FEHD held different versions. In the absence of independent corroborative evidence, The Ombudsman could not comment.

164. Nevertheless, when members of the public report a food complaint case to FEHD, it goes without saying that the Department is expected to state after investigation whether the food is safe for consumption.

165. In this case, FEHD argued that the complainant had not queried

whether the luncheon meat was unfit for consumption. Consequently, FEHD only told her that both the black substances and the luncheon meat contained protein, without confirming whether the black substances were foreign matters and whether the luncheon meat was fit for consumption. FEHD had indeed handled the complaint carelessly.

166. Moreover, as regards whether the luncheon meat was fit for consumption, it was only after The Ombudsman's intervention that CFS conducted other tests to arrive at a comprehensive conclusion. Obviously, there were inadequacies in its initial analysis of the food specimen for foreign substances.

167. Against this background, The Ombudsman considered the complaint substantiated.

Administration's response

168. FEHD has accepted The Ombudsman's recommendations. They have completed a review on the testing items and parameters for cases involving food with suspected foreign substance. The following enhanced procedures have been added to the procedural guidelines –

(a) In determining the purpose of the analysis and testing parameters for the food specimen under complaint, FEHD would consider the nature of the complaint, the information provided by the complainant and food safety issues before deciding on the test(s) to be conducted and sending the specimen to the Government Laboratory, Pest Control Advisory Section or Public Health Laboratory Service Centre under the Department of Health for chemical analysis of the nature of the foreign substance, rodent/entomological identification or bacteriological examination respectively. If necessary, FEHD staff will seek expertise advice from its Senior Chemist (Food Chemistry) or Head (Risk Assessment Section) for carrying out other tests.

(b) In order to let the complainant fully understand the progress of the complaint, upon the receipt of the result, FEHD staff would give a verbal reply to the complainant explaining the details of the result of the examination and stating whether the food under complaint is safe for consumption or otherwise. FEHD would issue a written reply to the complainant within 21 days upon receipt of examination results.

Case No. 2010/1600 : (a) Failing to address properly the problem of some stall operators taking possession of the communal seating in a cooked food market; and (b) Condoning such malpractice which stifled the complainant's business, and unreasonably refusing to compensate him for his loss

Background

169. In November 2008, the complainant rented a stall in a cooked food market (the Market) under the Food and Environmental Hygiene Department (FEHD). Shortly afterwards, he complained to FEHD that other stall operators had taken possession of the communal seating in the Market, leaving only one table for his customers. His complaint was, however, not properly handled by the Department and the problem remained. He alleged that FEHD had condoned such behaviour and he eventually had to close his business at the end of January 2009. He sought compensation from FEHD but was unreasonably refused.

170. Since 2000, FEHD has been providing communal seating in its new cooked food markets.

171. In the Market, there were 13 stalls. FEHD had informed all stall operators of the communal seating arrangement when they signed the tenancy agreement. Moreover, the Department had told them not to place any articles outside the boundary of their stalls. Between mid-2008 and mid-2010, the management of the Market was outsourced to a contractor, whose performance was monitored by FEHD.

172. In mid-November 2008, the complainant complained to the contractor that other stall operators had taken possession of the communal seating. The contractor told him that notices had been posted in the Market to remind stall operators of the communal seating arrangement.

173. At the end of December 2008, the complainant notified FEHD that he had decided to close his business and terminate his tenancy at the end of January 2009. Meanwhile, in response to a similar complaint that he had lodged with the media, FEHD and the contractor took a number of follow-up measures, such as distributing and posting notices in the Market and stepping up inspections.

174. Since February 2009 (i.e. after termination of the tenancy), the

complainant had complained to the Chief Executive's Office repeatedly, alleging that FEHD had mishandled the problem of stall operators taking possession of the communal seating. He demanded FEHD to refund him his rent as compensation. Between March and June, FEHD and the contractor conducted a number of inspections in the Market and found that some stall operators had placed articles on communal seating and in common areas. The contractor subsequently issued verbal warnings to those operators and again posted notices. Further surprise inspections did not reveal similar problems.

175. After The Ombudsman's investigation commenced, a Senior Health Inspector of FEHD conducted an inspection in the Market in June 2010. He found a stall operator occupying a communal table for display of food. Moreover, tables and chairs had been set up in a vacant stall. The Senior Health Inspector issued verbal warning to the operators concerned on the spot and directed the contractor to follow up.

176. FEHD explained that stall operators could "coordinate among themselves" regarding the use of the communal seating to suit their businesses and customers. FEHD would take immediate action if there were complaints about stall operators taking possession of the communal seating.

177. FEHD rejected the complainant's claim for compensation on the grounds that he had already used the stall and he had been apprised of the communal seating arrangement when he signed the tenancy agreement.

The Ombudsman's observations

178. The Ombudsman's investigators visited the Market thrice during peak hours in May, August and November 2010 and found the following evidence –

(a) Stall operators placed their own crockery, cutlery and menus on the communal tables in front of their stalls. They indicated to potential customers that those tables were exclusively for their own customers;

(b) A stall operator displayed food on the communal tables in front of his stall; and

(c) Another stall operator had laid tablecloths and placed crockery and cutlery on some communal tables.

The Ombudsman's Comments

179. On the one hand, FEHD had made it loud and clear that the Market ran a communal seating system. On the other hand, the Department allowed stall operators to "coordinate among themselves" regarding the use of the communal seating. This indicated that the Department was indecisive and ambivalent about seating arrangement in cooked food markets.

180. The Ombudsman's inspections confirmed that some stall operators in the Market had taken possession of the communal seating and this might well have become a customary practice. Communal seating arrangement in the Market existed in name only and yet staff of FEHD and the contractor were all along "unaware" of the abuse. This incident revealed that FEHD had been relying too much on the contractor and failed to discharge its own management responsibility.

181. In the light of the above, The Ombudsman considered allegation (a) on failing to address properly the problem of some stall operators taking possession of the communal seating in a cooked food market substantiated.

182. The premature closure of the complainant's business could be due to various factors. The Ombudsman could not ascertain whether it had been caused by FEHD's mismanagement of the Market. The Ombudsman, therefore, considered allegation (b) on condoning such malpractice which stifled the complainant's business, and unreasonably refusing to compensate him for his loss inconclusive.

183. Overall, the complaint was partially substantiated.

Administration's response

184. FEHD has accepted The Ombudsman's recommendations and conducted a comprehensive review of the communal seating arrangement in cooked food markets. At present, the communal seating arrangement is implemented in 45 of the 64 cooked food centres / markets under the FEHD's management. FEHD considers that there is a need to maintain this arrangement. In order to enhance the relevant arrangements, FEHD

has taken the following measures –

(a) a specific clause has been incorporated into the tenancy agreement against illegal occupation of the communal seating for exclusive use by any tenant. The tenancy clause provides that "The communal seating of cooked food centres and cooked food markets is provided for the shared use of all customers. The tenant shall not in any manner occupy the communal seating for the exclusive use of his/her stall.";

(b) notices have been displayed at conspicuous places of the cooked food centres / markets to heighten the awareness of the patrons and the operators on proper use of the communal tables and chairs and to encourage report of abusive occupations. The wording of the notice is as follows: "The communal seating of this cooked food centre / market is provided for the shared use of all customers and is not for the exclusive use of any one stall. In case of any abusive occupation of the communal seating, please report to the Food and Environmental Hygiene Department (Telephone Hotline: 2868 0000)."; and

(c) whenever a vacant cooked food stall is let out, the venue management staff of FEHD will call upon all tenants to a meeting reminding them of the provision of communal seating in the cooked food centre / market concerned which is for the shared use of all customers and not for the exclusive use of any one stall.

185. As for the other 19 cooked food centres / markets where stalls have their own designated seating, FEHD considers that there is no need to introduce the communal seating arrangement on these premises, having regard to the views of the relevant tenants, site situation and facilitation to the tenants and their customers.

186. FEHD has reminded its district management in November 2010 to monitor closely the work of its frontline inspection staff and to step up investigation and enforcement action.

Government Secretariat –
Chief Secretary for Administration's Office Efficiency Unit,
Leisure and Cultural Services Department
and Lands Department

Case No. 2010/1847 (Efficiency Unit), 2010/1849 (Leisure and Cultural Services Department) and 2010/3802 (Lands Department) : Delay in handling a complaint about road repair works

Background

187. The complainant lodged a complaint with the 1823 Call Centre (Call Centre) under the Efficiency Unit (EU) about waterlogging at some sunken surface of a footpath leading to a playground (the Footpath). The case was subsequently referred to the Lands Department (LandsD), the Leisure and Cultural Services Department (LCSD), the Drainage Services Department (DSD), the Home Affairs Department (HAD), the Highways Department (HyD) and the Food and Environmental Hygiene Department (FEHD) for follow-up action. The problem dragged on for several months but none of the departments took up the repair responsibility.

188. In February 2010, the complainant complained to DSD about waterlogging on the Footpath. DSD staff conducted a site inspection and identified the sunken surface on the Footpath to be the source of trouble. Since it was not a drainage problem, DSD referred the complaint to HyD and HAD. Both departments later responded and denied repairs responsibility. DSD then referred the case to LandsD.

189. LandsD indicated that it had received another complaint of flooding at the same location in March 2009. Having re-examined the land grant documents concerning the playground, LandsD confirmed that it was LCSD's responsibility to repair and had referred the case to the latter for follow-up actions. LandsD received no response from LCSD, but its staff conducted two site visits in October 2009 and March 2010 and found no flooding on the Footpath. LandsD had assumed that LCSD had fixed the problem and subsequently closed the file.

190. In April 2010, the complainant lodged the same complaint with the Call Centre. The Call Centre first referred the case to HyD and then LandsD, HAD and LCSD for follow-up actions. On receipt of the case, the District Lands Office (DLO) of LandsD had been cooperating with

the Call Centre in identifying the responsible departments. As the LandsD staff concerned was not the one who handled the complaint received in 2009, he was not aware that LCSD was responsible for the repairs. Thus, the staff concerned suggested that the Call Centre refer the case to HAD and HyD.

191. Since none of the departments came forward to take up the repairs responsibility in May and June, the Call Centre requested the complaints officers of the departments concerned to intervene and handle the case. Finally, LandsD pointed out to LCSD the land grant provisions of the playground, which stipulated that the latter should be responsible for the repairs of the Footpath. In August, LCSD completed the repair works.

192. LCSD explained that upon receipt of LandsD's referral in 2009, it had sent a memorandum to LandsD in June to seek further information to confirm whether the Footpath was within the perimeter of the land granted for the playground. However, LCSD had received no reply from LandsD and LCSD's staff had not followed up the case due to heavy workload. Besides, LCSD's staff had an inadequate understanding and knowledge of the land grant provisions and failed to thoroughly check the land grant records. The staff had wrongly believed that the Footpath was outside the purview of LCSD because it was not included in the allocation plan of the playground. That had resulted in delay in the repairs of the Footpath.

193. The Call Centre noted that its staff had followed the internal guidelines and considered the information provided by the complainant. Since none of the departments accepted the responsibility, the Call Centre requested the management of the departments concerned to intervene and handle the case. Meanwhile, the Complaint Handling Team of the Call Centre conducted a case analysis and collation and worked with the departments concerned. So, the Call Centre had been proactive in referring the case, monitoring its progress as well as escalating it to the management level of departments.

The Ombudsman's observations

194. The Ombudsman's investigation discovered that staff of the Call Centre had assigned different file numbers to the same complaint by the complainant and made multiple internal referrals without knowing that the case had already been escalated to the management of the

departments concerned. The staff members had merely made guesses on which department should be responsible based on information the complainant provided. Moreover, the Complaint Handling Team had failed to discharge its function of collating and analysing cases for efficient resolution of complicated or cross-departmental complaints. As such, The Ombudsman considered the complaint against EU substantiated.

195. The Ombudsman found that apart from its misunderstanding of the land grant provisions, LCSD had failed to consider the interests of the playground users or followed up with the referral from LandsD in 2009. The complaint against LCSD was, therefore, substantiated.

196. The Ombudsman considered LandsD to have hastily closed the case as its site inspections in 2009 and 2010 should not be able to confirm whether LCSD had completed the repair works at that time. Moreover, upon receipt of the complaint in 2010, LandsD staff had not carefully examined the material on file and overlooked the relevant land allocation information therein. As a result, the staff had not asked LCSD to follow up the complaint but suggested the Call Centre refer the matter to HyD and HAD, which had earlier already expressed that they were not responsible. This had reinforced the impression of shirking of responsibilities among departments.

197. Overall, The Ombudsman considered LandsD to have acted perfunctorily in handling the present case and that the complaint against LandsD was substantiated.

Administration's response

198. EU has accepted The Ombudsman's recommendations. The Call Centre has implemented a series of measures to improve work procedures to enhance complaint handling efficiency and service level. The measures include the launch of a mobile application to leverage on technology, so that members of the public and the Call Centre can identify a location under complaint more easily and accurately. EU is also planning for the replacement of the Call Centre systems. The new system will have better tracking, linking and referencing functions to help address issues raised by The Ombudsman and enable the Call Centre to continue to improve its services to the public. In addition, the Call Centre will continue to implement an intensive quality assurance programme, which includes on-going staff training, monitoring of call

and email handling, conducting customer satisfaction surveys and review of the knowledge base. With regard to The Ombudsman's recommendations, EU has taken the following actions –

(a) To help staff identify repeated complaints in a timely fashion, the Call Centre has reviewed the complaint handling procedures and revised the existing system. Staff are now required to ask the caller if the complaint is a repeated case, and the answer from the caller must be recorded in the system. The Call Centre has also reminded staff again that repeated complaints on the same subject from the same complainant should be treated as one case and consolidated for processing.

(b) To improve the communication between the Complaint Handling Team and frontline staff, when a complaint is escalated to departmental management for resolution, the Complaint Handling Team will make a remark in the case so that frontline staff will be informed of the latest position. If the complainant enquires about the case, frontline staff will inform the complainant that the Call Centre is discussing follow-up action with departments and will reply him/her after having further information.

(c) The Call Centre has strengthened staff training and stressed again in internal briefings the need to provide accurate information according to the knowledge base when handling enquiries and complaints. If information is not available in the knowledge base, the staff should record the case details and consult supervisors or departments before replying the complainant.

(d) According to the existing guidelines, staff are required to identify themselves as "1823 staff responsible for answering departmental hotlines". If a staff is not familiar with the respective functions of departments and an internal call transfer is required, it is necessary to give a brief account of the case to the next call handling staff. Since there was confusion in communication in this case, the Call Centre has reviewed the arrangement for internal call transfers. Apart from reminding staff of the above requirements, the Call Centre has established new guidelines to limit the number of internal call transfer to one time only. If the staff is unable to handle the enquiry or complaint after call transfer, he/she should record the case

details and seek help from supervisors or departments concerned before following up with the caller.

(e) The objective of setting up the Complaint Handling Team in the Call Centre is to better handle the more complex or cross-departmental complaint cases. The tasks of the Team include liaising with departments to clarify arrangement for complaints where responsibility is unclear, monitoring and taking follow-up action on overdue cases, and consolidating and analysing complaints. With regard to consolidating cases, the improvement measures of revised work procedures and system settings require staff to ask the caller if the complaint is a repeated case and to treat repeated complaints on the same subject from the same complainant as one consolidated case for processing, would help reduce the chance of opening repeated files on the same complaint. Also, when escalating a complaint to departmental management for resolution, the Complaint Handling Team will check if there are repeated cases. The Call Centre has also reminded frontline staff that they should inform the Complaint Handling Team if replies from departments indicate that the same complaint has been received from a different complainant.

199. LCSD has accepted all recommendations proposed by The Ombudsman. The improvement measures detailed below have been implemented –

(a) A review on the land grant provisions and the allocation plans for all the recreation venues in the district has been conducted. The file management system has been improved to ensure outstanding cases would be brought up at regular intervals to monitor the progress. Guidance for staff on how to handle cases involving land grant provisions has been enhanced. District Leisure Manager is required personally to handle cases involved land issues. A database for records of allocated lands has been set up.

(b) For gazetted venues with incomplete information and record on land grant provisions and plans, LCSD will continue to seek assistance from the LandsD to gather the missing information/record/plan.

(c) To ensure similar case will not occur in other districts in the New Territories, LCSD has drawn the attention of the district heads to adopt the measures detailed in (a) and (b).

200. LandsD has accepted The Ombudsman's recommendations and has implemented the following actions–

(a) Generally speaking, when a plot of land is allocated to a government department, the land grant provisions, plans and other related information of the land are also handed over to the department for record. In handling the present case, the relevant DLO had, on the request of LCSD, provided the department with land information of 40 recreation venues in the district under its purview. As for the other two recreation venues, the relevant records were not available and the land grant provisions and plans would have to be processed again. The case is now being followed up by the concerned DLO.

(b) A review of the existing record management system was conducted and the following guidelines have been issued to the clerical staff concerned –

(i) before a complaint file is created, a detailed check should be conducted by using the Bar-coding File Management System (BCFMS) to find out if there are any duplicated or related complaints files;

(ii) if a file has been created for the same complaint, the officer responsible for the case should be consulted as to whether it is necessary to create a new file for the new complaint or if the relevant information should be incorporated into the existing file;

(iii) after searching the BCFMS records, all information found relevant to the complaint should be printed and filed for the reference of the officer responsible for the case; and

(iv) consistent file indexes should be used whenever a new complaint file is created.

LandsD will continue to review the filing system from time to time so as to further improve the record management system and procedures.

(c) In April 2011, a memorandum was issued to remind staff to display initiative and handle each complaint carefully. On 12 July and 28 July 2011, seminars were organised by the Training Section for all land control staff to enhance their knowledge about complaint handling procedures and approach with a view to providing the public with more effective service.

Government Secretariat –
Commerce and Economic Development Bureau

Case No. 2009/3954 : (a) Unclear advice given by the Travel Agents Registry on whether the complainant had to apply for a travel agents license and how to organize study tours legally; and (b) Disparity in treatment by TAR of the complainant and another organization

Background

201. According to the Travel Agents Ordinance (Cap. 218) (the Ordinance), any person who carries on the business of a travel agent in Hong Kong is required to apply for a Travel Agents Licence (the licence).

202. The complainant called the Travel Agents Registry (TAR) hotline several times in recent years to enquire whether it is necessary to obtain the licence for operating study tours and how to apply for it. The TAR staff replied each time that the complainant had to become a member of the Travel Industry Council of Hong Kong (TIC) before applying for the licence. However, TIC was of the view that the complainant was not eligible for TIC membership as his core business was not related to travel service. The complainant thus followed TIC's suggestion to collaborate with a licensed travel agent to operate study tours.

203. In April 2009, TAR received a report that the complainant operated study tours without a licence. TAR contacted the complainant in May 2009 to find out the particulars of those tours. As TAR suspected that the complainant might have contravened the Ordinance, TAR referred the case to the Police in June 2009 for follow-up action.

204. The complainant was dissatisfied that TAR failed to provide clear advice on whether the complainant required a licence to operate the study tours. Moreover, between 2005 and 2008, the complainant operated the study tours jointly with another organisation (the other organisation), and TAR had never reported to the Police that the other organisation might have contravened the Ordinance. The complainant considered that TAR was unfair in handling the matter.

The Ombudsman's observations

205. TAR did not keep any record of hotline enquiries before 2010. Therefore, it could not provide information to The Ombudsman on whether the complainant had made the alleged telephone enquiries in or before 2009, or the contents of such enquiries. The Ombudsman could not determine the particulars due to the absence of such supporting evidence. The Ombudsman did not make any conclusion on complaint (a) but considered that there were other aspects of inadequate handling on the part of TAR.

206. Since TAR failed to maintain records of public enquiries, when there are disputes it will be difficult to gather the facts. TAR also cannot accumulate experience in handling such matters. This is inadequate. The key functions of TAR include issuing licences, regulating travel agents and handling enquiries and complaints. TAR staff should provide clear explanation on the relevant requirements when responding to enquiries on how to operate study tours legally and whether a licence is required. TAR has failed to provide clear guidelines and information to its staff for handling such enquiries.

207. With regard to complaint (b), TAR advised that, between 2005 and 2008, it had not received any report against the other organisation for carrying on the business of a travel agent without a license. Furthermore, upon investigation there was no evidence indicating that the other organisation had engaged in any activity in breach of the Ordinance. However, the information obtained by TAR when enquiring into the complainant's operations in May 2009 led it to suspect that the complainant might have contravened the Ordinance. It therefore referred the case to the Police for further investigation. To avoid interference in the Police investigation, TAR will not normally notify the suspected persons/organisations about the referral unless the Police have given prior approval. The Ombudsman accepted TAR's explanation and determined that complaint (b) was unsubstantiated.

Administration's response

208. TAR noted The Ombudsman's observation and comments and has implemented the following improvement measures on their own initiative –

(a) maintaining records of all hotline enquiries for future reference, including the time of call, callers' names (provided on a voluntary basis), contents of the enquiries, replies given and identity of the handling staff. Reference and publicity materials for frequently asked questions are also prepared and made available to the public;

(b) consolidating and updating the contents of Q&As and relevant information regularly; and

(c) reviewing the general arrangements for handling telephone enquiries and submit the findings to the Advisory Committee on Travel Agents for their comments regularly for on-going service improvement.

Government Secretariat – Labour and Welfare Bureau

Case No. 2009/4463 : Unreasonably rejecting an application for Registration Card for People with Disabilities

Background

209. The complainant had had poliomyelitis for over 50 years. In 2004, upon his application to the Central Registry for Rehabilitation (CRR) under the Labour and Welfare Bureau (LWB), he was issued a Registration Card for People with Disabilities (the Card).

210. In 2009, the complainant applied for a renewal of his Card. However, CRR asked him to provide a recent medical certificate. Since he had no need for medical services for years, he was unable to provide one. He considered the medical certificate that he had submitted in his first application in 2004 to be sufficient proof of his disability. He alleged that the staff concerned had made things difficult for him and handled his case irresponsibly.

The Ombudsman's observations

211. As the disabling condition of some disabled people may change over time, The Ombudsman considered that it was in principle proper for CRR to request those who apply for renewal of the Card to provide proof of their disabling condition. However, some diseases may result in permanent disability. CRR should exercise discretion when processing applications involving such cases.

212. The Ombudsman considered it common sense that the complainant would not recover from the disability. CRR should have exempted him from re-submitting proof of disability, given the medical certificate of 2004.

213. The Ombudsman found a lack of flexibility in CRR staff. Nevertheless, on learning that the complainant was unable to provide a recent medical certificate, the CRR staff had taken the initiative to contact him and suggested ways to help him to obtain proof of disability through other channels. The staff rejected his application only after all options turned out to be infeasible. This showed that the staff had not

been shirking responsibility or trying to make things difficult for the complainant.

214. In this light, The Ombudsman considered the complaint partially substantiated.

215. In tandem, The Ombudsman's investigation found that apart from medical certificates, LWB also accepts documentary proofs such as the Social Welfare Department's (SWD) certification that the applicant is a Disability Allowance (DA) recipient or rehabilitation service user, and driving licence for the disabled issued by the Transport Department. However, the Guidance Notes for applicants named only one acceptable documentary proof, that is "certificates issued by doctors or allied health personnel". The Ombudsman considered such practice inadequate. The Ombudsman also considered that LWB had not adequately publicised the Card. While the Card had been introduced for nearly 20 years, only about 10% of the disabled people in the territory held the Card. The registration rate was far too low.

Administration's response

216. LWB has accepted The Ombudsman's recommendation and taken the following actions –

(a) having consulted the Hospital Authority, Department of Health and Advisory Committee on the CRR, it was agreed that the requirement for recent proof of disability in renewal cases may be waived when it is evident that the applicants are permanently disabled;

(b) relevant guidelines have been formulated and promulgated to CRR staff to assist them in determining a waiver of recent proof of disability. The Guidelines have also clearly stipulated that CRR staff should consult their seniors should they have doubts on the cases;

(c) CRR is conducting a comprehensive review on the application and approval arrangements (including the application form and Guidance Notes) for the CRR Card. Upon completion of the review, the Guidance Notes for applicants will be updated to specify all types of acceptable documentary proofs of disability,

together with other necessary amendments, if any, for the applicant's easy reference;

(d) CRR has obtained the agreement of the following Government departments and organizations to refer eligible service users to apply for the Card –

(i) Licensing Division, Transport Department
(ii) Selective Placement Division, Labour Department
(iii) Department of Health
(iv) Vocational Training Council Shine Skills Training Centres
(v) The Special Schools Council

For DA recipients, they can use a copy of the relevant notification letter issued by SWD as a proof of disability for the application of the Card; and

(e) CRR had widely publicized the application procedures of the Card through promotional leaflets on "Productivity Assessment for Persons with Disabilities under the Statutory Minimum Wage (SMW) Regime" issued and distributed by the Labour Department prior to the implementation of SMW on 1 May 2011 and would continue to promote the Card through various service channels for persons with disabilities, including the SWD, Labour Department, hospitals, special schools, Hong Kong Council of Social Service, rehabilitation units and non-governmental organisations (NGOs).

Government Secretariat - Security Bureau

Case No. 2010/3027 : Delay in notifying the complainant, an inmate, of the result of a 'sentence review

Background

217. The complainant was sentenced to life imprisonment. In April 2008, the Correctional Services Department (CSD) referred his case to the Long-term Prison Sentences Review Board (the Board) for sentence review. However, he was not notified of the result of the review until January 2010. He was dissatisfied that the Security Bureau (SB), which provides secretariat service to the Board, had delayed processing the review.

The Ombudsman's observations

218. The Ombudsman found that three months after receiving CSD's referral, the Board had reviewed the complainant's case and decided not to recommend to the Chief Executive to substitute his indeterminate sentence with a determinate sentence. However, the Board Secretariat did not notify the complainant of the result until 18 months after the Board's decision.

219. SB explained that the time lag was due to the need to implement some new requirements imposed by the Court of First Instance after a judicial review of another case in October 2008, i.e. the Board should disclose to inmates under sentence review all relevant reports and documents before its deliberations and should give adequate reasons for not recommending a sentence remission in its notification of the review result. Consequently, SB had to conduct a comprehensive review of the Board Secretariat's procedures and workflow, seek legal advice from the Department of Justice on the sample notification letters to inmates and arrange the outsourcing of additional translation work. During the process, the Board Secretariat suspended issue of all notification letters to inmates.

220. The Ombudsman accepted that SB must ensure compliance with the Court's new requirements and a comprehensive review was time-consuming. However, the results of sentence reviews are of great

concern to inmates and the Board Secretariat should always notify them of the results as soon as possible.

221. As the complainant's sentence review had been completed well before the Court's imposition of the new requirements, SB's implementation of the new requirement regarding transparency of reports and documents was irrelevant to his case.

222. Regarding the other new requirement of giving adequate reasons for the Board's decision, SB should have been more flexible and considerate by informing the complainant of the result soon after receiving legal advice on the sample notification letters. Moreover, SB should have at least sent the complainant an interim reply explaining the situation. The Ombudsman found SB's procrastination unnecessary and unreasonable, and therefore, considered the complaint substantiated.

Administration's response

223. SB has accepted The Ombudsman's recommendation. It has strengthened its control over the workflow in processing the review cases and the Board Secretariat aims to issue notification letters to petitioners setting out the review results within four months following the respective review. If a similar situation arises in the future that some cases may require more complex workflow and procedures, the Board Secretariat will issue an interim reply to the concerned inmate to keep him/her informed.

Highways Department and Lands Department

Case No. 2009/4573 (Highways Department) : Impropriety in handing over an access road on government land to the local village representative

Case No. 2009/4574 (Lands Department) : Failing to take enforcement action against illegal occupation of Government land

Background

224. The complainant alleged that the Highways Department (HyD) had handed over an access road on Government land near the "Pai Lau" of the village concerned to the Village Representatives (VR) without LandsD's knowledge. The VR then turned it into a commercial car park from March 2008 onwards and caused inconvenience and danger to road users, including the complainant and other residents nearby. However, LandsD failed to take enforcement actions against such illegal occupation of Government land.

225. In June 1998, Government gazetted the subject road improvement project (the Project). In August 1998, Government received an objection from the VR claiming that the Project would affect the village access from the subject road, the "Pai Lau" of the village and its metal gate. Representatives from the relevant District Lands Office (DLO) of LandsD, District Office (DO), and HyD jointly met the VR and agreed to realign the village access and provide a new "Pai Lau". In May 1999, the amended project was gazetted.

226. In November 2001, DLO handed over the land required for the project to HyD by way of a block excavation permit for the period from November 2001 to August 2006 and a temporary Government land allocation for the period from September 2006 to December 2007. HyD then commenced the works.

227. In August 2004, DO agreed to take up responsibility for the maintenance of the new access road. In May 2006, the whole project including the new access road and the new "Pai Lau" was completed. In April 2007, DO sent HyD's consultant a signed hand-over agreement stating that DO would be responsible for the maintenance of the new access road and "Pai Lau". In June 2007, HyD's consultant issued a letter to the VR confirming that the access road and "Pai Lau" had been

handed over to the VR and a village leader that month. As a matter of fact, neither the VR nor DO have undertaken any maintenance works on the said road and "Pai Lau" since 2007.

228. In October 2008, DLO received a verbal complaint on illegal parking on the new access road. DLO then informed HyD of the complaint and doubted whether the land had been returned to DLO. Based on the hand-over agreement between HyD and DO, HyD replied that the access road had been taken over by DO in 2007 and suggested that DLO follow up the matter with DO. DO, however, clarified that it had taken up only the maintenance and not the management responsibility since DLO had never allocated it the land.

229. In May 2009, staff of DLO, DO, HyD and the consultant had a meeting. DLO reiterated that it had not been handed back the land. In the subsequent months, the departments concerned exchanged correspondence, but no consensus was reached on the management responsibility for the access road. DLO then requested a discussion at the District Inter-departmental Committee (DIC) convened by DO. Meanwhile, the Police erected warning signs against illegal parking and DLO requested the Police to continue enforcement action.

230. Starting in late November 2009, the DIC discussed the complaint over a large number of meetings. Since the hand-over of the land was still in dispute, it was suggested that advice be sought from the Department of Justice (DoJ). In January and March 2010, DoJ advised that –

(a) as the new access road was on unleased government land, the occupation of it without a licence or a deed or memorandum of appropriation was unlawful; and

(b) government had no justification for not taking action under the Land (Miscellaneous Provisions) Ordinance.

231. DO, DLO and HyD proceeded to plan a joint clearance operation by posting notices on the vehicles concerned requiring the owners to remove them before a specified date, after which the Police would take action to remove any vehicles parked illegally there. The plan was to be further discussed by the DIC.

The Ombudsman's observations

232. The Ombudsman took the view that while HyD's consultant had handed the VR the keys of "Pai Lau", there was no evidence of the land having been handed over to the VR. Complaint (a) was, therefore, unsubstantiated. The complaint against HyD was, nevertheless, substantiated other than alleged. This is because in The Ombudsman's view, although in accordance with the Administration's Project Administration Handbook (PAH), it has been an established practice for the works departments that the hand-over of completed works to an identified maintenance party need not route through DLO, compliance with the PAH does not prevent a works department from informing the lands authority / administrator of its hand-over of a site upon completion of works to another department.

233. Despite HyD's explanation that the hand-over of the management of the concerned access road by HyD's consultant to DO accorded with the PAH, The Ombudsman considered that HyD should have, upon completion of its works, at least involved DLO in or informed DLO of the hand-over of the management of the access road by its consultant to DO, since LandsD is the Government's lands authority and lands administrator and the site had been allocated by DLO to HyD for the works. HyD agreed that keeping LandsD informed would facilitate LandsD's updating of its lands status records. Since PAH is subject to regular review by a working group chaired by the Civil Engineering Development Department (CEDD), HyD undertook to liaise with CEDD to see if amendment to the PAH is necessary.

234. As LandsD had not been returned the land in question, The Ombudsman appreciated that LandsD took time to clarify the issue before deciding on the action to be taken against the illegal occupation of the land. Complaint (b) was, therefore, unsubstantiated. However, The Ombudsman considered that HyD's hand-over of the land to DO for "management" as well as maintenance without LandsD's knowledge appeared to be an inadvertent error. By the nature of its duties, DO was clearly not an appropriate department for managing an access road. HyD should have handed back the land to DLO upon completion of its works and the latter would have been obliged to take it back and take enforcement against the illegal occupation of the land, which started long after HyD's completion of its works.

235. LandsD explained to The Ombudsman that it had been a well established policy that on determination of an allocation, the site should

be handed back by the allocatee to and in a condition to the satisfaction of the DLO concerned, free of structures and debris and cleared of all occupation. HyD should therefore clear the illegal occupation on the access road prior to returning it to DLO. However, The Ombudsman considered it a lame excuse of LandsD to insist on HyD clearing the illegal occupation before returning the land to DLO.

Administration's response

236. HyD has accepted The Ombudsman's recommendation and taken follow-up actions below –

(a) following the amended procedures mentioned above, HyD wrote to DLO on 30 November 2010, informing them that the completed access road in question had been handed over to the corresponding DO on 20 March 2007 and requesting them to update their records accordingly;

(b) at the request of HyD, CEDD coordinated a review among works departments on the hand-over procedures in the PAH. LandsD also participated in the review process and agreed with works departments on the amended procedures; and

(c) On 25 November 2010, CEDD formally promulgated the following amended procedures of the PAH –

"The area permanently occupied by the Works should be handed over to end-user/operation/control/maintenance departments or to the authority responsible for further work in the area. Upon completion of handing over, the project office must inform the appropriate District Lands Office of the arrangement made so that the appropriate records can be updated."

237. In July 2010, LandsD responded to The Ombudsman that it had reservation about the recommendation that LandsD should take the lead in clearing unauthorised occupation and made the following points –

(a) it was a well-established policy that the allocatee should hand back the site to DLO in a condition to the satisfaction of DLO free of structures and debris and cleared of all occupation. Furthermore, General Circular No. 2/2008 on Prevention of

Unauthorised Occupation of Land under Departmental Control clearly stated that it was the allocatee's responsibility to take action to prevent unauthorised occupation of land under their control, assistance from LandsD should only be sought as a last resort and it should not be the function of LandsD to clear squatters (which spirit is to cover any form of unauthorised occupation) because of the failure of the allocatee department to assume responsibility for protecting land under its control;

(b) taking into account DoJ's advice, LandsD was not involved in the handing over and was not in the position to take the lead in clearing the illegal occupation; and

(c) in handling a similar case in March 2008, HyD took the lead to clear the unauthorised occupation before returning the site to DLO. The present case should be handled in the same way.

238. The Ombudsman has taken note of the explanation from LandsD. The case was subsequently closed on 16 May 2011.

239. DO has coordinated with departments concerned at the DIC meetings and agreed on a preliminary plan to resolve the problem in the long term. The plan, if implemented, would involve a change in the legal status of the access road from "carriageway" to "government land" so that subsequent land enforcement action can be taken against the cars illegally parked on the land. The plan is also in line with DO's stand made since 2000 that the access road is not a village road.

Home Affairs Department

Case No. 2008/2653 : Unreasonably supporting the holding of a scheduled owners' general meeting in an estate, resulting in unfairness to the complainants and other flat owners not notified of the meeting.

Background

240. The complainant, Ms A, used to be the chairperson of the management committee of the owners' corporation (OC) of an estate. During her term of office, the OC scheduled a general meeting for 9 May 2008. However, she noticed in early May that the estate management company had failed to give notice of the meeting to all owners and tenant representatives at least 14 days before the date of the meeting under section 2(1) of Schedule 3 to the Building Management Ordinance (the Ordinance).

241. Ms A, therefore, called the local District Office (DO) under the Home Affairs Department (HAD) to enquire whether the OC should hold the meeting as scheduled. Ms B of DO suggested that Ms A seek legal advice.

242. Having obtained legal advice, Ms A decided to cancel the meeting on 9 May and so verbally informed DO. On the other hand, the estate management company and some of the owners decided to hold the meeting on 9 May as scheduled and invited DO to send representatives to attend. Since no written notice of cancellation of meeting was received, and considering that some owners might attend the meeting, DO then sent representatives to the meeting with a view to helping owners settle the problem. Ms A considered that DO had unreasonably supported the holding of the meeting as scheduled, which was unfair to her as well as those owners who had not been sufficiently notified of the meeting.

The Ombudsman's observations

243. On 6 May 2008, Ms A asked Ms B whether the OC should hold the meeting as scheduled. Besides advising the OC to seek legal advice, Ms B in fact also explained to Ms A section 37 of the Ordinance: "a resolution passed at any meeting convened under this Ordinance shall not be invalid by reason only of the omission to give notice of the meeting to any person entitled to such notice".

244. Obviously, Ms B thought that under section 37 of the Ordinance, the OC could still hold the meeting even if it had failed to comply with section 2(1) of Schedule 3 to the Ordinance, i.e. it did not matter if the estate management company had failed to give notice to each owner and tenant representative at least 14 days before the date of the meeting.

245. The Ombudsman asked HAD whether it had sought legal advice on its interpretation. HAD replied in the negative and said that section 37 of the Ordinance was self-explanatory.

246. The Ombudsman considered DO to have misinterpreted section 37. That section is meant to safeguard resolutions passed at an owners' meeting already held in compliance with the Ordinance from being challenged by individual owners or affected by any unforeseen circumstances. However, if violation of the stipulation on giving notice of meeting is found before the meeting is held, the OC should convene the meeting again in accordance with the stipulation.

247. Overall, DO had no legal justification to come to the view that the OC could hold the meeting as scheduled while knowing that some of the owners had not received the notice of meeting 14 days before the date of the meeting. Its decision to support the meeting was unfair to those owners.

248. In this light, The Ombudsman considered the complaint substantiated.

Administration's response

249. HAD has accepted The Ombudsman's recommendation and taken the following actions –

(a) HAD sought DoJ's advice regarding the correct interpretation of section 37 of the Ordinance. DoJ advised that section 37 should only apply where the omission to give notice of the meeting on a person entitled to the notice is discovered after the meeting; and

(b) to enable staff to offer proper advice on matters relating to the operation of OCs, HAD has further enhanced the concerned guidelines for reference and compliance.

Case No. 2009/3554 : (a) Failing to adhere to established procurement procedures; and (b) Mishandling a complaint

Background

250. In September 2009, the complainant lodged a complaint against a District Office (DO) of the Home Affairs Department (HAD) which placed an order for windbreakers and T-shirts and signed two documents for this purpose in November 2008. In April 2009, DO suddenly stopped the order and refused to pay for the whole batch. DO only agreed to pay for the samples.

251. The complainant complained to DO of this in June 2009 but to no avail.

252. The complainant made the following complaints against DO for –

(a) failing to follow the established procurement procedures for the purchase, thereby causing him to suffer a loss; and

(b) mishandling his complaint.

The Ombudsman's observations

253. HAD was of the view that DO had never started the procurement process. It had merely instructed its Office Assistant (OA) to obtain samples from the complainant and had never commissioned the complainant to produce the whole batch of clothing. The OA had signed and affixed the office chop to the two documents simply to acknowledge receipt of them, not to confirm the purchase order. HAD admitted there was inadequacy in the handling of this case by DO as DO had failed to make it clear to the complainant that it only wanted samples. Neither had it filed the relevant documents. In response to this complaint, DO had urged its staff to keep proper record of all correspondence. New guidelines have also been drawn up to instruct OAs to use only an "acknowledge receipt" chop and prohibit them from using the office chop when acknowledging receipt of documents.

254. In this case, The Ombudsman considered that DO had contravened the regulations and guidelines for procurement established by Government and HAD when it allowed an OA, whose rank was lower than those authorized, to handle procurement matters and negotiate with the supplier without proper supervision. This amounted to maladministration. Moreover, when DO previously ordered clothing from the complainant, the process was not much different. Naturally, the complainant would believe that DO had confirmed the purchase order in this case. Despite numerous contacts with the complainant, the staff concerned had never made it clear that DO was only ordering samples. Subsequently, when the complainant asked for payment from DO, the supervisor of the OA, without bothering to seek clarification, agreed to pay, which should only be the cost of the samples. It was not until later that they became aware of the misunderstanding.

255. Concluding from the above, The Ombudsman considered complaint (a) substantiated.

256. Upon receiving the complainant's letter in June 2009, DO immediately appointed a senior officer to investigate the case in accordance with HAD's guidelines on handling complaints. The DO investigating officer requested each of the staff involved to submit a statement. After examining the complainant's letter, statements of the staff concerned and other objective considerations, the DO investigating officer considered the complaint unsubstantiated and informed the complainant of the outcome in writing in August.

257. The Ombudsman considered that DO's investigation was unsatisfactory and inadequate. Not only were the contents of the statements given by the staff concerned different from what the complainant said, the statements of the staff were also contradictory to each other, putting their credibility in doubt.

258. The DO investigating officer was also aware that the statements given by the staff involved contradicted each other, and their side of the stories was different from that of the complainant. However, without further clarifying and clearing up these doubts, the DO investigating officer concluded that DO had not made an order of a large quantity from the complainant and closed the investigation.

259. For these reasons, The Ombudsman considered complaint (b) substantiated.

Administration's response

260. HAD has accepted the recommendations and directed the concerned DO to –

(a) strictly adhere to regulations and guidelines for procurement established by Government and HAD; and

(b) conduct thorough and in-depth examinations of all relevant information and verify the facts to clear up all doubts in the investigation of complaints.

Case No. 2010/0847 : Complaint of handling of quotation for HAD works contract

Background

261. The complainant is one of HAD's approved contractors on the the Headquarters List of Approved Contractors (Headquarters List) and the District List of Approved Contractors (District List) in several New Territories districts and is eligible to submit quotations for HAD's minor works projects.

262. According to the HAD Manual on Minor Works Projects (HAD Manual), quotations for HAD works projects of estimated cost of less than $1 million will be invited from the District List while the quotations of estimated cost between $1 million and $4 million will be invited from the Headquarters List.

263. The scope of the concerned project includes the construction of a trail and improvement to a jetty.

264. A District Office (DO) of HAD invited contractors on the District List to submit quotations in August 2009 (Contract A). The bid submitted by the complainant was the lowest among the quotations.

265. DO noted that several items in the Bill of Quantities in the complainant's quotation were unreasonably low and hence requested the complainant to provide written confirmation within 7 days that the complainant was willing to abide by the quotation price submitted. If the complainant was unable to do so, he should explain in detail. The complainant withdrew its quotation on the ground that the total value of all the works in hand was close to the financial capacity of the company. Since the complainant had withdrawn his quotation and the quotation price of the second lowest bid exceeded the upper limit of District List by far, DO cancelled the quotation exercise and informed the tenderers of the cancellation in writing.

266. DO invited quotations for the same project from the Headquarters List in September 2009 (Contract B). The complainant again submitted a bid which was the lowest among the quotations. DO then vetted the financial capability, the projects in hand and the past performance of the two contractors with the lowest bids and found that the complainant was rated "poor" in his performance in one of his

projects with HAD in the past 12 months. DO awarded the contract to the contractor with the second lowest bid.

267. The complainant complained that –

(a) a DO staff instructed the complainant to sign a letter prepared by the sub-ordinate of that staff for withdrawing the quotation for Contract A on financial grounds; and

(b) DO underestimated the project cost and invited quotations from the District List. DO subsequently invited quotations for the same project from the Headquarters List. The complainant was not awarded the contract even though he had submitted the lowest bid.

The Ombudsman's observations

268. For complaint (a), The Ombudsman noted that the statement by the DO staff concerned was different from that of the complainant. Regarding this, The Ombudsman wrote to the complainant informing him of the statement by the DO staff and requested the complainant to provide evidence supporting his. However, The Ombudsman received no response from the complainant.

269. DO informed the complainant in writing that several items in the Bill of Quantities in its quotation were unreasonably low and requested the complainant to provide written confirmation within 7 days if it would abide by the quotation. If in the negative, the complainant should provide detailed explanation. The action was considered appropriate as the letter was issued in accordance with the HAD Manual and this arrangement was also covered in the Instructions to Contractors Submitting Quotations enclosed in the quotation documents.

270. The Ombudsman had scrutinized the copy of the complainant's withdrawal letter and noted that the letter bore the complainant's letterhead, company chop and signature. Besides, the complainant had never mentioned that he was instructed by a DO staff to withdraw his quotation in his three appeal letters addressed to HAD Headquarters and DO.

271. The Ombudsman considered that there was no evidence to show that the DO staff had instructed or forced the complainant to

withdraw the quotation of Contract A. The Ombudsman considered complaint (a) not substantiated.

272. Regarding complaint (b), The Ombudsman had scrutinized DO's work in accepting the quotation for Contract B and confirmed that DO had followed all the relevant requirements and guidelines. DO had taken into account the past 12 months' performance with HAD contracts and the financial capabilities of the complainant and the contractor submitting the second lowest bid. The District Officer concerned finally made the decision in accordance with regulation 280(i) of the Stores and Procurement Regulations, i.e. for the procurement of services for construction and engineering works with a value exceeding $0.8 million but not exceeding $2 million, a Chief Engineer or equivalent is authorized to approve acceptance of a higher conforming offer under exceptional circumstances with full justifications.

273. The complainant's performance was rated "poor" in the performance report of another HAD minor works contract and withdrew his quotation for Contract A on the ground that the total value of works in hand was close to his financial capacity. DO's acceptance of the quotation with the second lowest bid in respect of Contract B was considered reasonable and prudent.

274. As such, The Ombudsman considered complaint (b) not substantiated.

Administration's response

275. HAD has accepted The Ombudsman's recommendations.

276. HAD will, in line with the Government's standard practice for procurement of works contracts, consider providing the unsuccessful bidder the reason of not accepting his quotation upon the receipt of request on a case-by-case basis having regard to the situation of the case and the availability of resources. HAD has also asked all staff involving in procurement matters to adhere to the guidelines on conflict of interest and will remind them of the guidelines regularly.

Hospital Authority

Case No. 2010/0706 : Failing to advise the complainant about the validity period of a referral letter and failing to address her complaint

Background

277. The complainant lodged a complaint against Tuen Mun Hospital (TMH) for failing to advise her the validity period of referral letters for specialist out-patient appointments. She also alleged that the Hospital Authority (HA) had failed to address her complaint against the Patient Relations Officer (PRO) of Prince of Wales Hospital (PWH).

The Ombudsman's observations

278. The complainant was a patient of the Surgical Specialist Out-patient Clinic (SOPC) of TMH and was referred to the Medicine SOPC on 31 December 2008 for suspected irritable bowel syndrome. She presented the referral letter to the Medicine SOPC of TMH on the same day and was given an appointment on 11 August 2009.

279. As she had moved from Tuen Mun to Shatin in March 2009, she would like to attend the Medicine SOPC of PWH instead of the one in TMH. On 11 May 2009, she went to the Medicine SOPC of PWH to book an appointment and was told that the referral letter issued in December 2008 had expired. The complainant telephoned the PR Office of PWH and told the staff that she had been informed by TMH that she could make use of the referral letter to book an appointment at the Medicine SOPC of PWH. As PWH staff were not in a position to comment or respond on behalf of TMH, the complainant was advised to contact TMH for assistance or clarification.

280. The complainant was dissatisfied that she had not been properly informed of the validity period of the referral letter and alleged that PWH staff had persuaded her to complain against TMH counterparts.

281. Having reviewed the case, The Ombudsman considered it reasonable to set a validity period for referral letters as clinic staff would screen the clinical content in the patients' referral letters to categorize

patients in terms of priority, and then to provide an appropriate consultation schedule. Patients with urgent conditions would be accorded priority appointments while those with conditions classified as intermediate or lower priority would have to wait longer.

282. Since the validity period of referral letters among SOPCs varied, clinic staff were unable to provide comprehensive information in this respect when so requested. The Ombudsman considered that HA should publicize a list of "expiry dates" for referral letters of all specialties in HA hospitals for public information and remind front-line staff to explain the issue to the public/patients upon enquiry.

283. Regarding the complainant's allegation that the staff of Medicine SOPC of TMH had failed to inform her that there was an "expiry date" for the referral letter, The Ombudsman was unable to determine, in the absence of a taped conversation to verify the complainant's enquiry, whether the clinic staff of TMH have had reminded the complainant to check with the Medicine SOPC of PWH the validity period of referral letters.

284. As to the complainant's allegation of failing to address her complaint, it was confirmed from the recorded telephone conversation that the Assistant PRO of PWH merely suggested the complainant to contact the PR Office of TMH or HA to reflect her views on wrong information given.

285. Since the complainant was dissatisfied with the information provided by TMH, The Ombudsman considered that the suggestion made by PWH was not inappropriate. However, as both PWH and TMH were HA hospitals, PWH's reply gave an impression of distancing itself from the problem. The complainant expected that PWH would help contact the relevant departments of TMH or HA and provide a coordinated response. Nevertheless, given that public hospitals were highly autonomous in the management of their own hospital services, the reply given by PWH to the complainant was understandable. The Ombudsman noted that the matter had been explained to the complainant when she appealed to the Public Complaints Committee of HA.

286. In the light of the above, the complaint was found unsubstantiated.

287. Considering the case, The Ombudsman opined that upon inter-hospital transfer, the receiving hospital should honour the original

appointment date given by the referring hospital as far as possible.

Administration's response

288. HA has accepted The Ombudsman's recommendations and has taken the following actions –

(a) the current practice about the validity period of referral letters for different specialties was surveyed. Alignment would be made in this respect taking into account the logistic arrangement and patient's expectation. In conjunction with publicizing the validity period, early booking would be encouraged. The public would also be reminded to seek medical advice if their clinical conditions changed;

(b) front-line staff would be reminded to explain the issue upon promulgation of the validity period of referral letters for new case booking at SOPCs; and

(c) in reviewing the inter-hospital transfer arrangement, the matter was considered as an operational issue and should be settled with enhanced communication between front-line staff and patients. Whilst awaiting permanent transfer of individual cases from the referring hospital to the receiving hospital, patients would be given a choice to have their first appointment at the referring hospital in case the receiving hospital could not offer an early appointment.

Housing Department

Case No. 2009/5416 : Mishandling the refund of rental deposit and overpaid rent

Background

289. With regard to the application made by the complainant's mother for tenancy transfer from her deceased husband in respect of a Public Rental Housing (PRH) flat, the complainant lodged a complaint against an officer of the Housing Department (HD) for unreasonably requesting her to pay the rental deposit and rent for the first month and that the officer had also delayed refunding the rental deposit and rent balance of the original tenant.

290. The complainant and the complainant's parents, who were recipients of Comprehensive Social Security Assistance (CSSA), lived in a PRH flat. The complainant's father, who was the original tenant, passed away in September 2009. In mid-October, the mother of the complainant ("the applicant") approached the estate office and applied for transfer of the tenancy of the flat. When the applicant was invited to the estate office on 11 November to complete the formalities, she was requested by Officer A to pay the deposit and rent for the first month (which totalled $1,840) before signing the new tenancy agreement. Although the applicant had pointed out the financial hardship of her family, Officer A insisted that she had to settle the above-mentioned sum before the refunding of the rental deposit and rent balance of the ex-tenant could be arranged. Eventually the applicant settled the payment as requested and signed the new tenancy agreement after completing the procedure of tenancy transfer.

291. However, the applicant still had not received the deposit and rent balance in late 2009. The complainant and the applicant made a number of inquiries to Officer A with regard to the application status. Officer A just asked them to wait with patience and shifted the responsibility of delay to other departments and staff members.

292. Discontented, the complainant lodged a complaint to The Ombudsman on 30 December 2009.

The Ombudsman's observations

293. On the day the applicant signed the new tenancy agreement, she had with her sufficient cash to settle the rental deposit and rent for the first month required. However, since she, as a CSSA recipient, had stated clearly to the staff concerned the financial situation of her family when going through the procedure, the processing officer should have sought further information on her actual situation and taken appropriate follow-up actions even though the applicant had not put up a request for financial assistance or an application for refund of the rental deposit she had paid.

294. The Ombudsman considered that the crux of the matter was the failure of the processing officer to explain clearly to the applicant the policy concerned and those things that she should note as a CSSA recipient over the payment and refund of rental deposit by CSSA recipients when she applied for the transfer of tenancy. In addition, the matter was compounded by the omission of the data in the computer system on the rental deposit and rent balance of the applicant's deceased husband, making it unfeasible to effect immediate payment of the refund or use the refund to offset the rent for the new tenancy, resulting in the refund procedure being only carried out upon verification with the Social Welfare Department (SWD).

295. The Ombudsman also considered that HD's current practice of requiring the CSSA households taking up a PRH tenancy to pay a deposit and apply for refund afterwards was cumbersome and should be reviewed.

296. Nevertheless, HD had completed the refund of the rental deposit and rent balance of the applicant's deceased husband within one month without any delay in accordance with the prevailing guidelines.

297. In light of the above, The Ombudsman considered this complaint partially substantiated.

Administration's response

298. HD has generally accepted the recommendations from The Ombudsman and taken the following measures –

(a) at present, a series of policies relating to public housing have been uploaded onto the Housing Authority / HD Website. HD has also publicised on its website an outline of its policy on Exempting, Deferred Payment or Refund of Rental Deposit for viewing by tenants and the general public;

(b) HD has issued a set of guidelines in November 2010 to remind its frontline staff to be observant on the financial situation of applicants, so as to offer appropriate assistance in processing the applications for the transfer of tenancy. Besides, HD has updated its computer system to include a message in the offer letters to remind tenants who are CSSA recipients that they may seek financial assistance from SWD for the payment of rental deposits and rent for the flat when necessary; and

(c) with the assistance of HD's staff, the applicant obtained the refund of the rental deposit in cash in mid-August 2010.

299. HD has examined the recommendation of establishing a direct transfer mechanism for CSSA recipients in collaboration with SWD. On the account that the amount of CSSA payment will be adjusted with reference to changes in the number of household members, and the date the new tenancy agreement is signed may not match with the date a household receives CSSA payment, HD does not accept the recommendation of establishing a direct transfer mechanism. CSSA households with all elderly members can apply for deferral in payment of rental deposit upon signing up of tenancy agreement. The tenants concerned should authorize HD to refer their case to SWD for the arrangement of granting rental deposit allowances. They can approach the estate office to pay the rental deposit after receipt of the said allowance.

300. HD has responded to The Ombudsman on these recommendations. The Ombudsman has noted and accepted HD's responses. The case was closed on 8 August 2011.

Case No. 2010/2661 : Failing to handle fairly the complainant's application for public housing according to the sequence of applications

Background

301. In 2006, the complainant applied to the Housing Department (HD) for public housing. In mid-2010, he went to HD's Customer Service Centre to check the latest application status, only to find that some applicants in his category with later Waiting List Application Numbers had been allocated flats, while he was still waiting for an offer. He asked HD staff for an explanation but did not get a satisfactory answer. He, therefore, lodged a complaint with The Ombudsman.

302. Applications for public housing are generally processed according to the sequence of registration on the Waiting List (i.e. the application numbers), the number of family members and the applicant's district choice. Flats are allocated randomly by the computer. When an application approaches the allocation stage for the first time, HD would investigate and verify the eligibility of the applicant. When an application is ready for allocation depends on various factors, such as the availability of flats of suitable size in the applicant's chosen district, or whether the applicant has changed his/her district choice.

303. If resources permit, HD would try its best to accommodate requests from those applicants with special allocation needs. To ensure that an applicant is still eligible for public housing when the tenancy agreement is signed, HD may conduct spot checks on or review those cases in which eligibility had been verified two or more years ago.

304. On the 15th of each month, HD publicises the "Highest Numbers that have accepted Public Housing Offers" ("Highest Numbers") for different categories of public housing applications via newspapers, the Department's website and its Customer Service Centre. Those "Highest Numbers" are for applicants' reference only and do not imply that all applicants with lower numbers have accepted public housing offers. All eligible applicants have three chances of flat allocation.

305. The complainant's application was registered on the Waiting List in 2006 and assigned an application number. In early 2008, HD gave him the first housing offer in his chosen district but it was refused. In June 2008, the complainant changed his choice of district.

306. In early 2010, HD verified the complainant's eligibility for allocation again. In mid-June, HD publicised the "Highest Numbers". The complainant found that the "Highest Numbers" for his category had exceeded his application number. He subsequently pressed HD five times for an early allocation. HD staff promptly responded and explained the situation to him either over the telephone or through written replies. The complainant's application reached allocation stage at the end of June. He was allocated a flat in the following month.

307. HD stated that it had processed the complainant's application according to the availability of public housing resources and the sequence of registration of applications, hence there had been no delay. HD further clarified that the "Highest Numbers" publicized in mid-June 2010 included those public housing applications where the first housing allocation offer was accepted. Applicants with application numbers close to the complainant's and who needed to undergo certain procedures before allocation (such as re-verification of eligibility) got the second offer at about the same time as the complainant did.

308. Furthermore, although the complainant's application had reached the allocation stage by the end of June 2010, he had made a number of enquiries. HD thus had to suspend allocation temporarily each time to clarify if there was any update of family particulars or new request, so as to avoid making an unsuitable offer which might cost the complainant one chance of allocation.

309. HD admitted that the above arrangement needed improvement. A "triage" system was thus introduced. If a public housing applicant's enquiry or complaint does not affect the order of allocation or involve new requests, HD must reply within two to three working days. Meanwhile, applications approaching the allocation stage would be put on designated shelves for centralized management and closer follow-up actions.

The Ombudsman's observations

310. HD's suspension of housing allocation to the applicant making an enquiry or a complaint on the presumption that such enquiry or complaint might involve requests affecting the allocation process might be unfair to the applicant concerned. This case showed that the complainant's enquiries had nothing to do with the factors relating to housing allocation. Nevertheless, HD suspended housing allocation for

him without his knowledge. This appeared to be a punishment in disguise and was obviously unfair to him.

311. Besides, to The Ombudsman's regret, HD had failed to provide a satisfactory explanation for such suspension all along.

312. In light of the above, The Ombudsman considered this complaint substantiated.

313. Announcing the "Highest Numbers" every month to inform applicants of latest allocation status (paragraph 304) is itself a good arrangement. However, HD failed to explain at the same time the various factors afore-mentioned (paragraphs 302 and 303) that would affect the actual sequence of housing allocation. Applicants would inevitably think that latecomers were served first and feel dissatisfied. HD should consider giving a brief explanation when publicising such information.

Administration's response

314. HD accepted The Ombudsman's recommendation. The following measures have been taken –

(a) HD has reviewed the "triage" system and other measures. Since the implementation of these enhanced measures in November 2010 up to end May 2011, HD has handled approximately 900 enquiries which did not involve requests for extra allocation offer. All of the enquiries were settled within the specified time of three days without affecting their priority of allocation. HD will continue to implement the above measures; and

(b) HD has fully implemented the recommendation since February 2011, and listed out in the "Points to Note" all the factors that may possibly lead to allocation of flats not following the priority on the Waiting List.

Lands Department

Case No. 2008/1771 : (a) Failing to inform the complainants of the cancellation of a road project; and (b) Refusing to release the ex gratia payment to the complainants after revoking their Government land licence

Background

315. In 2004, the Lands Department (LandsD) notified the complainants that Government would resume their farmland for a road construction project and that their Government Land Licence would be revoked that year. They were required to stop cultivation on the land. The Agriculture, Fisheries and Conservation Department would assess the value of their crops on the land and LandsD would calculate the ex gratia crop compensation payable to them.

316. The complainants discontinued cultivation on the land. Consequently, the vegetation there withered. However, LandsD neither cleared the land nor released the ex gratia compensation to the complainants. It was not until 2008 that the complainants learned that the road construction project had been suspended since 2005 and they would not be given any ex gratia payment. The complainants were dissatisfied that LandsD had failed to notify them promptly of the suspension of the project and that no compensation was granted for their loss.

The Ombudsman's observations

317. The Ombudsman considered that LandsD should have notified the complainants as soon as possible of the suspension of the road construction project instead of informing them nearly three years later that they would not be granted an ex gratia compensation.

318. Furthermore, the complainants had suffered a loss because they had discontinued their cultivation on the land upon notification of the revocation of their land licence, resulting in the withering of the vegetation there. LandsD refused to release the ex gratia payment to the complainants on the grounds that the Department had not cleared the land. However, the complainants pointed out that the vegetation had withered

because they had acted on LandsD's order to stop their cultivation and that was an allegation that LandsD could not refute. The Ombudsman considered that LandsD should have compensated the complainants according to the original assessment of crops in 2004.

319. Overall, The Ombudsman considered this complaint substantiated.

Administration's response

320. LandsD has accepted The Ombudsman's recommendation to grant ex gratia payment to the complainants of an amount no less than what they were entitled to according to the original assessment of crops in 2004 when it later proceeded to clear the land for some other development projects in the area.

Case No. 2008/3998: Failing to take enforcement action against illegal parking, illegal occupation of government land and unauthorized structures

Background

321. Since 2005, the complainant had repeatedly complained to the relevant District Lands Office (DLO) of the Lands Department (LandsD) against a resident of a village (Resident A) about the following matters and accused LandsD of failing to address the following complaints –

(a) constructing an unauthorised staircase and platform in front of the complainant's house, affecting the drainage system nearby and causing frequent flooding during rainy days;

(b) illegally occupying government land for the construction of a glass house and boundary walls; and

(c) illegal parking at the above platform.

Unauthorized staircase and platform causing flooding

322. In November 2005, the complainant approached DLO to complain about the aforesaid matters, which DLO said would be followed up. Later, DLO consulted the Drainage Services Department (DSD) on the flooding problem. In January 2006, DSD replied that it was the surface channel at the subject site being covered by steel plates which was causing the flooding. In April, after a site inspection conducted together with the complainant by DLO, DSD and the relevant District Office (DO), it was confirmed that the flooding was caused by the covering up of the surface channel by steel plates and blockage by debris. DO therefore decided to conduct drainage improvement works. In May, DO informed DLO that the works would be included in the 2007–2008 village improvement programme. Informing the complainant of the work details in the same month, DLO also said that the subject staircase provided an access which posed no immediate danger to anyone and therefore required no clearance for the time being. In June, the complainant complained to DLO about the flooding problem. LandsD HQ said that removing the steel plates which covered the surface channel would be considered to facilitate proper drainage discharge.

323. In August 2006, DLO conducted a site inspection and no flooding was found. In September, DLO consulted the Civil Engineering and Development Department on the stability of the subject slope. The reply was that the subject staircase did not have any significantly adverse effect on the slope. Also in September, DLO advised the Food and Environmental Hygiene Department to clear the debris at the surface channel to prevent blockage. The clearance was completed in October. That same month, DLO asked DO for the timetable of the drainage improvement works. DO replied that the works would commence in early 2007. In November, representatives of DLO and DO met with the complainant to discuss how to solve the flooding problem. DLO also explained to the complainant that, as the staircase provided an access, no demolition would be carried out.

324. DO completed the drainage and road improvement works at the subject site in May and June 2007 respectively. In July, the complainant complained to DLO again about the flooding problem. In August, DLO conducted a site inspection and explained to the complainant that reinstatement of the subject platform would not be conducted in order not to affect the stability of the slope. In September, the complainant complained again about the flooding problem and queried the effectiveness of the drainage improvement works. DLO then referred the complaint to DO for a review of the work effectiveness. Subsequently, DO said that the steel plates covering the surface channel would be replaced by drainage gratings, and there were plans that new channels would be constructed in 2008–2009 to relieve the flooding problem.

325. In April 2008, the complainant complained again to DLO about flooding at her house. In May, DLO replied that DO would conduct drainage improvement works again. In late 2008, DO commenced drainage improvement works, repaved the village roads and installed additional drainage facilities on part of the road surface for stormwater drainage. Due to the objection of the complainant, DO excluded the road section in front of her house from the originally planned work area. The works were completed in June 2009. But as, according to the complainant, her home was still troubled by flooding, DLO requested DO to continue to follow up. In September, DO conducted a site inspection with the complainant to discuss how to solve the flooding problem. In March 2010, DO informed DLO that the complainant had changed her mind and requested that drainage improvement works to be conducted near her house. This is still being followed up by DO.

Illegal occupation of government land for constructing glass house and boundary walls

326. In May 2006, the complainant complained to the media alleging that Resident A had occupied the government land in front of her house for constructing a glass house and boundary walls, which had caused obstruction to the emergency access of the village. Having been informed about it, DLO issued warning letters to Resident A in May and October, demanding prompt rectification of the unauthorised structures.

327. In March 2007, DLO conducted a site inspection and found that the unauthorised structures were still there. In March and then in April, DLO issued warning letters requiring the unauthorised structures be demolished before 13 April. Resident A then asked for an extension, which was allowed by DLO after considering the grounds for extension. In May, DLO conducted a site inspection and confirmed that demolition was in progress. In June, Resident A requested again for another grace period. In July, DLO issued another warning letter to Resident A demanding demolition of the unauthorised structures before 8 August. In September, the case was referred to the New Territories Action Team (NTAT) of LandsD. In December, NTAT issued a warning letter to Resident A requiring demolition by 31 December.

328. In January 2008, NTAT inspected the site and confirmed that the glass house had been cleared. In April, the complainant reported that the boundary walls had not yet been demolished. NTAT then contacted the party in breach for the demolition of the boundary walls as soon as possible. In May, NTAT met with the party in breach and ordered that the walls be demolished. In November, NTAT posted a notice on the boundary walls. The walls were finally cleared in December. Subsequently, NTAT enclosed the government land in question and erected a notice board warning against illegal occupation.

Illegal parking at the subject platform

329. Upon receipt of the complaint, DLO erected six metal bollards at the subject platform in June 2006 to prevent illegal parking. In August, the complainant reported that Resident A had removed two of the metal bollards and parked illegally there. In September, DLO informed the Police about the case. In December, the complainant and other villagers complained to DLO again about the illegal parking by Resident A. DLO replied that the case had been referred to the Police for follow-up actions.

The Ombudsman's observations

330. Regarding complaint (a), DLO had been liaising with DO for the latter to conduct drainage and road improvement works to relieve flooding. Although the government departments and the complainant held different views about the cause of flooding, DLO, in pursuing its way to solve the flooding problem, had overlooked the other key aspect of the complaint, which was that the unauthorised building works on government land had been the cause of the continuous disputes. DLO claimed that its officers had detected during its inspection in October 2005 the unauthorised structures, including the staircase and platform. However, no prosecution could be made because no one was seen conducting unauthorised works on site and the party responsible could not be found. The Ombudsman considered that DLO had not conducted any in depth investigation into the problem, such as asking any witnesses about the construction process of the staircase and platform, or identifying any suspect(s) for enforcement actions. This would only be seen as conniving at such illegal acts, which could lead to more unauthorised works on government land. The Ombudsman commented that when following up this point of complaint, DLO had only attempted to find a stopgap solution to the problem and had not done its best to crack down on illegal acts. This would erode the public's trust in law enforcement departments.

331. In November 2005, DLO first received the complaint from the complainant. Regarding complaint (b), DLO and NTAT had issued six warning letters and met with the party in breach. However, it was not until December 2008 that the unauthorised structures were completely cleared. The Ombudsman held that DLO and NTAT had been inefficient and indecisive in action.

332. Regarding complaint (c), DLO erected metal bollards at the subject platform in June 2006 and informed the Police for law enforcement in September 2006. The Ombudsman considered that this point of complaint had been duly followed up by DLO.

333. In conclusion, The Ombudsman considers that the complaint is partially substantiated.

Administration's response

334. LandsD has accepted The Ombudsman's recommendations and has taken the following measures –

(a) LandsD has issued working guidelines to staff responsible for land control works, requiring that while handling cases of unauthorised structures, they should conduct thorough investigation, identify any suspects and search for witnesses/evidence so as to take prosecution action against the suspects identified; and

(b) LandsD has liaised with the relevant works departments and DO to closely monitor the commencement and progress of any village facilities improvement works with a view to completely solving the flooding problem soon. On receiving DO's application for temporary allocation of government land for implementing the improvement works on 9 March 2011, DLO put up notices on 30 March to consult the villagers on the project. Subsequently, DO revised the works area and submitted a new application for temporary allocation of government land on 13 April. DLO put up notices of the revised works on 9 May to consult the villagers and subsequently received one objection. The objection is now being handled by DO.

Legal Aid Department

Case No. 2010/0701 : (a) Unreasonably refusing to remove an adverse remark against the complainant; and (b) Failing to introduce procedure to govern the addition or removal of that remark

Background

335. The complainant was a barrister on the list of panel lawyers of the Legal Aid Department (LAD). He found that LAD had not given him legal aid assignments since its Departmental Monitoring Committee (DMC) had put a remark (previously called "indicator") against his name pursuant to an order made by the Barristers Disciplinary Tribunal that had suspended him from practice for four months.

336. Since the lapse of the suspension order, he had repeatedly requested LAD for the removal of the remark but to no avail. He considered it unreasonable that LAD did not have any procedure for removing the adverse remark, which he believed to have affected his chance of being assigned legal aid cases.

The Ombudsman's observations

337. The Ombudsman considered that all substantiated findings by the regulatory bodies involving certain degree of professional misconduct would reveal a want of professionalism in the lawyers concerned and underline the gap between their standard of service and that generally expected of the profession. The Ombudsman accepted that there were sound reasons for LAD not to remove the remark. Complaint (a) was unsubstantiated.

338. Furthermore, the remark was a factual record of disciplinary proceedings in which LAD had no involvement at all. As such, it would be inappropriate and indeed impracticable for LAD to consider representations on the disciplinary proceedings. Complaint (b) was, therefore, also unsubstantiated.

Administration's response

339. LAD has accepted The Ombudsman's recommendation and has amended the Manual for Legal Aid Practitioners accordingly.

Leisure and Cultural Services Department

Case No. 2009/2183 : Failing to follow up the complainant's membership application for using a sports training centre

Background

Details of Complaint

340. The complainant claimed that he was a qualified coach as well as a range officer for a type of sports activity. When he learned that a training centre (the Centre) for this sport managed by a Sports Association (the Association) was opened, he joined its basic training course. On completion of the course, he immediately applied for membership of the Centre and paid the $700 membership fee so that he could later hire its facilities in his personal capacity for self-practice.

341. However, an Association staff later called and told him that his application had been rejected without giving him any reasons. He requested the Association to furnish him with a written explanation and formally notify him to get back the membership fee he paid. In this connection, he called the Leisure and Cultural Services Department (LCSD) for enquiries but a staff member replied that as the management of the Centre had been entrusted to the Association, she could not follow up his case. By the time he complained to The Ombudsman, he had not yet received any reply from the Association.

342. The complainant alleged that except for the training sessions organised by the Association, the Centre was not open to the public. He, therefore, suspected that the Association was using the remaining periods of the venue for private purposes. He further opined that even though LCSD had entrusted the operation of the Centre to the Association, it should never allow the Association to decide freely whether or not to open the Centre to members of the public and thus deprive them of their right to use the facilities.

Observations from The Ombudsman

Sports Training Bases

343. Since the lack of dedicated sports training bases was not conducive to structured training programmes and would hence impede long-term sports development in Hong Kong, LCSD tried out a pilot scheme, converting some of its under-utilised venues into sports training bases to be managed by non-profit-making sports associations. The Centre managed by the said Association was one of those training bases. According to the Tenancy Agreement signed by both parties, the Association would operate the Centre on a self-financing basis for seven years.

Initial Planning Not Thorough

344. LCSD and the Association had held different views on the modification project of the Centre, causing delay in the project, which took about eight months to complete instead of three as scheduled. Meanwhile, it had taken much time for the Association to obtain terms that would meet LCSD requirements when taking out public liability insurance for the Centre. As a result, the official opening of the Centre was also delayed. Moreover, because of space constraints in the venue and for safety reasons, only 15 practice bays could be used eventually instead of 20 as originally planned. The usable rate of the Centre was thus reduced. LCSD's initial planning of the Centre was not thorough.

Failure to Monitor Closely Compliance with Tenancy Agreement

345. The Tenancy Agreement provided that the Centre should be open for public use during its opening hours when it was not used for training. However, the Tenancy Agreement was already well into its third year when the Association still allowed public use of the Centre facilities only through its training courses. It had yet to fully comply with the provisions of opening the Centre to the public so that they could hire its facilities for self-practice.

346. Although LCSD claimed that it had monitored the operation of the Centre via routine communication with the Association, regular inspections, working meetings and the utilisation statistics of the Centre submitted by the Association, The Ombudsman did not see from the LCSD documents any formal minutes of meetings between the Department and the Association nor any substantial work plans or review

reports submitted by the Association to the Department. Obviously, the Department had failed to closely monitor the Association's compliance with the Tenancy Agreement.

Failure to Handle the Complaint Properly

347. LCSD was ignorant about the membership system launched by the Association. Upon receipt of the complaint, it then enquired with the Association and stopped it from doing so on the grounds that the system would restrict other members of the public from using the Centre. The complainant was thus dissatisfied when his application for membership was rejected. Meanwhile, the Association failed to formulate its complaint handling policy and procedures for the Centre as required under the Tenancy Agreement.

348. LCSD said that its staff had explained to the complainant that the operation of the Centre had been entrusted to the Association. The complaint, therefore, would be followed up by the Association direct. However, as the complainant's enquiries and complaint were lodged with LCSD, the Department was still duty bound to ensure that his complaint would be handled properly even though the Association staff had indicated that she would reply to the complainant direct. The LCSD staff concerned obviously failed to follow up the case actively and properly as he only enquired with the Association more than three weeks after the complaint was received.

349. Based on the above, The Ombudsman considered the complaint substantiated.

Administration's response

350. LCSD has accepted The Ombudsman's recommendation and has formed a Working Group to oversee the implementation of the recommendations. The latest progress is set out below –

(a) the Association is now providing seven out of the eight services stated in the Tenancy Agreement (except for a training course which involves the procurement of costly equipment and outfit as well as high security storage requirement). LCSD will continue to work with the Association to resolve the problems so that the remaining training course could be launched as early as possible;

(b) the Association has opened up more sessions to qualified persons for self-practice;

(c) LCSD holds quarterly meetings with the Association to ensure effective and efficient communication and monitoring of the operation of the Centre;

(d) in consultation with LCSD, the Association has drawn up and implemented an effective and feasible complaint handling mechanism; and

(e) the Association has launched various publicity measures to promote the use of the facilities and programmes of the Centre. These measures include roving exhibitions, display of posters at LCSD venues, upload of information to the Association's website and the provision of information to nearby schools.

Case No. 2009/3143 : Lack of flexibility in the venue booking system of a roller skating rink

Background

Details of Complaint

351. The complainant often took his sons to a Leisure and Cultural Services Department (LCSD) roller skating rink (the Rink) on Sunday evenings for practice. Between August and October 2009, however, LCSD allowed a training class to be held by a sports association (the Association) to have exclusive use of the Rink from six to eight o'clock every Sunday evening. The Department further refused to make available part of the Rink for use by the general public. He considered LCSD inflexible and insensitive to public interest.

Response from LCSD

352. The Association was LCSD-subvented and eligible for priority block booking of venues. Its booking application had been processed in accordance with established venue-booking guidelines, which stipulated, amongst other things, that "during peak hours (including Sunday whole day), only one-third of the total available hours of the month may be allowed for block booking". Of the total number of peak hours of August 2009, only 11% was booked by the Association for using the Rink. This fell within the stipulated limit. On the other hand, the provision in the guidelines that "not more than half the total number of facilities at each venue at any one time may be allowed for block booking" should only apply to venues with more than one facility of the same type available for block booking. Since there was only one roller skating rink in the playground where the Rink is situated, this provision did not apply.

353. Although there was no maximum number of users allowed at each of the three roller skating rinks in the district, the Association opined that since the training course was for beginners, adequate space was needed for basic skills training. Besides, roller skating is a high-speed sport that could easily lead to injury. For safety reasons, LCSD could not accept the complainant's suggestion to make available part of the Rink to the general public during the training sessions. Participants in the training course had strongly demanded that the sessions be held on consecutive Sundays. Sunday courses also recorded

a higher enrolment and attendance rate. The Association, therefore, did not agree to reschedule the training class to other time slots.

354. While private ice skating rinks allow shared use of venue between training classes and the public, this mode of operation, however, could not be adopted by public roller skating rinks. It was because in addition to coaches, private rinks employed a number of staff to maintain order and monitor user flow to ensure users' safety. Moreover, fees for the class organised by the Association were very low and it would be impossible for it to bear such staff costs. If other people were allowed into the Rink during the training class, it would be difficult to guarantee their safety.

355. A notice had been put up at the Rink for public information after the Association's successful block booking. LCSD would continue to monitor the enrolment and attendance rate of the training sessions. It would liaise with the Association with a view to striking a balance between its right to use the Rink and that of the general public.

The Ombudsman's observations

356. The fact that LCSD allowed exclusive use of the Rink by the Association during peak hours on Sunday evenings reflected that it had neglected the popularity of the time slot and failed to consider the public's right to the Rink during those hours. Furthermore, LCSD rejected the idea of reserving part of the Rink for public use during the training sessions because it considered the provision of "not more than half the total number of facilities for block booking" under the venue-booking guidelines not applicable to the Rink. Nevertheless, roller skaters do not need exclusive use of a venue. LCSD's arrangements obviously have failed to balance the interests of various parties.

357. LCSD argued that its refusal to reserve part of the Rink for the general public during the training class was also based on safety consideration. However, no maximum number of users had ever been set for the Rink. Roller skaters of different skill levels had been using the Rink at the same time. It seems that LCSD has adopted double standards in this regard.

358. The Ombudsman looked up the Places of Amusement Regulation and found that the licensing conditions for ice skating rinks

do not include a limit on the number of users. A certain private ice skating rink of comparable size to the Rink can accommodate more than 200 skaters, whereas the Rink allowed only about 20 participants during the training class. It was a stark contrast and LCSD failed to provide a satisfactory explanation. This raised doubts over whether LCSD had made good use of public resources. In fact, no available information shows that ice skating is a safer sport than roller skating.

359. On the whole, LCSD had failed to take into consideration various factors and the interest and needs of the general public when it gave the Association exclusive use of the Rink. The Ombudsman, therefore, considered the complaint substantiated.

Administration's response

360. LCSD has accepted The Ombudsman's recommendation on reviewing sports facilities' booking procedures and taken the following actions –

(a) LCSD reviewed and revised the 'Leisure and Culture Services Department Booking Procedure for the Use of Non-Fee Charging Facilities' (the Procedure) in March 2011 to provide its staff with clear guidelines for processing the booking of venues with one facility of its kind in the venue. Taking districts with only one roller skating rink as an example, exclusive use of the whole rink by one group/ organization should be approved by officers at the level of Assistant Leisure Services Manager II or above. By designating a managerial staff to handle such kind of bookings, the Department could ensure that approval will be given only after careful consideration and with justifications so that the interest of both the public and the organizations in the use of the only skating rink in a district can be taken care of.

(b) For districts with two or more roller skating rinks (the rinks), not more than half number of the rinks should be reserved for advance booking so as to better meet the demand of the general public. Moreover, notices would be posted at the venues concerned to inform the public of the location and availability of the skating rinks in the district and the means of public transport to reach these facilities.

361. LCSD has re-examined the feasibility of "shared use" of venues and the findings are as follows –

(a) LCSD has carefully studied and consulted the Association concerned (which is also the National Sport Association governing the development of the roller skating in Hong Kong) on the suggestion of "shared use" of roller skating rinks. For safety reasons, the Association reiterated that opening up roller skating rinks for shared use with the public when training courses were held might generate serious safety and liability problems and would likely cause conflicts between different users.

(b) Roller skating is a unique sport and its training mode is different from that of ice-skating. As a high-speed sport, beginners of roller-skating have to move fast when practicing but control and pause skills are difficult to master. Adequate space is thus necessary for learners to skate confidently and to practise acceleration. Otherwise, accidents and injuries could easily occur. In contrast, basic ice-skating training focuses more on skill than on speed and therefore needs less space for practice than roller skating.

(c) As far as ice-skating rinks are concerned, their operators are not only responsible for venue management (including crowd control, safety, user admission and dispute handling), but also all training matters. Since the coaches of an ice-skating rink are the employees of the operator, the operator has the right and ability to manage and control the shared use of the rink by training course participants and individual users without causing problems or conflicts. However, roller skating rinks are managed by LCSD while the training courses are organised by the relevant Association with subvention from LCSD. Since LCSD does not have the resources to provide a strong staff presence to maintain order during each of its subvented sports programmes held at the venues, shared use of public roller skating rinks might easily lead to conflicts between course participants and other users.

(d) Furthermore, as the Association is only a hirer, it does not have the power to manage other users who are not their own trainees. Neither can it ensure the co-operation of other users sharing the use of the rinks. Under such circumstances, accidents and conflicts are likely to occur. Unlike the commercial operators,

LCSD is unable to provide staff professionally trained in the sport to co-ordinate shared use of public roller skating rinks by training course participants and other users. In fact, some years ago, there was an incident in which public users barged into a roller skating rink before a training class was dismissed, causing confusion and injury, and eventually the police was called in.

362. For the above reasons, LCSD share the safety concerns raised by the Association about "shared use" of the rink and remain of the view that the Association's request for exclusive use of rinks (when training courses are held) is a responsible arrangement towards the general public and course participants.

363. Given that the overall usage rate of LCSD roller skating rinks is not high, the Department will do its best to manage all the available rinks to meet the needs of both the organisations/associations and the general public. In fact, the Association concerned has arranged for its Sunday training courses in Sha Tin to be held at another roller skating rink with lower usage rate in the same district so that more sessions of the rink under complaint could be made available for use by the general public.

364. To further enhance the safety of rink users, LCSD has also prepared guidance notes on the safe use of roller skating rinks in collaboration with the Association.

365. The Ombudsman noted that LCSD has made an in-depth study to explore the feasibility of shared use as proposed by the complainant. In their case report, The Ombudsman concluded that LCSD has implemented this recommendation and considered various means to achieve shared use taking care of the interest of the public and the organizations.

Case No. 2010/0492 : Improper handling of a tendering exercise for the provision of an aerial work platform

Background

366. The complainant is a registered supplier of the Leisure and Cultural Services department (LCSD). On 5 February 2010, the complainant received a fax of Invitation to Quotation from LCSD inviting it to bid for the supply of an aerial platform to the Hong Kong Science Museum (the Museum) by 3 p.m. on 10 February 2010. The Complainant alleged that –

(a) LCSD gave the bidders too little time (less than four working days) to prepare and submit their bids; and

(b) the delivery terms were unreasonable, requiring the specified platform to be delivered within one week after order confirmation, even though it had to be acquired from overseas which would take one to two months for sea freight.

The Ombudsman's observations

367. Evidence collected in the investigation indicated that safety consideration was a reason for purchasing the platform. However, The Ombudsman considered that there was little evidence suggesting that urgency was the operative factor in the minds of the staff concerned when submitting or approving the request to shorten the bidding period. Therefore, even granting that there was in fact urgency for the purchase for safety reasons, The Ombudsman was not convinced that such urgency was perceived and used at the material time to justify the shortening of the bidding period. Moreover, the claimed urgency could have been avoided with more meticulous planning.

368. The Ombudsman noted LCSD's view that the platform in question was a ready-made and self-contained product and that suppliers should be able to determine the selling price and the quotation sum in one or two days. However, the mere fact that bidders were considered to be able to comply with a shorter period was not sufficient justification not to follow the normal procedures.

369. The Ombudsman considered that the scant market research conducted by LCSD was inadequate for indicating that delivery of the product did not require modification or assembly. The Ombudsman also disagreed with LCSD's view about the need for the Museum to refrain from favouring suppliers who choose to stock products in Hong Kong. While The Ombudsman agreed that the Government should not interfere with business decisions on whether to keep a local stock of a particular product, the Government must watch out that its procurement practice would not unnecessarily result in higher purchase costs or more limited choice of bidders. Allowing longer delivery periods could attract more bidders and even lower costs. Unnecessary shortening the delivery period could prejudice Government and public interest.

370. The Ombudsman could not accept LCSD's justification for using fixed dimension rather than permitted range in the technical specifications. The Museum's practice of receiving offers of minor deviations was not publicised and was unfair to potential bidders. LCSD and the public might also suffer as there might be less competitive bids in terms of price and product/service quality to choose from. Therefore the specifications in this case were unjustifiably rigid.

371. There was no strong evidence that suggested tailor-making of the quotation exercise for the successful bidder. Nonetheless, it was undesirable for a Government department to put itself under any doubt of rendering favouritism to any commercial enterprises.

372. To conclude, LCSD's decision to shorten the bidding and delivery periods was made without good justifications and hence the complaint is substantiated. LCSD's failure to comply with the stated procurement rules and requirements compromised the credibility of the quotation exercise. On this, there was maladministration on the part of LCSD other than those alleged by the Complainant.

Administration's response

373. LCSD has accepted The Ombudsman's recommendations and has taken the following actions –

(a) LCSD has strengthened the training and alertness of staff on compliance with the procurement rules and requirements. The number of regular seminars on procurement procedures and requirements has been increased from two to four per annum and the content has been enriched. Apart from supplies-related topics, more emphasis has been put on case study and experience sharing, particularly for some cases in which deviation from usual practice is needed. Moreover, the content of the above seminars has been uploaded to the LCSD's Document Library for staff's reference;

Finance and Supplies Circulars in force are circulated to all staff of the Museum on a half yearly basis to refresh them of the relevant rules and regulations. Besides, they were reminded to comply strictly with the procurement procedures and pay special attention when determining the quotation period and drawing up tender specifications. Any shortening of the bidding and delivery periods has to be fully justified and documented, and the specifications have to be drawn up in a way to ensure that they will not invite misconceptions or queries on fairness and openness;

(b) LCSD has reviewed the need for enhancing support for user sections. LCSD's Supplies Section has been providing expert advice both orally and in writing to all user sections on procurement procedures, drafting of quotation documents and contract management. User sections have been encouraged to consult the Supplies Section whenever they have doubts. In addition, more specific guidelines on procurement matters will be issued for compliance by user sections, if necessary;

(c) to enable senior officers who take the role of either authorizing officer or approving officer in procurement exercise to better equip themselves in discharging their duties, a special seminar has been arranged for officers at Segment C or above at LCSD during which they were reminded to conduct random checks on file records from time to time; and

(d) LCSD's Direct Purchase Authority System has been enhanced and new functions have been implemented starting from June 2011. Stepped-up measures have been included to check the user profiles and to ensure that appropriate authority is exercised in the procurement exercise. The Supplies Section will also run management reports periodically and scrutinize individual purchase records whenever necessary. Any questionable situation detected will be further investigated.

Case No. 2010/0510 : Failing to conserve an old tree within a statutory monument

Background

374. The complainants were dissatisfied with the Buildings Department (BD), Drainage Services Department (DSD), Development Bureau (DEVB) and the Antiquities and Monuments Office (AMO) under the Leisure and Cultural Services Department (LCSD) for failing to properly scrutinise and approve the drainage works carried out within the site of a privately-owned monument, to conserve the trees in the area and to assess the potential impact of the proposed works at an early stage. As a result of such failure, an old tree had to be removed after its roots were damaged by the drainage repair works.

The Ombudsman's observations

375. AMO had provided the monument holder with copies of the Antiquities and Monuments Ordinance (Cap. 53) (the Ordinance) and the Block Permit. It also asserted that verbal reminders had been given repeatedly for the monument holder to comply with the requirements. However, the monument holder might not be able to comprehend fully the technical terms used in the Block Permit. Moreover, it was unable to ascertain what were discussed between the parties during some of the follow-up visits undertaken by AMO because only simple fieldwork records were kept. In fact, the monument holder seemed unable to precisely follow the requirements under the Ordinance, as it merely took care of the trees within its site in the same manner before it was declared a monument. After this incident, the monument holder further informed AMO that it had removed 18 trees impaired by termite attack in December 2008. The fact that AMO was unaware of this all along showed inadequacy in its monitoring system.

376. Although the old tree was located within the monument boundary, it did not form part of the monument as it had no heritage value, nor was it listed in the Register of Old and Valuable Trees. It is the duty of the property owner to conserve trees within a privately-owned monument. In spite of this, AMO had made a great effort to assist the monument holder in devising methods to preserve the old tree since the intention to remove it was made known in 2009, including engaging three consultants to conduct assessments. The Ombudsman considered that

AMO's active participation admirable.

377. Nonetheless, AMO had knowledge of all issues concerning the monument, including the actively planned drainage project, yet it failed to be an effective coordinator. While two consultants were appointed to preserve the tree in the second half of 2009, no records showed that they were clearly informed by AMO of the upcoming drainage works, nor were they provided with any project documents for reference. Had they been so informed or provided with the material, the potential risks posed by the drainage works to the tree could have been properly dealt with at an early stage. The Ombudsman considered that there was inadequate alertness and coordination on the part of AMO in handling monument management and tree conservation concurrently.

378. In ordinary circumstances, it was understandable that AMO did not review the draft details and descriptions of drainage works received at the initial stage. However, the drainage consultant had already indicated in its email in October 2009 that the works would commence by the end of that year. Had AMO done a preliminary review at that time, it could have easily discovered that some of the water pipes to be replaced were located in the vicinity of the old tree. It was unfortunate that AMO followed its usual practice and missed an early opportunity to prevent the roots of the tree from being damaged by the renovation works. The incident showed that AMO lacked sensitivity and flexibility.

379. The Historical Building Unit of AMO is responsible for scrutinizing the proposed works submitted by the monument holder and following up the assessment reports submitted by the tree expert and arborist it appointed. The Technical and Advisory Unit of AMO is responsible for following up the structural survey conducted by the structural engineering company it appointed and giving technical advice to the Historical Building Unit on the proposed works submitted by the monument holder. AMO contended that the two Units would inform each other on receiving any applications or information that should be handled by the other Unit. However, in October 2009, when the Technical and Advisory Unit received the list of renovation works for drains and manholes submitted by the consultant appointed by the monument holder and learned that the repair works would probably commence by the end of that year, it did not inform the Historical Building Unit accordingly for follow up. This clearly indicated a lack of communication between the two Units.

380. In the emergency removal of the tree, the monument holder had duly submitted a written notification, and AMO, after carefully considering the professional advice of two tree experts, agreed that the decision to remove the tree urgently was justified and gave its written notification of no objection. The Ombudsman considered that there was no maladministration by AMO.

381. To conclude, DSD was not involved in the incident under complaint. BD only performed its function to ensure slope safety and was not involved in approving the drainage works or conserving the tree. Further, DEVB, being the Authority in granting the Block Permit, was only responsible for policy matters. AMO, under LCSD, was responsible for the daily routine duties of enforcing regulatory and policy requirements. The Ombudsman, therefore, considered the complaint against BD, DSD and DEVB unsubstantiated, while the complaint against LCSD partially substantiated.

Administration's response

382. LCSD has accepted The Ombudsman's recommendations and AMO has taken the following measures –

(a) AMO has required their staff to keep proper record of their work. AMO has also revised the fieldwork record sheets to facilitate their staff to record and follow up their work more effectively;

(b) AMO has completed the review of the contents of the Block Permit and revised the template to set out in a clearer manner the categories of works covered by the permit and to provide more examples for the technical terms used in the permit. AMO has also kept liaising with the monument owners (including arranging meetings and seminars) to explain in more detail the relevant provisions of the Ordinance and the permit (including the legislative requirements on tree preservation and related works within monuments);

(c) AMO has strengthened the monitoring system. Apart from arranging staff to patrol monuments, AMO has also enhanced its communication with monument owners to ensure that they understand clearly the requirements under the Ordinance and the permit. Moreover, AMO has engaged a consultancy to record the number and location of trees in privately-owned monuments.

AMO has also provided training in tree preservation for all its staff responsible for patrolling monuments. This could help them supervise tree works within monuments more effectively to ensure that the works are conducted in accordance with the requirements under the Ordinance and the permit to avoid causing damage to monuments; and

(d) AMO has enhanced the communication and cooperation among its different units in carrying out routine duties, and has set up inter-unit working groups to discuss specific works projects on a regular basis to enhance internal communication and works management.

Case No. 2010/1675 : Discrepancies in handling applications for concessionary fees in the hiring of cultural venues

Background

Details of Complaint

383. In early 2010, the complainant, on behalf of an organisation (Organisation A), applied to the Leisure and Cultural Services Department (LCSD) for hiring the cultural activities hall at a town hall in the New Territories (NT) to hold a concert. Upon approval of the venue hiring, she submitted an application for rent reduction. However, LCSD asked her to pay a deposit to confirm the venue hiring first before processing her rent reduction application. Moreover, the Department assumed a "full house" in estimating the ticket revenue of the concert and determining the amount of rent reduction. Her application for rent reduction for the concert was subsequently turned down.

384. The complainant indicated that Organisation A used to hire its performance venues in the urban area and each time the rental subsidy had been granted before the deposit was paid. Arrangements of the NT venues were clearly different and disadvantageous to those financially tight organisations. Estimation on the assumption of a "full house" was also unreasonable. Since all performance venues were managed by LCSD, the complainant found it confusing that they should have different assessment criteria and approval procedures in handling applications for rent reduction.

Response from LCSD

Complaint (a)

385. Discrepancies in handling rent reduction applications for venues in urban and NT areas originated in the different approval criteria and procedures set by the former Provisional Urban Council, the Provisional Regional Council and their executive departments. For instance, the Rental Subsidy Scheme (RSS) of the urban venues offered subsidies at a fixed ratio (65% off for major venues) while the Hire Charge Reduction Scheme (HCRS) of the NT venues would grant rent reduction on the basis of the income and expenditure of an event. Reduction of 50% to 80% would be granted only if there was a deficit.

386. Since taking over the functions of the two Municipal Councils in 2000, LCSD had begun to review and align gradually the operation and fees/charges of the urban and NT performance venues and facilities. A Working Group on the Review of Fees and Charges of Cultural Services was set up in 2008 and an initial review was already completed. After discussion and consultation with the relevant policy bureau, the rent reduction schemes of the urban and NT venues could be aligned as soon as possible.

Complaint (b)

387. One of the approval criteria under HCRS was that the applicant organization must be a non-profit making organisation "considered to be in genuine need of financial assistance". As such, a detailed estimate of income and expenditure for the event to be held was required. To prepare the financial estimates after hiring of venue was approved can obviate unnecessary administrative work for the organisation and save administrative resources for LCSD.

388. In fact, venues in both urban and NT areas required the applicant organization to pay a deposit equivalent to 25% of the rent. The difference was that under RSS of the urban venues, applications for venue hiring and rental subsidy were processed simultaneously, and the amount of deposit was calculated using the actual rent (i.e. net rent after the subsidy) as the basis. As for HCRS of the NT venues, applications for rent reduction would only be processed after venue hiring was confirmed with the deposit paid. Therefore, the amount of deposit was calculated with reference to the basic (i.e. original) rent.

389. The concert held by Organisation A was ultimately granted a 70% rent reduction. Only $225 needed to be settled after deducting the 25% deposit paid. This should not be a burden on its finance.

Complaint (c)

390. Although it was stated in "Application for Reduction of Hire Charges" for the NT venues that total ticket revenue should be estimated "on a full house basis", it actually meant that the applicant organisation must list out in detail the price schedule and the total number of seats. In assessing an application for rent reduction, LCSD would always use 50% attendance rate to estimate the ticket revenue of an event. In fact, according to the initial financial estimates submitted by Organisation A, the concert in question would record a surplus in either the full or half

house scenario. Rent reduction would not be granted. LCSD staff had explained this to the complainant and suggested that the financial estimates be amended to include expenditures previously left out. The amended version could be submitted to LCSD for reconsideration. The concert was finally offered a rent reduction.

The Ombudsman's observations

Complaint (a)

391. It had been more than ten years since LCSD took over the functions of the two Municipal Councils. Still, RSS of the urban venues and HCRS of the NT venues were yet to be aligned. As a result, discrepancies in assessment criteria, handling procedures and the rate of rent reduction still exist. Applicants would inevitably feel confused. All this reflected poorly on the efficiency of LCSD.

392. In fact, the relevant policy bureau had repeatedly urged LCSD to complete the realignment exercise as early as possible. However, there had been little progress. Though the review process was re-activated in 2008, the timetable for consultation was yet to be confirmed. This was indeed undesirable.

393. In the light of the above, The Ombudsman considered complaint (a) substantiated.

Complaint (b)

394. The ratio of deposit required for both the urban and NT venues was originally the same. However, different handling procedures for rent reduction applications led to discrepancies in the basis of calculating the amount. As the NT venues would process an application only after the deposit was paid to confirm a hiring, the amount of deposit was thus calculated with reference to the original rent. Organisation A considered such practice of the NT venues to exert a greater financial pressure on the applicant organisation and hence unreasonable. Actually, it all originated from the difference in handling procedures for rent reduction applications.

395. The Ombudsman, therefore, considered complaint (b) unsubstantiated.

Complaint (c)

396. The Ombudsman had examined the application for rent reduction by the complainant and confirmed that LCSD had estimated the ticket revenue of the concert based on the 50% attendance rate. However, the application form did require the applicant organisation to estimate total ticket revenue "on a full house basis". Thus, it was only natural that the complainant had misunderstood the situation.

397. The Ombudsman, therefore, considered complaint (c) partially substantiated.

Conclusion

398. Although staff members of LCSD had handled the complainant's application for rent reduction in accordance with prevailing policy and guidelines, her complaint arose because the Department failed to align the fees and charges of the urban and NT venues. Overall, the complaint against LCSD was partially substantiated.

Administration's response

399. LCSD has accepted The Ombudsman's recommendations and is taking/has taken the following actions –

(a) LCSD is reviewing the Fees and Charges for Civic Centres. LCSD will arrange consultations with stakeholders on the fees and charges proposals as soon as the review is completed; and

(b) LCSD updated in mid-March 2011 the Guidelines on Reduction of Hire Charges of NT performance venues and its reply letter according to The Ombudsman's advice. The revisions aim to display more transparency on the handling procedures of the Reduction of Hire Charges, state clearly the reduction rate to be granted and the calculations of projected box office income, point out that the detailed breakdown for the projected income and expenditure items will be required, and make a performance pledge for application processes.

Official Receiver's Office

Case No. 2010/1560 : Failure to follow up properly the complainant's bankruptcy case

Background

400. A bankruptcy order was made against the complainant by the court on 26 April 2005 and the Official Receiver was appointed as his trustee-in-bankruptcy. In August of the same year, the complainant sustained an injury at work and claimed damages through the Legal Aid Department (LAD).

401. The complainant was discharged from bankruptcy on 26 April 2009. On 23 June 2009, the LAD informed the Official Receiver's Office (ORO) that the court had made an order on 19 March 2009 to award the complainant damages of $520,000. Having considered in-house legal advice, ORO was of the view that part of the awarded damages had to be remitted to ORO and a notice claiming the property acquired after bankruptcy should be sent to the complainant pursuant to section 43A of the Bankruptcy Ordinance. A written notice was served on the complainant by ORO on 13 August 2009, and a sum of $229,765 was remitted to ORO by LAD on 23 September 2009. Later, ORO found that the notice served on the complainant was not valid, and had to apply to the court to validate the notice. On 17 March 2010, ORO made an application to the court and a court order confirming the validity of the said notice was granted on 25 March 2010. In early May 2010, ORO found mistakes in the application made to the court and the contents of the court order and hence applied to the court for rectification, which was granted on 14 May 2010. ORO completed distribution of dividend and interest to the creditors in June 2010, after which ORO applied to the court for, and was granted, an annulment order on 4 August 2010.

402. The complainant alleged that –

(a) ORO had delayed in applying for the annulment of his Bankruptcy Order;

(b) ORO had refused to provide details of income and expenditure and the relevant receipts of his bankruptcy estate account; and

(c) the case officer failed to return his phone calls.

The Ombudsman's observations

403. The Ombudsman concluded that the complaint was partially substantiated –

(a) There was delay in the case, otherwise it would have been able to distribute dividend and interest within five months from the date of the receipt of the remittance from LAD. The interest involved would have been $2,193.20 less than the amount paid;

(b) ORO arrangements were not considered inappropriate; and

(c) The Ombudsman could offer no comments as they were unable to determine without independent evidence.

Administration's response

404. ORO has accepted the recommendations from The Ombudsman, and implemented the following actions –

(a) ORO has sent an apology letter to the complainant;

(b) ORO has paid a sum of $2,193.20 to the complainant to compensate for the additional interest paid by him as a result of the delay arising from the problem on the validity of the notice as well as the mistake in the relevant application made to the court and the content of the resulting court order;

(c) ORO has issued a Circular on "After-acquired Property in Bankruptcy" to all Insolvency Officers and Legal Officers reminding them to pay attention to time limitation in such work and to exercise due care to avoid mistakes; and

(d) A seminar on Time Limitation has been held in January 2011 for the Insolvency Officers in order to strengthen the training of staff.

Hong Kong Post

Case No. 2010/2186 : Mishandling a fraudulent application for mail redirection service: (a) Failing to adhere to established procedures when processing the application in question; (b) Lax handling procedures for adding new applicant(s) to mail redirection service; and (c) Staff being unfamiliar with the procedures of adding new applicant(s) to existing mail redirection service

Background

405. In early June 2010, the complainant came to notice that he had not received any mail for several days. He learned from the postman that since 1 June all mail sent to him at his address ("original address") had been redirected to another address. As the complainant had never applied for mail redirection service, he lodged a complaint with The Ombudsman against the Hong Kong Post (HKPost) for being careless.

406. Applications for mail redirection service should be made in writing. When a person hands in his/her application to a post office, staff will check his/her identification document.

407. Upon receipt of the application, the Redirection Section will check with the postman serving the old address. In case of doubt, the postman would go to the old address for verification. If the old address appears to be vacant or there are special circumstances, he should report the situation to his supervisor, who will then conduct a site visit. The applications will be considered accordingly.

408. To prevent fraudulent applications, the original of confirmation letter for mail redirection service ("confirmation letter") would be sent via ordinary mail to the new address, with a copy sent by registered mail to the old address.

409. In this case, the application for mail redirection service was submitted on 20 May 2010 by a Mr A. HKPost staff checked his identity card. Subsequently, a postman tried to verify the information at the "original address", but no one answered the door. Assuming that the premises had already been vacated, he suggested that HKPost approved Mr A's application. A few days later, the postman delivered the confirmation letter sent by registered mail to the "original address".

The complainant's wife said that there was no Mr A living there. The postman thus asked the Redirection Section to follow up. An officer of the Section then telephoned Mr A, who claimed that the occupants of the "original address" had denied his residence there only because they and he were not on good terms. His explanation was accepted and mail redirection service took effect that same day.

410. Later on, Mr A requested to include the complainant in the redirection service. He then faxed to HKPost a written application signed by the complainant and a copy of his identity card. That application was also approved and redirection service started on 1 June 2010.

The Ombudsman's observations

411. When Mr A applied for mail redirection service, HKPost staff only checked his identity card. Although that was in keeping with HKPost's then prevailing procedures, loopholes in the procedures were evident. Since 27 May 2010, HKPost had revised those procedures to require the applicant to provide original documentary proof of the old address.

412. Moreover, the postman in this case suggested that HKPost approve Mr A's application, merely because no one answered the door at the "original address" when he went there for verification. The postman even stated that Mr A had lived there. The Ombudsman considered this most perfunctory.

413. Meanwhile, though the complainant's wife had pointed out that there was no Mr A at the "original address", staff at the Redirection Section still chose to believe Mr A's one-sided story and approved his application. The Ombudsman considered such practice was most slipshod and defeated the whole purpose of sending out the confirmation letter by registered mail.

414. Mr A's request to include the complainant in the mail redirection service seemed to reflect his intention to steal the complainant's mail. His application was easily approved by HKPost staff because HKPost had no proper guidelines in place for its staff to assess such requests judiciously, thereby allowing people with ulterior motives to take advantage of the loopholes.

415. In the light of HKPost's inadequacies in the above respects, The Ombudsman considered the complaint substantiated.

Administration's response

416. HKPost has accepted all recommendations made by The Ombudsman and implemented the following measures –

(a) HKPost has strengthened the Departmental Rules to stipulate that if a delivery postman is unable to ascertain whether the applicant has indeed been residing and has moved out from the old address, he/she should consult the property management office and bring this to the attention of his / her supervisor for further checking;

(b) HKPost has embedded in the Departmental Rules formal procedures to handle requests for adding new applicants, under which a request must be made in writing by the principal applicant with relevant reference number as well as the old and redirected addresses. Every new applicant must also sign on the application form, put down his/her personal details and supply a copy of his/her identity document. As additional safeguard, a confirmation letter will be sent to every new applicant by ordinary mail to the redirected address with a separate copy by registered mail to the old address to verify the application; and

(c) HKPost has promulgated a set of guidance notes on verification of applications for redirection service and processing of request for adding new applicants, followed up by regular briefing to the staff concerned at quarterly intervals.

Social Welfare Department

Case No. 2009/4216 : Unreasonably refusing to disregard part of the complainant's earnings for each of his income-earning months, resulting in unfair reduction of his Comprehensive Social Security Assistance entitlement

Background

417. The complainant is a recipient of the Comprehensive Social Security Assistance (CSSA). He alleged that the Social Welfare Department (SWD) had unreasonably refused to disregard part of his earnings for each of his income-earning months from July to September 2009 when calculating his CSSA Payment. As a result, his CSSA payment was reduced unfairly.

418. The amount of CSSA payment of a household is based on the difference between the Recognised Needs[1] of the household's members who are eligible for CSSA and the Assessable Income[2] of this household.

Disregarded Earnings

419. To encourage CSSA recipients to find and maintain employment, SWD disregards a certain amount of their earnings when calculating their CSSA payment. For this case, the CSSA payment is:

Recognised Needs – [(Earnings – Disregarded Earnings)]
(Assessable Income)

420. The Ombudsman considered that the following provisions under the CSSA Scheme are applicable to this case when assessing the Assessable Income –

[1] Recognised Needs include standard rates, supplements and special grants under the CSSA Scheme.

[2] Assessable Income includes earnings from employment and other income (for example, contributions from relatives/friends and regular free meals provided by employers) less the amount of earnings or training/re-training allowance that can be disregarded.

(a) First-month Income
The first-month income earned by a CSSA recipient from a new job can be totally disregarded if he/she has not benefited from this rule within the last two years. When the recipient takes up a new job, the caseworker should ask him/her if he/she accepts application of this rule.

(b) Monthly Disregarded Earnings
The first $800 of the monthly earnings of a CSSA recipient is totally disregarded and 50% of the next $3,400 is disregarded. In other words, a maximum of $2,500 of monthly earnings can be disregarded.

(c) Arrears of Wages
If the payment of wages to a CSSA recipient has been delayed, the arrears of wages will be taken into account in the calculation of Disregarded Earnings and CSSA payment.

The complaint

421. The complainant's monthly Recognized Needs amounted to $2,245. On 18 August 2009, the complainant declared to SWD that –

(a) He had started new employment as a salesman from 13 July 2009.

(b) His employer had delayed paying wages to him. He would not be paid until 15 September 2009.

422. On 15 September 2009, the complainant received $3,000 as wages for the employment period 13 July - 18 September 2009. However, SWD caseworker treated the $3,000 as his wage in August 2009 and calculated his Disregarded Earnings as follows –

Disregarded Earnings
= $800 + {[$3,000(Earnings) - $800] x 50%}
= $1,900

423. As a result, the CSSA payment in respect of the complainant for October 2009[3] was calculated as follows –

[3] Earnings from employment in a month will be taken into consideration in assessing the Assessable Income in the month following the date of receipt of the earnings. For example, earnings from employment received on 15 September 2009 will be taken into consideration in assessing the Assessable Income in October 2009.

CSSA Payment for October 2009
= $2,245(Recognised Needs) - [$3,000(Earnings) - $1,900(Disregarded Earnings)] (Assessable Income)
= $1,145

424. The complainant considered that as a result of the above calculation, his CSSA payment had been unfairly reduced, as the $3,000 should have been treated as earnings over a two-month period. On 22 October 2009, he complained to the SWD caseworker.

The Ombudsman's observations

425. The Ombudsman observed that although the complainant had at the outset declared that payment of wages of his new job had been delayed, the SWD caseworker ignored the arrears-of-wages rule when calculating his Disregarded Earnings and CSSA payment. Furthermore, the caseworker failed to advise him of his right to opt for total disregard of his first-month income. The caseworker's failure to apply those rules did result in the complainant's Disregarded Earnings being less than it should be and hence a larger reduction in his CSSA Payment.

426. The Ombudsman is of the view that there may well be other CSSA recipients who, like the complainant, have genuine difficulties in attributing accurately their wages to each month of employment. Therefore, SWD should consider averaging out the figure among the months of employment, subject to the CSSA recipient's consent. This approach appears to be more sensible and fairer than taking the entire wages as those for the first month of his/her employment.

Administration's response

427. SWD has accepted The Ombudsman's recommendation and reminded staff that when CSSA recipients have genuine difficulties in attributing accurately their wages to each month of employment, they should average out the figures among the months of employment subject to the recipients' consent.

Case No. 2010/0193 : (a) Failing to obtain the authorisation of the complainant's mother and the consent of other family members before appointing one of her sons to handle her Disability Allowance; and (b) Delay in handling a complaint regarding the misuse of Disability Allowance.

Background

428. The complainant's mother (Ms A), aged over 80, had been assessed by a doctor to be eligible for Disability Allowance (DA) for one year. However, Ms A was physically and mentally unfit to handle her DA. The Social Welfare Department (SWD) thus appointed one of her sons (Mr B) to act on her behalf.

429. The complainant alleged that SWD had failed to obtain Ms A's authorisation and the consent of other family members before appointing Mr B. Separately, the complainant had complained to a Social Security Field Unit (SSFU) and an Integrated Family Service Centre (IFSC) under SWD against Mr B for misusing Ms A's DA, and asked for a change of appointee to handle her DA. However, SWD delayed handling the case and the problem remained unresolved.

The Ombudsman's observations

430. As Ms A was unfit to handle her DA, SWD was obliged to select an appointee as soon as possible to act on her behalf. SWD has guidelines on the selection of suitable appointees. In this case, Mr B was Ms A's next of kin and they had been living together. Moreover, he had all along been taking care of her hospitalisation matters and was willing to accept the responsibilities of an appointee. SWD therefore appointed Mr B to handle Ms A's DA. The Ombudsman considered SWD's decision reasonable. As a matter of fact, the consent of other family members was not crucial. In this light, complaint (a) was not substantiated.

431. SWD's internal guidelines stipulate that SSFU is responsible for monitoring the handling of Social Security Allowance (including DA) by appointees on behalf of the beneficiaries. If there is any query about or objection to SWD's appointment, the case should be referred to IFSC for assessment and recommendation in order to safeguard the interests of the beneficiary. Where necessary, the Director of Social Welfare

(represented by SWD's social workers) may handle Social Security Allowance on the beneficiaries' behalf.

432. In this incident, SSFU's failure to check Mr B's records of receipt and expenditure of Ms A's DA amounted to dereliction of duty.

433. Upon receipt of the complaint against Mr B for misusing Ms A's DA, SSFU had followed the established guidelines and requested IFSC to assess the suitability of Mr B as the appointee. Nevertheless, IFSC did not give SSFU a substantive reply, on the excuse that it needed time to reconcile the divergent views of Ms A's children on the appointment and to follow up on her medical assessment. IFSC had obviously been evading its responsibility, while SSFU had failed to pursue the question of the suitability of Mr B as the appointee.

434. The case dragged on for seven months before SSFU referred it to the Special Investigation Section for investigation. There was indeed a delay. Complaint (b) was, therefore, substantiated.

Administration's response

435. SWD has accepted The Ombudsman's recommendations and is taking/has taken the following actions –

(a) SWD has shared this case with its district SSFU management staff during regular Social Security Meetings and reminded them to strengthen the monitoring mechanism to ensure that frontline staff have strictly complied with the departmental guidelines in reviewing appointee cases so as to make sure that appointees have handled the social security payment on behalf of the recipients properly. Besides, SSFU management staff have also been reminded to deal with the matter promptly in case of any doubt about the appointee in fulfilling his/her responsibilities.

(b) The existing Social Security Manual of Procedures of SWD has already laid down the procedures for handling appointee cases and appointing a suitable appointee, including when social workers should be made as appointees. That said, to provide more detailed guidelines, SWD has further enhanced and amended the Social Security Manual of Procedures. The amendments are in relation to the handling of cases where the

suitability of the appointee is in doubt or upon receipt of complaints about the appointee's failure to discharge his/her duties; and to specify the need to conduct investigation on such cases and check against the receipt, expenditure and other payment records provided by the appointee to make sure that payments made to the recipient are properly handled; and

(c) During the recent induction courses and investigation techniques workshops arranged for newly recruited and in-service social security staff respectively, SWD has reinforced their skills and techniques in handling appointee cases. These include the need to explain to the appointees about their responsibilities and the need for the appointees to keep clear expenditure and payment records for checking by SSFUs. Besides, staff have been reminded to check these records during case reviews to ascertain that DA has been properly used for the recipient. In case the suitability of an appointee is in doubt or upon receipt of complaints about the appointee's failure to discharge his/her duties, staff should take prompt and appropriate follow-up actions. SWD would continue to conduct training courses for staff to sharpen their sensitivity in handling suspicious cases.

Student Financial Assistance Agency

Case No. 2009/4669 : (a) Failing to properly monitor a Continuing Education Fund course provider; and (b) Delay in handling a complaint

Background

436. The complainants were enrolled in an English language course operated by a training institution (Institution A). They intended to claim course fee reimbursement under CEF from the Office of the Continuing Education Fund (OCEF) administrated by the Student Financial Assistance Agency (SFAA) upon completion of the course. After attending the course, they found that the level of the course was much higher than they were told by Institution A before enrolment. They considered that they could not meet the course requirements with their prevailing English proficiency. They, therefore, requested to quit the course and asked Institution A to refund the course fee to them. Institution A rejected their requests.

437. The complainants filed complaints against Institution A with SFAA during the period from mid-July to end-September 2009. The case, however, had not been resolved yet. They complained to The Ombudsman against SFAA about its –

(a) failure to monitor a CEF course provider properly, resulting in Institution A's enrolling them in the course in question though their English proficiency did not meet the entry requirements; and

(b) delay in handling their complaints.

The Ombudsman's observations

438. Following the established registration procedures of CEF, SFAA had, in collaboration with the Hong Kong Council for Accreditation of Academic and Vocational Qualifications (HKCAAVQ), made professional assessment on the course in question before registering it as a CEF course. SFAA had performed its gate-keeping role.

439. SFAA had a mechanism in place for monitoring CEF course providers. The mechanism relies on, to a considerable extent, the self-discipline of the course providers in complying with CEF terms and conditions and complaints of learners. Nonetheless, there are also penalties with deterrent effect as well. In view of the considerable number of CEF courses and course providers, it was pragmatic for SFAA to adopt a risk-based approach with a view to maximizing the resources spent on monitoring the high-risk course providers.

440. The Ombudsman was sympathetic to the complainants. Nevertheless, the CEF reimbursement requirements had been set out in both the CEF Application Guidance Notes and the letter of approval issued to those applicants who were successful in opening CEF accounts. The complainants had the responsibilities to read the related terms carefully before enrolment. They should also have reported to SFAA at the earliest instance of identifying any irregularities pertaining to the course or course provider.

441. If the complainants suspected that they were deceived by Institution A in enrolling in the course, they should report it to the Police or pass the information and evidence to SFAA for referral.

442. Upon receiving the complaint, SFAA initiated an investigation immediately, including requesting information from Institution A and conducting two on-site inspections. The case lasted for five months, from SFAA's receipt of the complaint in mid-July 2009 to its issuance of the reply letter to the complainants on 24 December 2009. During the period, SFAA had to process a lot of information and coordinate with HKCAAVQ in conducting professional assessment. The lead time required was considered reasonable.

443. Based on the above considerations, The Ombudsman concluded that complaints (a) and (b) not substantiated.

Administration's response

444. SFAA has accepted The Ombudsman's recommendations and taken the following actions –

(a) SFAA has tightened the random checking of the records pertaining to new CEF learners since August 2010. Besides inspecting the records about the successful CEF claimants, SFAA staff also check those about new CEF learners to ascertain if there is any violation of CEF terms and conditions; and

(b) in order to remind the public to select courses prudently, SFAA has provided clearer information through the CEF website, the 24-hour hotline of OCEF and CEF Application Guidance Notes.

Student Financial Assistance Agency and Vocational Training Council

Case No. 2010/1096 (Student Financial Assistance Agency) : (a) Delay in handling the complainant's application for course fee reimbursement under the Continuing Education Fund; and (b) Unreasonably requesting the complainant to provide additional documentary proof for his application.

Case No. 2010/1473 (Vocational Training Council) : Unclear notice on eligibility for course fee reimbursement by Continuing Education Fund.

Background

445. The complainant had enrolled in a programme offered by an institute (the Institute) under the Vocational Training Council (VTC). Three of the modules in the programme were registered under the Continuing Education Fund (CEF) as a reimbursable course. On completion of the course, he applied to the Office of the Continuing Education Fund (OCEF) under Student Financial Assistance Agency (SFAA) for reimbursement of course fee.

446. According to the notice previously issued by the Institute on the eligibility for reimbursement of course fee, applicants must satisfy the minimum attendance requirement of 80% and their overall average mark should be 50 or above for each module. As the complainant's attendance rate for one of the three modules was just 74%, he was granted reimbursement of course fee by OCEF for two modules only. When he later learned that the requirement referred to overall attendance rate, he submitted another application for the remaining module.

447. The complainant alleged that the attendance requirement had not been defined clearly in the notice issued by the Institute. Moreover, SFAA had unreasonably requested him to submit further supporting documents for his overall attendance rate, thereby causing delay in processing his application.

The Ombudsman's observations

448. For SFAA, The Ombudsman considered that though applicants

had a responsibility to provide the necessary documents, SFAA had created difficulty for the complainant when it demanded a supporting document from him to prove his overall attendance rate. At that juncture, even the Institute was unable to provide such a document.

449. It was due to a misinterpretation of the attendance requirement that the Institute had refused to issue an additional supporting document about the complainant's overall attendance rate. As the operator of CEF, SFAA should have the responsibility to clarify with VTC the eligibility for the application. However, it was only after the complainant asked for a review that SFAA sought clarification from VTC on the attendance requirement. As a result, the reimbursement of course fee was not fully granted at once to the complainant. The Ombudsman therefore considered that the first allegation against SFAA on unreasonably requesting the applicant to provide additional documentary proof for his application partially substantiated; while the second allegation on application process delay is substantiated.

450. The Ombudsman also found that VTC had not fully understood SFAA's attendance requirement and the notice in question was indeed unclear. Therefore, The Ombudsman considered the case against VTC substantiated.

Administration's response

451. SFAA has accepted The Ombudsman's recommendations. They have reminded its staff to be more attentive to the needs of the applicants when processing applications for reimbursement and provide suitable assistance to the applicants as far as possible. SFAA has also requested its staff to strengthen the necessary communication with CEF course providers, including VTC, when processing the applications, and take timely follow-up actions when handling cases which clarifications from the course providers are required.

452. VTC has accepted The Ombudsman's recommendation. VTC has revised the relevant notice and reminded its staff regularly of the guidelines for processing CEF applications. In addition, the guidelines have been uploaded to VTC's intranet. Besides, VTC has reminded its staff to seek clarifications from a designated subject officer at Headquarters Division when there are doubts in the interpretation of clauses related to the reimbursement of CEF course fees. VTC staff will communicate with and seek clarifications from SFAA as necessary.

Transport Department

Case No. 2009/4217 : Failing to properly reply to the complainant

Background

Details of Complaint

453. Between June and August 2009, the complainant, through the 1823 Call Centre, complained several times to the Transport Department (TD) about obstruction to traffic in Section A of a road due to frequent double parking and buses picking up and dropping off passengers at a bus-stop there. Pedestrian safety was put in jeopardy as a result. He requested TD to impose a 24-hour no-stopping restriction in the area and install railings along the pavement there.

454. Nevertheless, TD provided him with contradictory replies. In one, TD indicated that a no-stopping restriction had been imposed in Section A; yet in another, it said that a public consultation on the restriction would be conducted. Besides, TD did not respond to his request for installation of railings, but mentioned information about another section ("Section B"), which was not in his complaint. The complainant considered that TD was indecisive regarding the imposition of no-stopping restriction and the information provided to him was very confusing.

The Event

455. Several months before receiving the complainant's case, TD had, in response to other complaints, sought advice from the Highways Department (HyD) and the Police regarding a proposal to impose no-stopping restrictions on both Sections A and B, prohibiting vehicles from parking anywhere near the bus stop at Section A between 7 am and 7 pm (7-19 no-stopping restriction) and the areas at Section B before and after the bus stop there between 7 am and 12 midnight (7-24 no-stopping restriction).

456. The complainant complained to TD about the obstruction to traffic in Section A in June 2009 and twice enquired of case progress afterwards. TD indicated in its three replies at the end of June, in early July and in mid-August that a work request had been issued to HyD

regarding the imposition of a 7-24 no-stopping restriction (which was in fact a 7-19 no-stopping restriction) in Section A. In another reply sent out at the end of July, TD also mentioned incorrectly that a 7-19 no-stopping restriction (which was in fact a 7-24 no-stopping restriction) had already been imposed on the relevant area of Section B at the end of June.

457. In early September, the complainant enquired again about the actual work completion date. It was not until then that TD noticed the mistakes and provided the correct information in a new reply. As there was little improvement in traffic after implementation of the above measures, TD proposed a 7-19 no-stopping restriction in the whole area of Sections A and B (they being adjacent sections). A consultation was conducted between early November and mid-December and then a work request was issued in January 2010. However, people in the area strongly objected to the new restriction since its implementation in mid-March. TD then decided to conduct a public consultation again.

The Ombudsman's observations

458. The TD staff made repeated mistakes in her replies to the complainant. Although correct information was later provided, no effort was made to acknowledge or clarify those earlier mistakes. It was, therefore, difficult for the complainant to tell which of the replies conveyed the correct message and that inevitably left him confused. Furthermore, the mistakes had gone unnoticed for several months, showing that TD's monitoring system was in need of a review.

459. Furthermore, TD had told the complainant that a consultation would be conducted regarding the imposition of a 7-24 no-stopping restriction in Section A. However, it later decided to conduct consultation on a 7-19 no-stopping restriction covering both Sections A and B instead. This again was not explained to the complainant. Besides, the second round of consultation upon receipt of objections to the restriction gave the impression of a lack of thorough consideration before implementation of new measures as well as poor consultation work by TD.

460. TD had an obligation to explain to the complainant its justifications why his suggestion to install railings was not accepted. It should not have simply remained silent on the matter.

461. Based on the above considerations, The Ombudsman concluded that the complaint was substantiated.

Administration's response

462. TD has accepted The Ombudsman's recommendations and has taken the following actions –

(a) TD cautioned the case officer in May 2010, who indicated that she had learnt the lesson and would be more vigilant in handling cases in future. She again apologized to the complainant;

(b) TD has implemented the following improvement measures in regional offices since August 2010 –

(i) for routine or simple cases, frontline staff can reply to the complainant direct with a copy to the supervisor for reference. Should there be any queries, frontline staff should seek the advice and guidance from the supervisor; and

(ii) for complicated, non-routine, sensitive, or repeated cases, frontline staff should seek the approval of the supervisor on the draft reply before replying to the complainant. Approval records must be properly filed for future references.

With the new measures, complaint handling process of TD has been improved; and

(c) TD, upon a review with the Home Affairs Department (HAD), has improved the working procedures for local consultation since January 2010. In requesting HAD to carry out local consultation for traffic improvement proposals (including no-stopping restriction), apart from the related plans, TD will provide HAD with a list of key stakeholders and a brief summary of the proposal for consultation which will give the consultees a clear understanding of the proposal and its impact. With the

new measure, the scope of consultation will be clearer; and information on the traffic improvement schemes can be conveyed accurately and effectively to the consultees. In general, the new measure has been implemented smoothly. TD will continue to monitor and review the situation from time to time.

Vocational Training Council

Case No. 2010/2037 : (a) Poor attitude of an invigilator towards the complainant; (b) Interpolating the complainant's answer sheet; and (c) Unreasonably rejecting the complainant's request for viewing her answer sheet.

Background

463. The complainant sat for two papers of "Insurance Intermediaries Qualifying Examination" conducted by an institution operated by the Vocational Training Council (VTC) (hereinafter referred to as Examination Centre) in May 2010. On the day of examination, the complainant made an enquiry about examination procedures to an invigilator. The complainant claimed that the enquiry was not heeded by the invigilator who replied with impolite words.

464. The two papers taken by the complainant were both Multiple Choice questions. The Examination Regulations required that all answers should be marked with pencils. At the end of the examination, all the answer sheets were put inside an unsealed box. The complainant suspected that her answer sheets of one of the papers were interpolated by the invigilator, which caused her failure in one of the papers.

465. The complainant subsequently lodged the above complaint with VTC. The complainant claimed that VTC did not take appropriate follow-up action on the complaint. The request for viewing the answer sheets was also rejected.

The Ombudsman's observations

466. The Ombudsman considered the complaint against the poor attitude of the invigilator not substantiated, having considered the statements respectively by the complainant and VTC, and the supporting statements by five other candidates. The Ombudsman also considered there was a lack of supporting evidence for the complaint against the alleged interpolation of the complainant's answer sheets. The Ombudsman considered that there was inadequacy in VTC's response to the complainant's request for viewing the answer sheets, as the staff only explained on the suspected interpolation of answer sheets but did not

adequately inform complainant the right to view the answer sheets.

467. To conclude, The Ombudsman considered the complaint against VTC not substantiated.

Administration's response

468. VTC has accepted The Ombudsman's recommendations and has taken the following actions –

(a) The Examination Centre has revised the Invigilator's Guideline, under which an invigilator is required to submit a report on suspected cases of cheating, as well as irregularities involving candidates (including verbal warning issued to and disputes with candidates, and candidates' complaints against invigilators during an examination); and

(b) the Examination Centre has reviewed the procedure for handling candidates' answer sheets. Efforts have been stepped up as from December 2010 in further improving confidentiality arrangements whereby invigilators are required to place all answer sheets into sealed envelope(s) in front of the candidates at the end of the examination, and two invigilators on duty are required to sign on the seal(s). The two invigilators will then deliver the envelope(s) from the examination site to the Examination Centre and place the envelope(s) into a secure wooden box, which could only be accessed by designated Examination Centre staff members. The box will subsequently be opened and the examination answer sheets taken out in the presence of two staff members who will inspect the envelope(s) and the seal(s) to ensure that they have not been tampered with before opening them for further processing.

Water Supplies Department

Case No. 2009/4063 : Impropriety in replacing a defective water meter and recovery of unpaid water charges

Background

469. The complainant's water meter was found not registering on 7 December 2007 and 9 April 2008 when meter readers conducted routine meter reading. Consequently, the Water Supplies Department's (WSD) Customer Care and Billing System issued a field order to its site staff to replace the defective meter. The replacement work, however, could not take place because of blockage of access to the meter position. The defective meter was eventually replaced on 21 July 2008.

470. In April 2009, WSD informed the complainant that his meter had been found defective and his water charges had to be adjusted during the period of defective meter from 6 December 2006 to 21 July 2008.

471. The complainant was dissatisfied that WSD had taken a long time to replace the defective water meter and had adjusted the water charges for the period concerned. He considered that WSD should only raise bill adjustment within four months from the date the water meter became defective.

The Ombudsman's observations

472. The Ombudsman observed that WSD had taken seven months to replace the defective water meter and considered that there was a delay. WSD also failed to follow up whether the blockage of access to the meter position had been cleared so that the meter replacement work could be carried out.

473. The Ombudsman agreed that WSD had acted in accordance with relevant ordinance to adjust the water charges when the meter was found defective. Nevertheless, The Ombudsman noted that the consumption observation period in this case had lasted for eight months and considered that there was a delay.

474. The Ombudsman noted that depending on the case merits and

the physical constraints so encountered, WSD may not be able to complete the required observation and assessment procedures for bill adjustment within four months. As such, The Ombudsman considered that the complainant's suggestion that WSD should only adjust the water charges within four months from the date when the water meter becomes defective might not be practicable.

475. In view of the above, The Ombudsman considered this complaint partially substantiated.

Administration's response

476. WSD has accepted The Ombudsman's recommendations and taken the following actions –

(a) WSD has reviewed the procedures for handling meters and related works, and has issued guidelines to its staff stipulating, among other things, the timelines for following up different categories of field orders and internal pledge for meter tests; and

(b) WSD has reviewed the procedures for handling cases where the meters are found to be defective/ not registering and has issued guidelines to its staff stipulating, among other things, the follow-up actions to be taken by different sections/units, the mechanism for determining the need for meter replacement and the monitoring of meter replacement work.

Case No. 2009/4508 : Impropriety in handling a complaint about incorrect meter reading

Background

477. The complainant applied to the Water Supplies Department (WSD) at the end of December 2008 for the closing of her water account of a long-vacant residential flat. Shortly afterwards, she received the final bill demanding a water charge of around $900. Suspecting a mistake, she went to check the water meter of her flat and discovered that its number was different from the one stated on her final bill. Besides, the reading on the meter was some 900 units less than that on the bill.

478. The complainant first called WSD to enquire about the final bill in early January 2009. Subsequently, she called WSD again reporting the wrong meter number in mid-January 2009. WSD staff conducted a site inspection two months later and confirmed that the meter number on the bill belonged to the meter of another flat (Flat A). Another month later, the complainant received WSD's letter informing her that she need not pay the bill and a refund of her water deposit would be arranged. However, the reply fell short of addressing such issues as overcharging, prolonged meter misreading and also who should be responsible for the mistakes. She expressed her dissatisfaction again but WSD's replies just failed to answer her queries.

The Ombudsman's observations

479. The Ombudsman considered that there was maladministration on the part of WSD in several areas. The complainant reported the wrong meter number in mid-January 2009, but WSD did not carry out a site inspection until March 2009. The investigation results and notification of water charge adjustment were sent respectively to the complainant and the household of Flat A at the end of April 2009. There was a lapse of more than three months without a reasonable explanation. Such delay inevitably caused anxiety to the complainant and it was also unfair to the household of Flat A. WSD should have set a timeline for handling cases of meter mix-up so as to avoid delay or any adverse effect on public revenue. Such procrastination might also make recovery of water charges difficult.

480. The Ombudsman noted that WSD received the complainant's letters in May and September 2009 and sent out substantive replies at the

end of June and early November 2009. However, it did not issue interim replies to the complainant within ten working days as stipulated in its performance pledge. This would give the impression that the Department was sluggish and inefficient.

481. WSD attributed the incident to errors in record-taking or data upload to the computer system. The Ombudsman checked the meter installation records submitted upon completion of the estate in question and found an amended set of records submitted to WSD by the developer. According to the amended records, the numbers of both the complainant's flat and its water meter had been changed. It so happened that her original meter number became the new meter number of Flat A. In fact, for a number of flats in the estate, the meter numbers in the amended records were different from those in the original installation records.

482. The Ombudsman believed that WSD had failed to conduct a site inspection to verify the amended records and was, therefore, not aware that the actual meter numbers of the two flats concerned were different from the original installation records. As the housing estate was more than ten years old and the complainant's flat had changed ownership several times, more than two users may have been affected.

483. Besides, WSD had failed to clarify in its three replies to the complainant that no refund of overpayment would be arranged given that the complainant had never paid any water charges for the flat. Consequently, the complainant misunderstood that WSD refused to give her a refund.

484. Overall, The Ombudsman considered this complaint substantiated.

Administration's response

485. WSD has accepted The Ombudsman's recommendations and taken the following actions –

(a) WSD has reviewed and set a timeline for handling reported cases of suspected wrong meter arrangement (meter "mix-up" cases) within 21 working days in relevant guidelines;

(b) WSD has reminded its staff to make timely replies to the public in accordance with the departmental guidelines. In addition, WSD is studying the feasibility to generate automatic interim replies to the public by the computer system;

(c) WSD has inspected most of the flats in the estate in question for which attempts of access have been successful. For the remaining flats for which access could not be gained, WSD has written to the occupiers concerned to advise them on self-checking procedures and invite them to contact the Department if assistance was required. The inspection results show that apart from the two meter mix-up cases involved in the subject complaint, no other cases of mix-up have been found; and

(d) WSD has reviewed the practice of cross-checking meter installation and replacement and promulgated updated guidelines with a view to ensuring the accuracy and validity of records.

Case No. 2010/0119 : Failing to properly follow up the complainant's dispute about high water charges and delay in handling his wrong meter arrangement case

Background

486. In 2009, the number of persons living in the complainant's flat decreased from four to two. However, there was no significant change in the water charges. The complainant thus lodged a complaint with the Water Supplies Department (WSD) in mid-September 2009 about the high water charges. After a site inspection in early October 2009, WSD staff verbally told the complainant that the meters had been mixed up. However, the complainant did not receive any written reply afterwards.

487. In mid-January 2010, WSD replied to the complainant and confirmed that the meters had been mixed up. It also revealed that the complainant had been overcharged for his water bills in the period between December 2008 and December 2009. The complainant was dissatisfied that WSD had delayed in handling his meter mix-up and overcharging complaint and complained to The Ombudsman.

The Ombudsman's observations

488. The Ombudsman noted that in mid-February 2009, WSD hired a contractor to conduct a routine meter replacement project at the complainant's building. WSD believed that the contractor had mistakenly swapped the serial number of the complainant's meter with that of the flat below when recording the serial numbers of the new meters of the flats in the building on completion of the replacement work. As WSD staff updated the meter information in its computer system based on the installation data submitted by the contractor without cross-checking them on site, the mistake in WSD's meter records occurred.

489. The complainant raised the water charges dispute in September 2009. During a site inspection in early October, WSD staff discovered that the complainant's meter had been mixed up with that of the flat below. Although WSD immediately issued a letter to the registered consumer of the flat below to arrange for an inspection, no reply was received. WSD did not actively follow up and could conduct an inspection at the flat in question only in January 2010, confirming that the meters had been mixed up. It was frustrating and unfair to the complainant as he was aware that

the meters had been mixed up but still had to wait for many months before he got the result.

490. Furthermore, The Ombudsman noted that WSD had not yet input the new meter data and updated the records in its computer system six months after the replacement work. As a result, it could not conduct meter reading and calculate the water charges for consumers in the building according to their actual consumption but had to resort to estimation, making it more difficult to resolve the water consumption dispute arising from the meter mix-up.

491. In view of the above, The Ombudsman considered the complaint partially substantiated.

Administration's response

492. WSD has accepted The Ombudsman's recommendations and taken the following actions –

(a) WSD has reviewed and set a timeline for handling reported cases of suspected wrong meter arrangement (meter "mix-up" cases) within 21 working days in relevant guidelines;

(b) WSD has inspected all but two of the flats in the building in question. For the remaining two flats for which access could not be gained, WSD has written to the occupiers concerned to advise them on self-checking procedures and invite them to contact the Department if assistance was required. Apart from the two meter mix-up cases involved in the subject complaint, no other cases of mix-up have been found;

(c) WSD has reviewed the practice of cross-checking meter installation and replacement and promulgated updated guidelines with a view to ensuring the accuracy and validity of meter records; and

(d) WSD has reviewed and set a timeline for updating computer records after meter installation or replacement.

Case No. 2010/2756: Unreasonably refusing to refund the charge for water meter test

Background

493. On 7 April 2010, the Water Supplies Department (WSD) issued a demand note to the complainant requiring him to pay a water charge of $108.10 for the consumption period from 30 November 2009 to 28 March 2010. On 13 May 2010, WSD contractor replaced the complainant's meter under the Department's routine meter replacement programme. Shortly afterwards on 24 May 2010, the complainant called the WSD hotline disputing the water charges and applied for a meter test at one of its Customer Enquiry Centre (CEC) on the following day. The water meter in service at the time was duly replaced on 8 June 2010 and was found to have functioned normally after testing in the meter testing laboratory on 22 June 2010.

494. Upon review of the complainant's consumption records, WSD noted that the high water charges for the period concerned was due to an incorrect meter reading taken earlier. Also, the meter tested was not the one which was alleged to have registered high consumption based on which the disputed water bill was issued. After adjustment, there was no need for the complainant to pay any water charges for the period concerned. However, WSD did not refund the charge for the water meter test to the complainant.

495. The complainant considered that WSD had not actively investigated his complaint about high water charges. He was aggrieved that WSD had not provided him with other alternatives when he raised his dispute on water charges, apart from application for a meter test. Besides, the meter tested by WSD was not the one which was alleged to have registered high consumption and WSD only discovered that the high consumption was in fact due to an incorrect meter reading after the meter was tested. The complainant was also dissatisfied that WSD did not refund the charge for the water meter test to him.

The Ombudsman's observations

496. The Ombudsman noted that the complainant had reported an incorrect meter reading to WSD hotline staff when he made his enquiry and consequently WSD's current mechanism for handling water charge

disputes was not triggered. Nevertheless, The Ombudsman considered that WSD should not rely on the information provided by the customer as the responsibility to obtain a correct meter reading and confirm the proper functioning of inside service should rest with WSD.

497. The Ombudsman observed that WSD contractor replaced the meter which was alleged to have registered high consumption on 13 May 2010 but the new meter data had not been uploaded to its computer system until 28 May 2010. The Ombudsman considered that should the information be available when the complainant called the WSD hotline for enquiry on 24 May 2010 or applied for a meter test at CEC on the following day, the staff should have noticed that the meter in question had been replaced earlier and the test of a meter unrelated to the high water charge dispute might have been avoided.

498. In addition, as it was confirmed that the high water charge was due to an incorrect meter reading, The Ombudsman considered WSD inflexible and rigid in not refunding the charge for the water meter test to the complainant. The Ombudsman, therefore, considered this complaint substantiated.

Administration's response

499. WSD has accepted The Ombudsman's recommendations and taken/is taking the following actions –

(a) WSD is reviewing its procedures for handling disputes on water charges/bills including procedures on applications from customers for meter tests; and

(b) WSD will continue its efforts in improving the accuracy of meter reading. Meter readers' performance is currently duly reflected in their annual performance appraisals and appropriate actions against poor performers would be taken. In addition, WSD will continue to provide meter readers with suitable training to enhance their performance in meter reading accuracy.

Part III
– Responses to recommendations in direct investigation cases

Fire Services Department and Food and Environmental Hygiene Department

Case No. DI/190 : Fire Safety Regulatory Measures

Background

500. The Cornwall Court fire in August 2008 aroused concern over fire safety especially on food premises, which entertain members of the public in large numbers. The Ombudsman, therefore, initiated in June 2009 a direct investigation to examine –

(a) the procedures and practices in enforcement of regulatory measures for fire safety applicable to all premises;

(b) the administration of arrangements for fire safety in licensing food premises; and

(c) the mechanism for monitoring compliance with fire safety on food premises.

Administration's response

501. The Fire Services Department (FSD) and the Food and Environmental Hygiene Department (FEHD) have generally accepted The Ombudsman's recommendations and taken the following actions –

(a) FSD is pushing forward with the development of the Integrated Licensing, Fire Safety and Prosecution System (LIFIPS) which would enable prompt identification of owners of Fire Service Installations (FSI) and Registered Contractors (RCs) who fail to comply with statutory requirements. FSD expects that the LIFIPS should be ready for rolling out in 1st Quarter of 2012. FSD will review the need for legislative amendments for the long run, taking into account of the LIFIPS operation.

(b) FSD has prioritised the registration of major defect cases and streamlined the operational process to speed up enforcement action since February 2011.

(c) Since July 2011, FSD has put in place the measure to issue advisory letter for every case with Certificate of Fire Service Installations and Equipment (FS251) reporting defective FSI, regardless of whether it is a major or a minor FSI defect;

FSD has set up a working group to follow up on the recommendation to conduct random check on non-major FSI defective cases, which is expected to be implemented by end 2011.

(d) FSD has conducted a study on requiring RCs to make good FSI before submitting FS251 to FSD. As a preliminary assessment, FSD considers that since it would normally take time (ranging from a day to a few weeks, depending on the nature of the defects) for RCs to rectify the defects, it would be important for FSD to receive reports of defective FS251s in the first instance for the purpose of better fire risk management and fire safety protection. Upon receipt of such reports, FSD would issue advisory letter as an immediate first response. The local fire station would also issue instructions to the concerned buildings/premises on taking interim remedial measures (e.g. installing additional fire extinguishers) and formulate contingency plans against potential fire calamities. If RCs were required to submit FS251s only after they had rectified the defects, FSD would not be able to take the interim measures to tackle the higher fire risk. The Department would continue to study the pros and cons and the feasibility of the recommendation.

The launching of the LIFIPS in 1st Quarter 2012 will facilitate FSD to track the progress of the verification of FSI defects and will enable the department to expedite necessary action against buildings/premises which fail to perform rectification works.

(e) FSD is pushing forward with the development of the LIFIPS which will enable prompt identification of owners of FSI and RCs who fail to comply with statutory requirements. With the information, FSD would then be able to step up prosecution against owners of FSI for their failure to check FSI and RCs for

their failure to submit FS251. FSD expects that the LIFIPS should be ready for rolling out by 1st Quarter of 2012;

In the meantime, officers of operational fire commands have stepped up prosecution action against owners/users for causing obstruction to or locking means of escape (MoE);

Radio and TV Announcement in Public Interest (API) for promoting proper maintenance, annual inspection of FSI and display of FS 251 have been launched since 30 June 2010 and 5 January 2011 respectively.

(f) FSD has issued a corresponding poster for general display since 1 February 2011.

Letters were sent to property management companies through the Hong Kong Association of Property Management Companies Limited, Hospital Authority and Airport Authority for encouraging them to display certificates of FSI at conspicuous locations of buildings/premises under their management.

(g) A new mechanism for referral of "serious obstructions"' to MoE caused by Unauthorized Building Works (UBW) has been put in place since 31 January 2011, under which "serious obstructions"' to MoE by UBW will be referred to BD through a dedicated unit in FSD. After the receipt of referrals, BD will, upon request at regular intervals, inform FSD the progress of the cases and actions taken. The dedicated unit in FSD will notify the relevant frontline units in the department regarding the existence of the 'serious obstructions' and the actions taken by the BD. The FSD frontline units will inspect the sites and formulate relevant contingency plans where necessary having regard to the seriousness of the obstructions. FSD and BD will review the effectiveness of the referral mechanism in due course.

(h) FEHD and FSD have been discussing the setting up of a regulatory mechanism for handling breaches of fire safety requirements of food business premises, under which relevant licensing conditions would be imposed. The latest proposal consists of the following –

(i) For serious breaches of fire safety requirement, FSD will recommend immediate suspension of license to the Food and Environmental Hygiene Department (FEHD). FEHD will invoke the Director of Food and Environmental Hygiene's power under section 125 of the Public Health and Municipal Services Ordinance (Cap. 132) to suspend a food business license; and

(ii) For minor breaches of fire safety requirements, FSD will inform FEHD accordingly and FEHD will issue warning letters to the concerned licensees and ask them to rectify the breaches. FEHD will consult with FSD on follow-up actions should the irregularities continue to exist after 2-3 warning letters have been issued.

FEHD and FSD have formed a working group to finalize details of the proposals and would then consult the trade. Subject to the views of the trade, the departments would confirm the implementation details in due course.

(i) The latest proposal from the working group above is that FEHD would only renew licences of food premises where there are valid FS251(s) and annual inspection certificate of ventilating system (AIC) where applicable.

(j) FSD has set up a working group to follow up on the recommendation related to surprise inspection. The electronic inventory on FSI is expected to be completed by end-2011. FSD will implement the risk-based inspection strategy in food premises and step up inspection to those involving higher risks.

(k) A standard memo has been devised for FSD to inform FEHD of any actions taken against fire safety related irregularities in food premises referred by FEHD. The revised mechanism adopting the new referral memo has been implemented since November 2010.

Regular inter-departmental liaison meetings among FSD/FEHD/BD are being held every six months to enhance coordination and communication. The first and second inter-departmental liaison meetings were held on 31 January 2011 and 26 July 2011 respectively.

Government Secretariat –
Education Bureau and Lands Department

Case No. DI/184 : Allocation and monitoring of government Land

Background

502. Government land policy stipulates that for Government land allocated by the Lands Department (LandsD) to another Government department, the latter will assume responsibility for managing the land. The Ombudsman found, however, that this policy was not followed in one case involving a piece of Government land which had been allocated in 1974 by the New Territories Administration, the predecessor of LandsD, to the Education Department, the predecessor of the Education Bureau (EDB), for use by a sports association (the Association).

Administration's response

503. EDB has accepted the recommendations from The Ombudsman and has taken the following actions –

(a) EDB maintains close contact with the Association through formal meetings, site visits, emails and telephone conferences. EDB requested the Association to provide an update on its activity progress, meeting minutes, etc for scrutiny;

(b) The EDB entered into a tenancy agreement with the Association on 28 June 2011, among other specific requirements, detailing the performance objectives for using the site and the three-year development plan of the Association between 2011 and 2014. The evaluation conditions and terms in relation to the development plan are in place for objective evaluation of the Association's performance over the period under scrutiny; and

(c) As laid down in the tenancy agreement with the Association, EDB reserves the right to terminate the use of the site by the Association in case of continued underutilisation or abuse.

504. LandsD has accepted The Ombudsman's recommendation and issued memos to the bureaux/departments requesting them to –

(a) provide a list of their Government Land Allocations (GLAs) for LandsD's counter-checking to see whether there is any discrepancy between their lists and LandsD's records;

(b) check if the allocatee has signed any tenancy agreement (T/A) or undertaking with each of the end-users if the end-user is not the allocatee, and if not, consider whether such T/A or undertaking should be executed;

(c) check if the conditions of GLA and T/A or undertaking are complied with, and if not, the allocatee should follow up with the end-user to enforce such conditions;

(d) institute a system whereby the allocatee will supervise and monitor the use and occupation of the land/building under each of GLAs on a regular basis; and

(e) return GLAs which are no longer required (e.g. the land/building is not fully utilised or there is a significant breach, etc.) to LandsD.

505. LandsD is in the process of counter-checking the returned records. Since some returns from bureaux/departments were incomplete, LandsD is chasing their replies for further counter-checking. District Lands Offices (DLOs) of LandsD have to liaise with the concerned bureaux/departments to take back their reported under-utilised sites/buildings. For those surplus Government properties, they will be referred to the Government Property Agency for follow-up actions.

506. For newly allocated sites, DLOs will remind the allocatees of their responsibilities to supervise and monitor the use and occupation of the sites held under the GLAs as detailed in (b) to (e) of paragraph 504 above.

Transport Department

Case No. DI/183 : Driving-offence Points System

Background

507. A driver who has accumulated 15 driving-offence points (DOP) within two years is liable to be disqualified by the court from driving. However, it was found that some drivers with 15 or more DOP were able to evade receipt of court summonses for disqualification hearing. Hence, the Administration proposed in February 2009 to amend the Road Traffic (Driving-offence Points) Ordinance (the DOP Ordinance).

508. Concerned that the proposed amendment still seemed unable to promptly disqualify wilful evaders, The Ombudsman decided to initiate a direct investigation to assess the effectiveness of the proposed amendment.

509. The amendment took effect on 29 May 2009. Following the amendment, summonses are served, as before, by ordinary post first. However, if the driver does not appear in court, the summons will be served again by registered post to the driver's last known address. The summons will be deemed served, even if it is returned undelivered. If the driver still does not appear in court, the court will issue non-appearance arrest warrant, upon which the Police will step in to ask the driver to surrender to a Police station or the court. The Commissioner for Transport (C for T) has also been empowered to refuse to issue, reissue or renew the driving licence of the driver who has been served a summons and has failed to appear in court for it.

Administration's response

510. The enhanced mechanism was introduced in mid 2009. Since then and as at end September 2011, there were a total of 7,461 new cases on which summonses were issued to drivers with 15 or more Driving-offence Points (DOPs) under the DOP system. Among these cases, arrest warrants for 112 cases were still in force as at end September 2011. The percentage of cases with arrest warrants in force has decreased from 2.4% as at October 2010 (134 cases where arrest warrants in force, out of 5,599 summons issued since introduction of the

scheme), to 1.5% in September 2011. The decrease in percentage shows that the enhanced mechanism is effective in expediting the process of disqualifying drivers who have accumulated 15 or more DOPs within two years, and has been effective in addressing the concerns about wilful evaders and those who disregard arrest warrants.

511. Therefore, while the Transport Department (TD) appreciates the rationale for the recommendations, TD considers it prudent to observe the effectiveness of the enhanced mechanism further before deciding how to take forward recommendations (1) to (3) below, which have to be effected through legislative amendments. TD has already implemented recommendations (4) and (5) below, and will continue to monitor effectiveness, and explore further improvement measures.

(1) Consider legislation to empower the court to impose a longer disqualification period on evidence of deliberate attempt by drivers to frustrate law enforcement

The intention of the recommendation is to create a deterrent effect for wilful evaders and those who disregard arrest warrants. As shown by the updated figures in the preamble, the enhanced mechanism has achieved the desired effect of significantly reducing the number of drivers who have accumulated 15 or more DOPs within two years by improving the summons serving process. In case of signs of a possible reversing trend, TD will consider possible further enhancement of the DOP system, including whether a longer disqualification period is the appropriate deterrent to drivers who attempt to frustrate law enforcement.

(2) Consider accepting drivers' guilty plea by letter and acceptance of disqualification by letter to the court in the same spirit as the fixed penalty system

While accepting drivers' guilty plea by letter and acceptance of disqualification by letter to the court may improve the efficiency of the disqualification process, some drivers may not be able to appreciate their right of being heard by court and possible consequences. Such right of drivers should not be compromised when considering the recommendation, if needed.

(3) Consider empowering C for T to refuse issue and renewal of other licences, such as vehicle licences, to any driver who evades court attendance or Police arrest

Legal advice is that non-issuance or renewal of other licences may have impact on the property rights of the evaders.

(4) Streamline its procedures and practices to further shorten the disqualification process

TD has already worked with relevant parties to reduce the processing time of disqualification cases (i.e. from the date on which a driver incurred 15 or more DOPs to the date of first hearing) from about 14 weeks to 7 weeks on average. Of these 7 weeks, 3 weeks are needed by the relevant parties to complete due diligence to ensure that the case has been thoroughly examined before it is put to the court and 4 weeks are required by the court for fixing disqualification hearing. After compressing the average overall process from 14 to 7 weeks, there is very limited scope for further significant compression without compromising the reasonableness of time allowed for relevant parties concerned. That said, TD will continue to be alert about possible scope for further streamlining the process, and have also conveyed The Ombudsman's recommendation to the Judiciary regarding shortening the time required for fixing disqualification hearings.

(5) Systematically maintain and regularly analyse statistics on drivers with DOP, including related accidents, with a view to identifying problems in the DOP system for review and early remedy

Since 2011, TD has started to produce quarterly statistical reports on traffic accidents involving drivers with 15 DOPs or more but yet to be disqualified for internal reference and analysis, with a view to enabling early identification of specific issues that may be addressed through further enhancements in the DOP system.

Case No. DI/206 : Transport Department Actions for Safe Operation of Public Light Buses

Background

512. Public Light Buses (PLBs) are one of the most popular modes of public transport in Hong Kong. However, statistics show that the incidence of accidents involving PLBs over the past decade has been significantly higher than that of other classes of motor vehicles. The Transport Department (TD) undertook in 2000 to examine and develop safety enhancement measures for PLBs, after several fatal accidents involving PLBs. Nevertheless, little progress was made in the following nine years and actions were only accelerated after two major fatal accidents involving PLBs in June and July 2009.

Administration's response

513. TD has generally accepted the recommendations from The Ombudsman and has implemented/ is implementing the following measures.

514. The Administration introduced the "Road Traffic (Amendment) (No. 2) Bill 2011" (the Bill) into the Legislative Council on 13 July 2011. The Bill provides the necessary statutory provisions for introducing a package of measures to control and regulate the travelling speed of PLBs and to deter inappropriate driving behaviour of PLB drivers. The Bill also mandates the installation of blackbox as basic equipment of new PLBs. It is proposed that failure to comply with various requirements related to speed limiter and blackbox, and tampering with these devices would be an offence. It also empowers TD and the Police to retrieve data stored in blackbox, and provides for the use of such data as evidence in any criminal proceedings. Installation of blackbox will facilitate fleet management and deter PLB drivers from improper driving. The Bill also makes the attendance and completion of a pre-service course a condition for the issue of a PLB driving licence. It mandates the display of a PLB driver identity plate in every PLB, and makes failure to comply with this requirement an offence. The requirement on pre-service training course and display of driver identity plate will help enhance the quality of PLB services.

515. TD will implement the above measures after the Bill is passed,

and the relevant provisions take effect.

516. TD meets green minibus (GMB) operators and red minibus (RMB) associations at regular trade conferences, which provide a forum for the exchange of knowledge and experience about new technology, regulation and market information between TD and GMB/RMB trades. TD also maintains close liaison with the motor traders, trade associations of automotive parts, local automotive professional institutions (such as the Automotive Parts and Accessory Systems R&D Centre and the Hong Kong Productivity Council), local and national automotive testing bodies as well as the overseas homologation units and authorities for keeping up with the latest developments in the automotive industry and technological advancement.

517. On the extension of the requirement for installation of passenger seat belts to PLBs registered before 1 August 2004, TD has explained to The Ombudsman that retrofitting passenger seat belts in a PLB affects its body structure, and PLBs of older age or models cannot cope with the reinforcement work required. Therefore, when considering the legislative amendments in 2000 to further enhance the safety of PLB operation, the Government proposed to require only newly registered PLBs to be fitted with passenger seat belts. Such proposal took into account the practicality of the retrofitting work and struck a balance between the views of the community and the PLB trade. The legislative amendments were enacted in 2002 and implemented on 1 August 2004 from which date all newly registered PLBs are fitted with seat belts. To encourage more PLBs first registered before 1 August 2004 to be retrofitted with passenger seat belts, TD issued in 2006 to the trades specifications and drawings as guidelines for retrofitting approved passenger seat belts in popular PLB models. In addition, since 1 August 2004, the Government has introduced three incentive schemes to provide the PLB trade with financial assistance to encourage owners to replace older PLBs with newer models that are fitted with passenger seat belts. With old PLBs being gradually replaced with new models, the percentage of PLBs fitted with passenger seat belts continues to rise.

518. To follow up The Ombudsman's recommendation for TD to review and consider the retrofitting of seat belts, TD has reviewed the retrofitting proposal in consultation with the PLB trade in early 2011. The trade has raised strong objection to the retrofitting proposal. In gist, the trade's concerns are –

(a) when the law on seat belts was passed in 2002, the clear understanding then was that seat belts would only be required on newly registered PLBs;

(b) given (a) above, any retrofitting requirement now would effectively label PLBs as an unsafe transport mode;

(c) given that Government has already introduced (or will introduce) a number of safety measures targetting at PLBs, any further measure is unfair to the trade, and will create serious financial hardship to it; and

(d) the retrofitting cost is high (about $80,000 to $100,000). The estimated cost has not yet included revenue foregone due to the vehicle down time during retrofitting works.

519. TD respects and attaches great importance to The Ombudsman's recommendations. In fact, TD has endeavored to implement the recommendations from The Ombudsman as far as possible. While all vehicles, including PLBs registered before 1 August 2004, licensed to operate on the road meet the safety requirements of the Road Traffic Ordinance, TD will continue to engage the PLB trade to review and consider the feasibility and viability of retrofitting seat belts on PLBs first registered before 1 August 2004.

Hospital Authority

Case No. DI/194 : Management of Non-Emergency Ambulance Transfer Service by Hospital Authority

Background

520. In view of complaints handled on the delay and uncertainty of the Emergency Ambulance Transfer Service (NEATS) by the Hospital Authority (HA), The Ombudsman decided to initiate a direct investigation to examine –

(a) the booking system and scheduling of the NEATS fleets;

(b) mechanism for monitoring the service; and

(c) areas for improvement.

Administration's response

521. HA has accepted all recommendations of The Ombudsman and conducted a review on the performance standards, service monitoring mechanism, improvement needs and resource requirements of NEATS. The review covered the waiting time for discharge or transfer cases and out-patients; and the possibility of engaging non-profit making organizations and commercial operators in service provision. The improvement proposal after the review is as follows –

522. Through enhancement of intra-hospital logistics, HA has reduced the waiting time standard for inter-hospital transfer cases from 90 minutes to 75 minutes for 85% of patients requiring NEATS in 2011/12. HA is considering introducing new standards on waiting time for out-patients and further enhance the waiting time standard for in-patients/ discharged patients in 2012/13 and 2013/14.

523. To enhance the certainty of service, HA is considering expanding the NEATS fleet in order to reduce the average number of patients to be conveyed per vehicular journey and to shorten the vehicle turnaround time. At the same time, HA is planning to enhance the NEATS Transport Supporting System (NTSS) to capture the

"approximate patient ready time" at time of order booking to facilitate order scheduling by the NEATS Centres; and to enhance the communication between the wards/units and NEATS Centres to facilitate early order scheduling for the homeward trips. Furthermore, the NEATS Centres will inform the wards/units within 1 hour after the cut-off time for booking in case a service request cannot be entertained on the same day.

524. As for the reasons of low compliance in punctuality, high loading factor (sometimes as high as 6–9 patients per vehicular trips) and hence long turnaround time for vehicles are considered as the major factors. HA is considering expanding the NEATS fleet to improve overall service, including punctuality of service. Draft order scheduling guidelines have been devised to enhance the order grouping and route assignment work to reduce transit time for patients.

525. HA has required the mandatory reporting of reasons for order cancellations in the NTSS. HA will conduct regular analysis of the trend of unmet demand, and plan for the service in light of the growing and ageing population.

526. HA will continue to promote and facilitate vendors in the market to provide alternative transport service to patients, e.g. Diamond Cab, Accessible Hire Car. Meanwhile, the feasibility to outsource the workload of geriatric day hospitals and specialist out-patients clinics in the NEATS to non-governmental organizations/commercial operators to provide supplementary services is being explored. Detailed assessment on the cost and impact on staff and service will be conducted.

527. For prioritizing service targets, HA has considered the proposal of setting service priority having regard to the severity of the patients' mobility and their financial means. HA considers it appropriate to continue according priority of service to in-patients on discharge and inter-hospital transfer for the efficient utilization of hospital beds. As for other patients, this service will be provided based on clinical needs.

528. In conducting long-term planning of patient transfer service, HA will maintain close communication with the Food and Health Bureau.

Buildings Department and Lands Department

Case No. DI/203: Enforcement against Unauthorised Building Works in New Territories Exempted Houses

Background

529. To curb the proliferation of unauthorised building works (UBW), it is Government policy that BD should take priority action against "new" UBW, i.e. UBW completed within 12 months. However, for UBW in New Territories Exempted Houses (NTEHs), BD will take enforcement action only against UBW in progress (WIP), not even those "practically completed", i.e. the construction of the concrete framework of the structure or the cover of the stairhood of the building has been completed; while LandsD will accord high priority of lease enforcement action only to cases of blatant breach, such as the erection of an over-sized NTEH.

530. Against this background, The Ombudsman has initiated a direct investigation to examine the effectiveness of the current enforcement regime and suggested areas for improvement.

Administration's response

531. The Development Bureau (DEVB), Buildings Department (BD) and Lands Department (LandsD) have taken actions to implement The Ombudsman's recommendations. DEVB has also completed a comprehensive review of the existing enforcement policy and has developed a progressive strategy for systematic enforcement against UBW in NTEHs. Implementation details of the new strategy are being drawn up.

532. Under the new strategy, UBW in NTEHs will be categorised and subject to enforcement action in stages. Apart from giving priority to enforcement against WIP, new UBW and those UBW which constitute obvious hazard or imminent danger to life or property, proactive enforcement actions will also be taken against existing UBW that constitute serious contravention of the law and pose higher potential risks to building safety. In addition, a reporting scheme will be introduced for existing UBW in NTEHs which constitute less serious contravention

of the law and pose lower potential risks. The information collected from the reporting scheme will facilitate further detailed risk assessment of these UBW and enable BD to formulate progressive enforcement plans, taking into account the types and numbers of UBW involved and the availability of manpower and resources.

533. Specifically in relation to The Ombudsman's recommendations, the following actions have been/are being taken –

(a) under the new enforcement strategy, enforcement action will be taken against all new UBW undertaken after a cut-off date to be announced, irrespective of whether they are completed or in progress.

Meanwhile, in order to plug the existing loophole in enforcement, BD has broadened the definition of WIP to cover fitting-out works or site clearance in progress even after the completion of the main frame of the UBW. The new definition has been brought into force at the end of April 2011;

(b) the new enforcement strategy clearly recognises BD's responsibility for enforcement against UBW in NTEHs and LandsD's responsibility for land administration, including enforcement of lease conditions and action against unauthorised occupation of government land, which will not impede the enforcement actions to be taken by BD under the Buildings Ordinance (Cap. 123). The clarification of the demarcation of responsibilities between the two departments will eliminate unnecessary referrals and misunderstanding among staff.

In line with The Ombudsman's recommendation, BD will keep records of UBW in NTEHs for which enforcement action has or has not been taken, in order to build up a database for future reference;

(c) the categorisation of UBW and the systematic, progressive approach in enforcement will streamline work processes and make for more efficient and effective operation. BD and LandsD will keep monitoring operation and will further refine procedures as and when necessary;

(d) in pursuance of The Ombudsman's recommendation, BD has issued guidelines to staff on the collection of circumstantial

evidence including verbal, written, photographic or other types of evidence obtained from the workers, occupants, owners, neighbours, complainants, past inspection and enforcement records. BD will also keep under review the availability of new technology for detection and compilation of evidence against UBW and, as appropriate, consider adoption of such technology in its work;

(e) following The Ombudsman's recommendation, BD has, in April 2011, instructed its staff to record in the case files the rationale behind any changes made to the consultants' recommendations and to communicate the decision and the rationale to the consultants. This arrangement not only facilitates the consultants' understanding of BD's requirement, it also fosters communication to ensure proper consideration of matters especially when BD staff have different views to those of the consultants'; and

(f) the reporting scheme to be introduced for existing UBW in NTEHs will provide the necessary information for assessing the size and complexity of the problem of existing UBW in NTEHs and help formulate further detailed plans to tackle these UBW. The information collected will also provide the basis for future assessments of the effectiveness of the enforcement regime.