THE GOVERNMENT MINUTE

IN RESPONSE TO

THE EIGHTEENTH ANNUAL REPORT OF THE OMBUDSMAN

ISSUED IN JUNE 2006

Government Secretariat

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Introduction

The Chief Secretary for Administration presented the Eighteenth Annual Report of The Ombudsman to the Legislative Council at its sitting on 5 July 2006. The Administration undertook to prepare a Government Minute in response to The Ombudsman's Annual Report.

ii. This Minute sets out the action that the Administration and relevant public bodies have taken or intend to take in response to the cases on which The Ombudsman has made recommendations in her investigation reports. The cases referred to in Parts I and II of this Minute are those contained in Annexes 11 and 7 of the Annual Report respectively.

Part I
Investigated Cases

Agriculture, Fisheries and Conservation Department (AFCD)

Case No. 2004/4681：Impropriety in handling an application for a temporary exhibition permit and poor staff manners.

A representative of a cat club complained against AFCD staff for impropriety in handling its application for a Temporary Exhibition Permit. While organizing an exhibition of cats, the complainant received a call from the sponsor claiming that an AFCD officer had alleged the club to have failed to obtain a permit for the event. The complainant called the officer to clarify but found his telephone manners hostile. The officer also failed to explain why he had contacted the sponsor instead of the club, thereby jeopardizing the club's relationship with the sponsor.

2. When the club applied for a permit, it took more than ten days, with the permit issued just one day before the event. Allegedly, this was due to its seeking legal advice on the need for a permit. The complainant claimed that AFCD had caused unnecessary delay in processing their application. The complainant also alleged that an AFCD officer had shown up without authority on the day of the event and made a scene there.

3. The Ombudsman noted that any person organizing an exhibition of animals and birds for a period not exceeding a month and admitting members of the public on payment is statutorily required to apply for a temporary permit from AFCD. As AFCD received a complaint that the exhibition concerned did not have a permit, AFCD had a duty to investigate whether the exhibition required a permit. Given the time constraint and the effort in vain to contact the complainant, The Ombudsman considered it reasonable for AFCD to contact the sponsor, who was named in the event leaflet attached to that complaint. The Ombudsman believed that AFCD had no intention to jeopardize the complainant's relationship with the sponsor. In fact, AFCD had apologized to the complainant and offered to write to the sponsor to clarify. However, the complainant did not respond to the offer. It is also proper for AFCD to seek the Department of Justice's advice on legal matters including interpretation of the law. AFCD had issued the permit within two days once the legal advice was available and there was no evidence of delay in processing the application. The Ombudsman also considered it appropriate to inspect event to ensure compliance with permit condition. The complaint was unsubstantiated.

4. AFCD has accepted The Ombudsman's recommendations and taken the following actions -

(a) AFCD has improved its record maintenance and documentation since January 2006. Officers are reminded to append their signature, name, post title and date against their reports/minutes. File records have been audit checked to ensure that records are properly maintained.

(b) AFCD has issued the procedural guidelines on the way the inspection should be conducted in July 2005. An inspection report form listing the areas to be looked into during inspection has been used since November 2005.

(c) In the letters issued to applicants for collection of temporary exhibition permit, AFCD has stated that the exhibitions are subject to inspection(s) by AFCD staff. The requirement is also stated in the licensing conditions.

Buildings Department (BD)

Case No. 2004/2234：Failing to enforce a planning approval condition of Town Planning Board.

5. In October 1984, the Town Planning Board (TPB) approved the development at 91-93 Caine Road, Hong Kong with two conditions, one of which required that the vehicular access to and from the site should be via Peel Street and to the satisfaction of the Commissioner for Transport.

6. The developer once submitted building plans with vehicular access to the carpark of the development from Caine Road via Coronation Terrace. The then Buildings Ordinance Office (BOO) of the then Building Development Department (now BD) rejected the plans because of its non-compliance with the TPB's condition and adverse comments from the Transport Department (TD) and the then Town Planning Office (TPO) (now Planning Department (PlanD)) in April 1985.

7. In August 1985, the BOO approved the revised building plans of the development which indicated that the vehicular access to and from the site would be via Peel Street. The plans complied with the TPB's condition and received no objection from the TPO and the TD. The plans showed no vehicular access to and from Caine Road.

8. In November 1988, the BOO of the then Buildings and Lands Department (now BD) received a set of amendment plans showing an opening formed along Coronation Terrace. The BOO considered that the proposal was in compliance with the TPB's requirement as there was no amendment to the previously approved vehicular access via Peel Street and the proposed opening along Coronation Terrace was not designed for vehicular access. The clear width of the opening was approximately 3.5 metres whereas that required for a proper run-in/out for vehicles was 6 metres. Furthermore, the Buildings Ordinance did not prohibit such opening. In this light, the BOO approved the amendment plans without consulting TPO or TD.

9. Subsequent to the completion of the development of the site in 1990, notwithstanding the provision of the approved vehicular access via Peel Street, some owners have used the opening along Coronation Terrace for convenient vehicular access from the carpark of the development to Caine Road. One of the occupants of the building considered that such use created a nuisance to him and complained to the Ombudsman in April 2004.

10. The Ombudsman is of the view that given the TPB's imposed condition and the adverse comments made by the TPO and the TD in connection with an earlier development proposal with vehicular access to Caine Road via Coronation Terrace, the amendment plan showing an opening formed along Coronation Terrace should have triggered concern and prompted the then BOO to consult the TPO and the TD as before, as well as seeking legal advice. The Ombudsman sees this as inconsistency in the processing of building plans or an oversight.

11. The BD has accepted the Ombudsman's recommendations and revised the inter-departmental referral procedures so that staff members are required to refer all building amendment plans subject to planning conditions to PlanD for comments. The revised referral procedures have been promulgated through an internal departmental practice note issued to all relevant staff. The BD will also seek legal advice where there are any ambiguities in the interpretation of the statutory provisions or requirements during the building plan approval process.

Food and Environmental Hygiene Department (FEHD)

Case No. 2004/0411：(a) Delay in handling a complaint about unauthorised demolition of a partition wall between two adjacent market stalls; (b) Allowing the two stall owners to rebuild the demolished partition wall with materials different from specified requirements; and (c) Selective enforcement action against unauthorised stall extensions.

12. In September 2001, the complainant lodged a complaint to FEHD about the unauthorised demolition of the partition wall between two stalls ("Stall B and Stall C") in a market ("Market A") under FEHD. FEHD found the complaint substantiated and ordered the tenants to reinstate the partition wall. Two years had lapsed since the first verbal warning was given by FEHD in October 2001 until the issue of the third warning letter to the tenants of Stalls B and C in September 2003. The tenants of the two stalls kept on procrastinating under the pretext of disruption to business operation. It was not until November 2003 that the tenants finally rebuilt the partition wall with a different kind of material.

13. According to the prevailing market policy, the tenants of Stalls B and C did not qualify for applying for the removal of partition wall between them. Yet they still demolished the partition wall without prior approval. They also failed to rebuild the demolished partition wall in good time despite repeated requests by FEHD.

14. FEHD was aware of the relatively serious obstruction of the passageway caused by the stall tenants in Market A. In response to repeated complaints received, frequent enforcement actions were taken against offending tenants including the complainant between April 2003 and March 2004.

15. In the end, the complainant lodged a complaint to The Ombudsman against FEHD in respect of the following -

(a) delay in handling her complaint against the unauthorised demolition of the partition wall between Stalls B and C by the stall tenants concerned;

(b) allowing the tenants of the aforesaid stalls to settle the matter by rebuilding the partition wall with formica and wood instead of bricks and concrete;

(c) selective enforcement. Many stall tenants of Market A were placing their goods in public area beyond their respective business boundaries, but the complainant was the only one frequently subjected to more stringent enforcement (including prosecution); and

(d) the market staff were rude to her and told her that, because of her complaint against the aforesaid "demolition of partition wall", departmental officers were offended. She would thus be subjected to frequent and more stringent enforcement.

16. The Ombudsman considered that FEHD had not followed up on the case in relation to the reinstatement of partition wall between Stalls B and C properly and in a timely manner. The tenants of the two stalls did not meet the requirement for removing the partition walls. Yet they still demolished the partition wall without seeking prior approval. FEHD should have requested the reinstatement of the partition wall earlier in order to give a correct message to other stall tenants that any addition or alteration to the stalls would not be tolerated. Complaints (a) and (b) were therefore substantiated.

17. Regarding complaint (c), The Ombudsman noted that FEHD had responded to repeated complaints against the relatively serious situation of obstruction of the passageway caused by the stall tenants in Market A by taking frequent enforcement actions. The complainant frequently ignored the advice of FEHD staff and did not cooperate. This complaint was therefore unsubstantiated. For complaint (d), as there was a lack of independent evidence to support the allegation, the complaint was unsubstantiated.

18. FEHD has accepted The Ombudsman's recommendation and taken the following actions -

(a) FEHD has revised the "Operational Manual for Markets" in March 2005, requiring that warning letters and relevant documents with acknowledgement receipts be delivered by hand by market staff to the market stall tenants or their registered assistants;

(b) In the light of the legal advice that FEHD may require stall tenants to carry out works to rectify unauthorised alterations during the tenancy period, rather than waiting until the time of renewal of the tenancy, FEHD has further revised the "Operational Manual for Markets" in June 2005. Stall tenants are required to rectify, within a specified period, the addition or

alteration of fixture and fitting of the stalls that was effected without the written permission of the Director of Food and Environmental Hygiene. If the tenants fail to do so, FEHD will request the Director of Architectural Services to carry out or cause to be carried out such work as may be necessary to restore the stalls to the condition in which they were before the alteration or addition was carried out, and shall recover the cost of such work from the stall tenants concerned;

(c) FEHD has arranged training programmes on market management for staff before they are posted to, or shortly after their assumption of office in, the Market Section. Refresher courses will be arranged where necessary;

(d) The Discipline Section of FEHD issued three advisory letters in relation to observance of departmental working procedures to the staff concerned in November 2004 and December 2005;

(e) The stall tenants concerned including those of Stalls B and C have rebuilt the partition walls with bricks and concrete; and

(f) FEHD has completed the investigation and concluded that there was not sufficient evidence to prove the existence of sub-letting by tenants of the case. The complainant was informed of the findings of the investigation in May 2005.

Case No. 2004/3685：(a) Staff entering private property without authority; and (b) Delay in handling a complaint in that regard.

19. The complainant alleged that an FEHD officer had entered his village house without prior notice and stolen his property. Moreover, the supervisor of the officer concerned had delayed processing his complaint about the incident.

20. In August 2004, FEHD received seven reports on the revolting hygiene condition and odour caused by decaying meat, dead fish, dead shrimps and rubbish in the complainant's village house. The FEHD officer investigating the case could not gain access into the village house. So he looked into the complainant's backyard by mounting a ladder in an adjacent house. On confirming the insanitary condition, he posted a notice on the front gate requesting the complainant to contact the Department.

21. The complainant did not respond and his house remained locked up on subsequent visits by FEHD. The Department therefore

decided to invoke the law to enter the premises to see if the house was used for illegal food processing and to clear the rubbish and recover the cost from the occupier later.

22. The FEHD officer and cleaners finally gained access into the complainant's backyard by climbing over the wall from adjacent premises and removed a decaying pig's head, a box full of maggots, dead shrimps, a bucket with foul matter and other garbage. These articles were then taken to a refuse depot for disposal. Two neighbours witnessed the operation.

23. Later, the complainant alleged that the FEHD staff had entered his village house without authorisation. He claimed that the articles cleared were elements of his *fung shui* "shrine" and there was a jade pendant in the pig's mouth. He therefore sought compensation from the Department for his lost property. He also indicated that he had reported to the Police as a case of unauthorised entry and theft. After investigation, the Police found insufficient evidence to support a charge and closed the case.

24. FEHD subsequently charged the complainant for failing to remove household waste from his premises at least once every 24 hours as required under the Public Cleansing and Prevention of Nuisances Regulation (Cap. 132 sub. leg. BK). The complainant was found guilty and fined.

25. The Ombudsman considered complaint (a) partially substantiated as the FEHD officer had neither posted a statutory notice of Intended Entry nor applied for a warrant for entry before entering the complainant's village house to clear the articles.

26. The supervisor of the FEHD officer made internal referral immediately upon receipt of the complaint and the Department issued monthly interim replies to the complaint thereafter. There was no delay in processing the complaint. Complaint (b) was, therefore, unsubstantiated.

27. In the light of The Ombudsman's recommendations, FEHD has revised the "Operational Manual for Environmental Hygiene Services" and taken the following actions -

(a) FEHD has revised and added new guidelines to give clearer instructions to its frontline staff so as to ensure that incidents with serious environmental hygiene implications will be handled properly. These include requiring the frontline staff to consider applying to the Court for a warrant for entry into private premises in imminent situations where the occupier of the premises concerned cannot be ascertained to enable the staff

to carry out investigation and to abate the nuisance;

(b) FEHD has instructed its staff to take decisive and prompt actions when handling cases that may cause serious nuisance to public health; and

(c) FEHD has revised guidelines to instruct its frontline staff to submit regular inspection reports to their supervisors for consideration as soon as possible until the completion of the nuisance investigation. The revised guidelines also cover the relevant monitoring mechanism; and

(d) FEHD has given careful consideration to The Ombudsman's recommendation on amendments to the Public Health and Municipal Services Ordinance (Cap. 132) so as to deter people from purposely causing nuisance to environmental hygiene. FEHD is of the view that the existing Public Health and Municipal Services Ordinance has a comprehensive coverage of nuisance problems and the ways to deal with them, including permission for entry into private premises for conducting operations. The existing legislation and a set of clear guidelines in place has already achieved the objective of handling nuisances expeditiously, whether such nuisances are wilfully caused or not. FEHD considers that similar incidents can be dealt with effectively with the implementation of the revised guidelines by its frontline enforcement staff.

Case No. 2005/0265：Impropriety in handling an application for transfer of restaurant licence and failure to follow up a report against an unlicensed restaurant.

28. The complainant purchased the equipment of a restaurant and obtained FEHD's approval for transfer of the restaurant licence. However, as the owner refused to rent the premises to the complainant, he could not conduct business. FEHD warned that if the restaurant could not resume business within six months, the licence would be cancelled. The complainant later discovered that someone had been using the said premises for an unlicensed restaurant. He reported the case to FEHD several times, but the Department did not take any enforcement action.

29. The complainant lodged a complaint to The Ombudsman against FEHD in respect of the following -

(a) failing to verify the complainant's ownership, or right to the use, of the said premises before approving his application for licence transfer; and

(b) failing to act on the complainant's report against the operation of food business at the said premises without a licence.

30. The Ombudsman considered it the complainant's responsibility to ensure that he had ownership, or right to the use, of the premises before applying for licence transfer. FEHD had acted according to the relevant legislation and existing policy. There was no dereliction of duty. Complaint (a) was therefore unsubstantiated.

31. FEHD considered itself to have taken appropriate action in response to the complaint. However, The Ombudsman considered that FEHD had all along focused evidence collection only on whether the complainant was operating his business at the said premises and whether his licence should be cancelled, instead of ascertaining whether there was any unlicensed operation. The Ombudsman considered that FEHD had failed to respond appropriately to the complainant's report against the unlicensed restaurant. Complaint (b) was therefore substantiated.

32. FEHD has accepted the Ombudsman's recommendations to conduct a detailed review on the operation of licensed premises by a person other than the licensee and to issue appropriate guidelines for handling such situation. Relevant guidelines have been formulated since October 2005 and further revised in April 2006, particularly on the following issues -

(a) FEHD has expedited the process by issuing a letter of intended cancellation of licence to the licensee concerned when detecting prolonged suspension/cessation of the food business, warning the licensee about the intended licence cancellation unless the licensee resumes operation within 10 days of the warning, or can provide a reasonable explanation;

(b) If a food business is operated by a person other than the licensee without the licensee's consent, FEHD staff will, after collecting sufficient evidence, institute prosecution against the person; and

(c) For trade facilitation and under normal circumstances, FEHD will continue to process a licence application in respect of premises covered by another valid licence, but the new licence will not be issued unless and until the existing licence has been cancelled.

Case No. 2005/2124：Failing to give prior notice of exhumation of remains to the deceased's family.

33. The complainant's late husband was buried in a cemetery ("Cemetery A") under FEHD in 1996. In April 2005, she contacted two different offices ("Office B and Office C") of FEHD's Cemeteries and Crematoria Section to enquire about exhuming the remains. The staff at both offices allegedly informed her that the remains were still in Cemetery A.

34. An undertaker went to Cemetery A to exhume the remains, and found that they were not there. FEHD later confirmed that it had exhumed the remains in January 2005. Before doing so, it had sent a written notification to the family of the deceased. However, the complainant claimed not to have received such notification (complaint (a)). She was also dissatisfied that the staff at Office B and Office C shirked their responsibility and refused to admit their mistakes (complaint (b)).

35. The Ombudsman observed that FEHD published a notice and an order in the Gazette and several newspapers, indicating that all human remains buried in 1996 in some specified cemeteries would be removed and disposed of if private exhumation was not arranged by 30 June 2003. FEHD had also sent a notification to the brother of the complainant before proceeding with the exhumation. The notification did not reach the brother because of wrong address and thus returned. The staff concerned should be held accountable for negligence. Complaint (a) was, therefore, partially substantiated.

36. The Ombudsman also commented that when the complainant contacted Office B in April 2005, the data had yet to be updated. The staff at Office B replied to the complainant's enquiry based on information in the computer. The computerised notification system in FEHD was the cause of the blunder. The three staff members at Office C overlooked that the year of burial was 1996. Consequently, they did not confirm with Cementery A whether the remains had been exhumed before issuing the complainant an exhumation permit. The three staff members at Office C admitted that they had mistakenly issued an exhumation permit to the complainant due to their heavy workload. In view of their readiness to admit their fault, complaint (b) was unsubstantiated.

37. FEHD has implemented The Ombudsman's recommendations and revised its internal guidelines on exhumation and upgraded its computer reporting system on 30 November 2005. The revised guidelines clearly stipulate the duties and the target completion dates assigned to relevant offices and officers involved in the mass exhumation exercise conducted

annually by FEHD. Officers are also required to accurately record the information regarding applications for coffin burial and to verify the address and contact telephone number of any returned written notification sent to the family of the deceased. Follow-up actions that should be taken after the mass exhumation exercise are also specified in the revised guidelines. The upgraded computer reporting system has improved the notification mechanism in respect of mass exhumation exercises, such that FEHD staff will have access to the latest information when handling enquiries of the families of the deceased or processing applications for Exhumation Permit.

38. FEHD also reimbursed the complainant the cost incurred in hiring an undertaker for the exhumation.

Government Secretariat – Economic Development and Labour Bureau (EDLB)

Case No. 2004/0344：(a) Failing to consult the public on a major public art project; (b) Delay in replying to the complainant's enquiries; and (c) Failing to properly monitor the project site condition.

39. The complainant was dissatisfied that a large stretch of turf had been removed and a wooden pole over eight feet high had been erected at Ngong Ping. He had since November 2003 complained to the Government and enquired about the case repeatedly. Though the Architectural Services Department (Arch SD) had explained to the complainant by telephone on two occasions, he was dissatisfied with the reply and wrote to The Ombudsman to complain about the following -

(a) no public consultation prior to implementation of a major public art project;

(b) delay in replying to the complainant's enquiries; and

(c) lack of effective project monitoring, no improvement to the site condition since the complaint was lodged more than two months ago.

40. After investigation, The Ombudsman noted that the Tourism Commission (TC) and Arch SD had actually announced the planned project, submitted papers to the relevant District Council (DC), liaised with a number of green groups and indirectly received public opinions via applications related to environmental protection and planning. The Ombudsman, however, noticed that there were inadequacies in the consultation exercise and therefore considered that allegation (a) was substantiated.

41. As regards Government's response to the complainant, The Ombudsman noted that Arch SD did answer the complainant's enquiries as soon as possible while TC only contacted the complainant some days after receipt of Arch SD's referral. The Ombudsman therefore considered that allegation (b) was not substantiated against Arch SD but partially substantiated against TC.

42. Furthermore, as the slope rejuvenation works involved the Technical Assessment Panel's schedule of work which was beyond the control of Arch SD, The Ombudsman considered that allegation (c) was not

substantiated.

43. Overall, The Ombudsman considered that the complaint was partially substantiated.

44. TC has accepted The Ombudsman's recommendation and taken the following measures:

(a) To improve the consultation arrangements with DCs, TC will state clearly in the consultation papers submitted to DCs that Members are invited to express their views; and

(b) Upon receipt of public enquiries or complaints, and where return address or telephone contact is available, interim replies will be given as soon as possible. As for enquiries or complaints involving more complicated issues, the person concerned may be invited for a meeting, as appropriate, to facilitate more detailed and clearer explanation.

Hospital Authority (HA)

Case No. 2004/2867：Mishandling the complainant's request for medical treatment.

45. The complainant, a resident of Mainland China, served his term of imprisonment in a local prison from May 2003 to August 2004. In May 2003, the complainant complained of discomfort at his lower chin, and noticed a cyst on the left hand side below his lower lip. He then sought treatment in late June at the prison's hospital (managed by the Department of Health), which declined his request for specialist consultation. Because of further growth of his cyst, coupled with intermittent pain, the complainant was subsequently given a referral by the prison's doctor in November 2003 for specialist treatment. On 2 June 2004, he attended a surgical consultation in a detention centre by a visiting surgical specialist of the Hospital Authority (HA). Upon assessment, the complainant was given a follow-up appointment of 7 July 2004 at the Surgical Department of the doctor's parent hospital (Hospital A) for further treatment.

46. On 7 July 2004, the complainant attended the Surgical Out-patient Clinic of Hospital A as scheduled. Upon further examination, the attending doctor recommended the complainant to have a minor elective operation for excision of a cyst at his lower chin. However, as there were no custodial facilities at the hospital, the attending doctor was of the view that there would be security problems should the complainant's handcuffs be removed during the operation. Having regard to the non-urgent nature of the operation, the hospital facilities and the security problems, the hospital decided not to proceed with the operation at the time.

47. The complainant was subsequently referred to Hospital B through the Correctional Services Department, where custodial facilities were available, for further management. The complainant was then given a follow-up appointment on 13 December 2004 at Hospital B according to his non-urgent clinical condition and the prevailing queuing criteria. Nevertheless, the complainant returned to the Mainland China in August 2004 at the end of his imprisonment.

48. The complainant alleged (a) delay in arranging specialist treatment on the part of the prison staff and (b) postponement of the operation for him by Hospital A on the grounds that there were errors in his medical record. He filed a complaint to The Ombudsman on 10 July 2004. The HA provided The Ombudsman with the following additional information in response to the allegations -

(i) Hospital A did not hold any medical record of the complainant when he attended for medical treatment for the first time on 7 July 2004. The allegation that there were errors in the complainant's medical record kept by Hospital A at the material time was unfounded.

(ii) The referral made by the specialist on 2 June 2004 was meant for an earliest further treatment and operation for the complainant. However, whether or not an immediate operation would be done was dependent upon the consideration and clinical judgment of the attending doctor. The factors under consideration were results of further assessment, urgency of the operation and hospital facilities, etc.

(iii) The appointment of 7 July 2004 was given by the specialist in the best interest of the complainant. Although no operation was carried out for the complainant by Hospital A on that day, the consultation did provide a further assessment reassuring the complainant that his clinical condition was non-urgent. The HA was of the view that one should not simply employ the layman's perspectives or base on the fact that some inconvenience had been caused to the patient, without due regard to the professional judgement on the doctor's part, in arriving at a conclusion that there was maladministration on the part of the HA.

49. With regard to allegation (a), The Ombudsman was of the view that there was no maladministration on the part of the Correctional Services Department as the department only followed the instructions of the attending doctor in arranging medical treatment for the complainant.

50. In relation to allegation (b), The Ombudsman, having considered the information and responses from the HA, pointed out that the surgical specialist should know clearly about the fact that Hospital A had no custodial facilities, and that it would not carry out the non-urgent minor operation for the complainant irrespective of the results of further assessment. The Ombudsman therefore concluded that this allegation was partially substantiated and recommended that the HA Head Office should review the referral arrangements. Notwithstanding this, The Ombudsman noted that even if surgical referral had been made by the specialist to a hospital with custodial facilities on 2 June 2004, the complainant would still be unable to receive the operation before his discharge from the prison in August 2004.

51. The Ombudsman noted that a review on the case had been done by Hospital A, and the arrangements for referral of prisoners for minor elective operations had been improved. The Ombudsman also recommended that the HA should extend the improvement measures to all prisoners under the custody of the Correctional Services Department so as to minimize recurrence of similar incidents.

52. Having duly considered the case and the recommendations from The Ombudsman, the HA Clinical Co-ordinating Committee in Surgery has worked out the guidelines on the procedures of referring prisoners for operation for reference of the Surgical Departments of the public hospitals -

(a) when considering the need for referring patients to a hospital with custodial facilities, the continuity of clinical care should be of prime consideration;

(b) hospitals should consider referring patients to a hospital with custodial facilities under the following conditions -

(i) the clinical needs necessitate treatment in in-patient settings;

(ii) the level of clinical care required of the patients could be provided in custodial settings; and

(iii) the quality of care would not be compromised significantly due to disrupted continuity of care.

Housing Department (HD)

Case Nos. 2005/1041 (HD), 2005/1043 (LandsD), 2005/1909 (PlanD)：Shirking responsibility and delay in handling an unauthorized structure.

53. The complainants complained against Housing Department ("HD"), Lands Department ("LandsD") and Planning Department ("PlanD") for "buck passing" over their complaint of an unauthorized structure on an adjacent lot as it posed a security risk to their estate.

54. The complainants wrote to PlanD and a District Lands Office of LandsD for action on the unauthorized structure. Both departments notified HD as it was responsible for demolition of unauthorised structures on leased land.

55. According to the planning permission granted by the Town Planning Board (TPB), part of the subject lot could be used for operating a temporary hardware shop. Under the Outline Zoning Plan, the unauthorised structure did not constitute "unauthorised development, but the storage of construction materials was a violation. For that offence, PlanD exercised control and issued warnings under the Town Planning Ordinance.

56. However, the case of unauthorised structures dragged on for nearly two years, as HD and LandsD refrained from any action and waited for the owner/occupier of the lot to apply to TPB for change of land use or to LandsD for a Short Term Waiver (STW) for regularization.

57. HD explained that the owner/occupier of the lot had thrice applied to TPB for change of land use and twice asked for review of the applications. Besides, LandsD had also indicated that it would consider granting a STW. HD, therefore, did not issue any notice of a deadline for demolition. HD claimed that it had to wait for the final decisions of TPB and LandsD on those applications before taking action.

58. LandsD explained that while the STW application was being processed, a large factory-like structure was found being constructed on the lot, the size and user of which were different from the TPB approval. The District Lands Office (DLO) referred the case to the Plan D and HD for appropriate enforcement action and rejected the STW on 7 August 2003. LandsD received the complaints on 24 November 2003 and 31 August 2004 on the unauthorized structure on the lot. The complaints were referred to the relevant department for follow up.

59. According to LandsD, the owner of the Lot submitted a new planning application to TPB on 4 November 2003 and was rejected. He then appealed for a review which was again rejected. The owner of the lot applied to DLO a STW on 22 January 2004. The application was rejected on the ground that the application was rejected. DLO has included the case in its "Priority List for Lease Enforcement Action".

60. The Ombudsman did not accept HD's explanation. There were at least two long periods when the owner/occupier did not seek change of land use or STW. HD had no reason to keep the case pending. The complaint against HD was therefore substantiated.

61. The Ombudsman considered that LandsD could have well taken action during the two long periods. Inclusion of the case in its "Priority List" was a pretext for procrastination. The complaint against LandsD was therefore substantiated.

62. HD and LandsD accepted The Ombudsman's recommendations in general and have the following response -

(a) Instead of shirking its responsibility, HD had all along been liaising with LandsD and PlanD in a bid to resolve the issue. However, HD admitted that there had been a delay in the handling of the case and agreed that it could have collaborated more closely with other concerned departments.

To improve collaboration, HD and LandsD had started regular meetings at the senior management level since August 2005 and carried out several joint operations. As at January 2006, part of the unauthorized structure had been demolished while LandsD was considering regularization of the remaining portion;

(b) Before transferring its squatter control duties to LandsD on 1 April 2006, HD had followed the recommendation of the Ombudsman to strengthen communication and collaboration with other government departments. It had also reviewed and revised its departmental guidelines to enhance operational efficiency when handling similar cases. LandsD has also put into practice procedural guidelines following the complete transfer;

(c) LandsD had granted a STW for regularization of the structure on the Lot was granted to the owner in April 2006.

Lands Department (LandsD)

Case No. 2004/4362：Delay in handling water seepage problem on a retaining wall.

63. In October 2004, the complainant lodged a complaint against the Home Affairs Department ("HAD") for its delay in handling his complaint concerning a seeping retaining wall at the back of his house. Later in November 2004, the complainant lodged a complaint against LandsD as well.

64. The investigation conducted by the Ombudsman revealed that the District Lands Office ("DLO") failed to take prompt action upon receiving the complaint to clarify the ownership of the retaining wall and the party responsible for its maintenance. The Ombudsman considered the DLO lax in performing its duties and it should have confirmed the land title in the first place upon receipt of the complaint.

65. Later, citing the "beneficiary-maintains" principle and subsequently other justifications, DLO determined the maintenance of the wall to be the responsibility of the complainant as lot owner.

66. The Ombudsman considered that the DLO was negligent on several occasions when handling the case. The complaint was therefore substantiated.

67. LandsD has accepted the Ombudsman recommendation and has reminded the staff member concerned to act pro-actively to avoid unnecessary delay in handling complaints. Regarding the disputes relating to the maintenance responsibility of the retaining wall, LandsD has written to the complainant in April 2005 to clarify that the complainant is responsible for maintaining the retaining wall as he is the owner of the lot. No response from the complainant has been received.

68. LandsD has sought legal advice on the basis of the "beneficiary-maintains" principle (the principle) and clarified to the Ombudsman the rationale upon which it had made reference to the principle. LandsD has also explained why the complainant as owner of the lot is responsible for the maintenance of the retaining wall.

Case No. 2005/0985：Failing to monitor the development of a small house and inclusion of a misleading condition in certificates of exemption in respect of building works of small houses.

69. Lot 708 in D.D. 256 (the subject Lot) and Lot 707 in D.D. 256 (the complainant's lot) were both granted by way of Private Treaty Grant under the Small House Policy on 3 February 2000. These two lots are meant to be developed into a pair of semi-detached Small Houses.

70. On 19 Feb 2004, Certificate of Exemption in respect of Building Works was issued to the grantee of the subject lot. A standard condition that "No building works shall commence until the applicant has completed satisfactorily the site formation works in pursuance of Cap. 123" was included in the Certificate of Exemption in respect of the Building Works.

71. The site formation works for the complainant's Small House started significantly earlier than those for the house on the subject lot. However, the building works on the subject lot overtook those on the complainant's lot. Consequently, the Complainant suspected that the development on the subject lot had not followed proper procedures and might adversely affect the slope foundation works of his house.

72. The complainant wrote to the Buildings Department ("BD") on 4 April 2005 and the District Lands Office ("DLO") on 20 April 2005 to raise his concern. As the site formation plans had been approved by BD, DLO referred the case to BD for assessment. BD's inspection on 17 May 2005 confirmed that the site formation works on the subject lot had been substantially completed. There was no structural or geotechnical danger and the complainant's lot, which is next to the subject lot, was not adversely affected.

73. On 20 May 2005, BD replied to the complainant that the site formation works on the subject lot had been substantially completed in accordance with the approved plan. BD pointed out in their memo dated 20 May 2005 to DLO that erection of New Territories Exempted House ("NTEH") prior to completion of site formation works may pose danger in certain cases and had suggested the imposition in future Certificate of Exemption for NTEH requiring completion of the necessary site formation works prior to the erection of the NTEH if the site condition warrants.

74. LandsD admitted that for cases posing no site danger, the building works could commence without BD's prior certification of satisfactory completion of the site formation works.

75. The Ombudsman noted that the staff of DLO who conducted site visits every three months on average had not followed the schedules laid down in the relevant Land Instruction in conducting site inspections for monitoring the subject development. Moreover, DLO had also not enforced the "standard condition" in the Certificate of Exemption in respect of Building Works for the subject Small House development.

76. The LandsD has accepted The Ombudsman's recommendations and taken the following actions -

(a) NT DLOs have been requested to comment on a practicable site inspection frequency for monitoring Small House developments. Having gathered the comments from NT DLOs, review on Land Instructions is underway.

(b) LandsD has, in consultation with BD and Geotechnical Engineering Office, considered and taken on board the recommendations on -

- reviewing whether the so-called "standard clause" could instead be included in the Certificate of Exemption in respect of Building Works on a need basis;

- ensuring that once included, any such clause must be enforced strictly; and

- informing BD of all cases where the DLO intends to enforce the "standard clause", for example, for safety reasons.

A memo was issued to the NT DLOs in July 2006 and amendments to the Land Instruction to effect the above recommendations are being arranged.

Case No. 2005/0991：Failing to investigate and rectify an excavation work in village, which resulted in the blockage of a drainage channel next to the complainant's house.

77. In late September 2004, the District Lands Office ("DLO") received a complaint through Integrated Call Centre ("ICC") from the complainant. In substance, the complaint was about the blockage of a drainage channel ("the blockage") caused by newly constructed steps adjacent to the complainant's house.

78. Since October 2004, DLO conducted several site inspections and tried to identify the responsible party. The Highways Department, the Drainage Services Department and the Water Supplies Department ("WSD") all confirmed that they did not authorise the works. DLO then requested the District Office ("DO") to follow up the case. DO replied in late March 2005 that the drainage pipe was not constructed by DO. During a site inspection conducted by the WSD's contractor in response to a referral made by DLO in April 2005, it was found that the blockage was not related to the drain replacement works carried out by WSD in 2002, but the contractor cleared the blockage voluntarily because the clearing procedures were not complicated.

79. DLO has not been able to identify the party responsible for the blockage of the drain. It is believed that the works might be an illegal excavation.

80. The Ombudsman opined that DLO should have dealt with the matter more flexibly by solving the blockage problem before pursuing the responsibility. In fact, DLOs are responsible for the proper handling of the problems found on unleased Government land. Based on this principle, DLO should have taken on the ultimate responsibility for fixing the problem even if the responsible party could not be identified. Regrettably, DLO failed to deal with the problem actively. In sum, although the investigation was hindered by a number of factors, DLO should share part of the responsibility for having delayed the handling of the complainant's case.

81. On The Ombudsman's views for LandsD to avoid making referrals, LandsD explained that the resolution of the subject problem required technical expertise including engineering works such as removal of concrete to expose the drainage channel, to clear the blockage and to carry out reinstatement work. LandsD does not have the know-how for resolving the problem. DLO had nevertheless taken the initiative as a hub manager to investigate the matter by carrying out on-site enquiries and seeking other Departments' assistance/follow-up. Referral to DO was made by DLO for the reason that the former was responsible for Rural Public Works programme which aims to upgrade the infrastructure and improve the living environment of the rural community.

82. LandsD has explained to the Ombudsman why it has difficulty in accepting in full her recommendation that DLOs should act on behalf of the Government whenever problems emerge on unleased Government Land and the site falls outside the purviews of other Government departments. LandsD has explained that the recommendation of The Ombudsman appeared to have extended LandsD's role and jurisdiction to cover all problems which may take place on, but are not related to management of,

unleased Government land.

83. LandsD has nevertheless accepted The Ombudsman recommendation to be more proactive and flexible when handing enquiries and avoid making referrals. A memo has been issued to remind all DLOs and relevant sections of the hub-management concept and the need for maintaining a flexible and positive approach in handling enquiries.

Case No. 2005/1043：Shirking responsibility and delay in handling an authorized structure.

84. Please refer to Case No. 2005/1041 under Housing Department.

Case No. 2005/1395：Failing to take enforcement action against an illegal structure.

85. The complainant lodged a complaint to the District Lands Office ("DLO") on 1 March 2003 against some unauthorized building works ("UBW") on Lot No. 3190 in DD102 ("the Lot") and claimed that the Lot was not a registered lot in the Land Registry.

86. Land status plan in DLO indicated that the Lot is a registered lot in private ownership. A subsequent site inspection by DLO found that some UBW was in progress on the Lot. The case was referred to the Buildings Department ("BD") for follow-up action and the complainant was informed accordingly.

87. On 13 March 2003, the complainant insisted that the Lot is indeed Government land. The owner of the Lot, the occupier and the San Tin Rural Committee Chairman ("STRCC") however maintained that the Lot is a "missing lot". In these circumstances, DLO conducted a full checking on the status of the Lot. Enforcement action was confined to unlawful occupation on Government land in the vicinity of the Lot. DLO's enforcement action however met with strong resistance from the occupier and the local villagers.

88. To ascertain the status of the Lot, DLO sought advice from various Government departments. District Survey Office commented that the Lot should be regarded as Government land although a lot number is marked on the record plan. BD and the complainant were advised accordingly in December 2003. The case was referred to Land Control Section of DLO for control action according to its priority.

89. On 10 May 2005, the complainant lodged a complaint to the Ombudsman. Meanwhile, the occupier of the Lot, supported by STRCC, expressed his intention to claim adverse possession of the Lot.

90. The Ombudsman was disappointed that the DLO had delayed in taking enforcement action. The complaint was therefore substantiated.

91. LandsD accepted all The Ombudsman's recommendation and taken the following actions -

(a) New procedural guidelines on dealing with adverse possession claims from occupiers of Government land are being prepared;

(b) LandsD is considering to take prosecution action against the occupier as he has failed to comply with a notice served under the Lands (Miscellaneous Provision) Ordinance (Cap. 28); and

(c) In the event that the occupier is successful in his claim for adverse possession of the Lot, DLO will ensure that he complies with all the New Territories Exempted House requirements. The "owner" will have to appoint an Authorized Person to certify the safety of the structures on the Lot.

Legal Aid Department (LAD)

Case No. 2005/0227：Delay in handling the complainant's two claims for compensation and failure to inform him of the progress of his claims between October 2000 and October 2004.

92. The complainant submitted two applications for legal aid in 1996 to file two compensation claims at court. He was issued two legal aid certificates in 1997 and Counsel A was appointed to take up his cases.

93. The complainant alleged that between October 2000 and June 2002, he tried to call Counsel A several times for progress and to inform him of his new address, but the Counsel never returned his calls. It was not until January 2004 that LAD contacted him again for an interview with counsel which, however, took place only in October 2004 with Counsel B. The complainant was dissatisfied that the Department had not informed him of the progress of his cases for four years and that there had been no progress whatsoever during that period.

94. The legal proceedings of the complainant's cases commenced in January 1997 and February 1998 respectively. Between 1998 and October 2000, LAD had written 15 letters to the complainant to follow up on the case, but the complainant seldom responded. Counsel A had also attempted to contact the complainant by telephone repeatedly from February to September 1998 and from October 2000 to December 2003, but all the calls were unanswered. Counsel A had reported the cases to his supervisor during that period. LAD however had no written record of Counsel A's telephone calls to the complainant and his reporting to his supervisor. Without instructions from the complainant, no action could be taken by LAD in relation to the cases. In light of the prospect of success of the complainant's claim, and the legal costs involved, LAD decided against discharging the legal aid certificate despite the loss of contact with the complainant.

95. It was in January 2004 that the Department was able to reach the complainant by telephone. A letter was sent out on the same day requesting him to get in touch with Counsel A. However, the complainant did not respond. Counsel A had tried to contact the complainant by telephone from January to June 2004. In July 2004, the two cases were taken over by another staff lawyer of the Department (" Counsel B") upon re-arrangement of work. Counsel B repeatedly called the complainant in September and October 2004, and got hold of him on 5 October 2004. An interview followed on 7 October 2004.

96. As for the complainant's notification of his new address, LAD did not receive it until October 2004.

97. In January 2005, the complainant lodged a complaint with The Ombudsman. The Ombudsman considered that Counsel A did not actively contact the complainant, and the complainant did not care sufficiently about his cases, and both factors contributed to the delay.

98. DLA has accepted The Ombudsman's recommendations and issued a departmental circular accordingly on 28 October 2005 –

(a) to advise his staff of the importance of keeping a detailed record of follow-up actions taken in the relevant case files for future retrieval; and

(b) to remind his staff of the need to explain the progress of cases to aided persons and to contact them in writing or by other appropriate means if repeated attempts to contact them by telephone failed.

Office of the Telecommunications Authority (OFTA)

Case No. 2004/1387：Impropriety in approving an application for installing a mobile telephone base station and failure to handle a complaint in that regard.

99. A residential unit adjacent to the complainant's was rented by a telecommunications service operator ("operator") for installing a mobile telephone base station ("base station). Alleging that the unit could only be used for residential purpose, and worried about radiation and fire hazards from the base station, the complainant lodged a complaint with OFTA and Buildings Department (BD). Nonetheless, the installation was eventually approved. The complainant was dissatisfied that the two departments had handled the application improperly and shirked their regulatory responsibilities.

100. An application for installing a base station would be approved so long as it complied with the Telecommunications Ordinance as well as OFTA requirements that it should not interfere with other radio equipment and the level of non-ionizing radiation could meet international safety standards.

101. OFTA's Guidance Note for Applications highlighted a requirement for operators to file separate applications with other departments for their specific approval. However, due to limited manpower and other resources, OFTA would not conduct site visits for all applications or initiate checks with other relevant authorities, nor require operators to submit information on their applications for approval or waiver with other departments. Should any department object to an installation, OFTA could only suspend, but not reject, the application.

102. In this case, OFTA had carried out a technical assessment of the installation and twice conducted investigation and survey in the unit. It was found that the technical specifications and non-ionizing radiation level of the base station met requirements. The installation was thus approved.

103. The Ombudsman pointed out that, whilst wires and electrical devices in the unit were approved equipment and installed by authorized persons, if an operator did not also apply to BD, the Department could not assess the safety of the building structure and the means of escape. Meanwhile, OFTA would still approve the application. Such arrangements did not provide adequate safeguard for residents' safety.

104. Furthermore, the Ombudsman considered that OFTA might approve an application without knowing whether an operator had complied with the Guidance Note or satisfied requirements by other authorities for waiver. There were no statements on consequence or penalty for non-compliance in the Guidance Note either. Legal advice to OFTA was that the court would not object to an authority taking into account the views of other departments when assessing an application. The Ombudsman, therefore, had reservations over OFTA's stance on this issue.

105. The Ombudsman concluded that, as the authority for approving base station applications, OFTA should coordinate with other departments concerned. It had unduly relied on the initiative of the operators and the approval process was hardly foolproof, so the public were not sufficiently protected.

106. OFTA has accepted The Ombudsman's recommendation and taken the following actions -

(a) OFTA has already implemented a new measure since November 2005 whereby OFTA will circulate to the concerned departments, including BD, Lands Department and Planning Department, the operators' applications involving new locations or structural changes to base stations at existing locations. The concerned departments are now aware of the applications of the mobile network operators being submitted to OFTA.

In addition, OFTA has held several rounds of discussions with the operators and the concerned departments to review the existing approval arrangements, including exploring the feasibility of implementing the "one-stop" arrangement for the approval of mobile base stations in the long term. Having regard to the legal advice from the Department of Justice (D of J) in respect of OFTA's power for rejecting an application for base station (see paragraph (c) below), OFTA is now further liaising and discussing with the concerned departments and mobile network operators with a view to finalizing an enhanced approval arrangement as soon as possible.

(b) The review mentioned in paragraph (a) also covers the need for OFTA to introduce the "temporary approval" arrangement.

(c) D of J has advised the Telecommunications Authority (TA) to

apply administrative law principles and consider whether the decisions of the concerned departments are relevant to the applications under the Telecommunications Ordinance. Taking into consideration D of J's advice, the TA is of the view that safety requirements are relevant consideration when approving the base station, and thus he should not approve an application under the Telecommunications Ordinance (TO) for a radio installation that would jeopardize personnel and structural safety. However, the TA considers that in principle, it is individual department's responsibility to enforce the legislation and to exercise the powers vested in it under the respective legislation.

(d) OFTA has implemented the Ombudsman's recommendation in respect of investigation on suspect cases and site investigation. Currently, OFTA conducts non-ionization radiation measurements at various sites about four times a week. Subject to availability of resources, OFTA will conduct site inspections more frequently to ensure operators' compliance with OFTA's requirements.

(e) OFTA will revise the Guidance Note for applications of the need to follow Government policy against unauthorized building works and comply with Deed of Mutual Covenants (DMCs) accordingly upon the completion of the review on the enhanced approval arrangement.

(f) OFTA will revise the Guidance Note relating to the waiver requirements of BD accordingly upon the completion of the review on the enhanced approval arrangement. As mentioned in paragraph (a) above, OFTA has already taken a new initiative to circulate to the concerned departments the mobile network operators' applications involving new locations or structural changes to base stations at existing locations. This arrangement can ensure that the concerned departments are aware of the applications being submitted to OFTA.

(g) OFTA has stepped up publicity through different channels to raise the public awareness on radiation safety. Since November 2005, OFTA has posted onto its website an

Information Note, a type-approval list of mobile phones, leaflets and other publicity materials which are related to the radiation safety of non-ionizing radiation. Moreover, hyperlinks were added to the websites of the World Health Organization and the International Commission on Non-ionising Radiation Protection, both of which provide the latest information on the effect of electromagnetic radiation on health.

To further enhance public awareness on safety of the base station, starting from May 2006, radiation safety has been included as one of the topics of the OFTA's publicity programme entitled "Smart Tips on the use of Telecommunications Services" ("電訊服務多面體").

107. OFTA will continue to liaise with the operators and the concerned departments with a view to finalizing the enhanced approval arrangement as soon as possible.

Social Welfare Department (SWD)

Case No. 2004/4489：Delay in processing an application for disability allowance by the complainant's wife.

108. On 9 August 2004, the complainant's wife applied for Disability Allowance (DA) through the SWD's Medical Social Services Unit (MSSU) at a hospital. A Medical Social Worker (MSW) issued a Medical Assessment Form (MAF) to the responsible Medical Officer (MO) to assess her eligibility. Upon completion of the assessment, the MO recommended the complainant's wife for Normal DA and returned the completed MAF to the MSSU on 13 September 2004 but the responsible MSW was on leave at that time.

109. The responsible MSW resumed duty on 27 September 2004. As she had to clear the backlog of work and to take up part of the work for a colleague on leave, the DA application for the complainant's wife was not promptly handled. On 15 October 2004, the responsible MSW sent the completed MAF to the SWD's Butterfly Social Security Field Unit (SSFU) at Tuen Mun District for further processing. The referral was received by the SSFU on 21 October 2004. When the staff of the SSFU contacted the complainant on 27 October 2004 to complete his wife's application formalities, the staff was informed that the complainant's wife had passed away that morning. Since the complainant's wife had not yet signed the DA application form and the relevant declaration, SWD could not further process her application.

110. The complainant was dissatisfied that SWD had taken more than two months to point out that his wife had not signed the application, and considered that SWD had delayed its processing.

111. The Ombudsman considered that SWD had delayed processing this application which resulted in the complainant's wife being deprived of her entitlement to the DA.

112. SWD accepted The Ombudsman's conclusion and had formulated improvement plans as follows -

(a) to set out explicitly the performance indicators, specifying the time frames for issuing the MAF to MO after receipt of application and for sending the MAF to SSFUs;

(b) to set up a clear monitoring system to ensure that officers-in-charge of MSSUs will appropriately manage the

work of staff on leave; and

(c) to strengthen, through training, the staff's alertness and sensitivity in setting work priority.

113. Furthermore, SWD has accepted The Ombudsman's recommendations and implemented the following measures -

(a) A letter of apology was sent to the complainant on 18 May 2005.

(b) Guidelines were issued to the MSSUs on 4 February 2005 and 18 May 2005 respectively to set out explicitly the performance indicators for processing DA applications, specifying the time frames for issuing the MAF to MO after receipt of an application and for sending the MAF to SSFUs. In addition, the guidelines specify that the MSWs can refer a patient to the SSFU while awaiting the result of medical assessment, so that the patient can complete the application formalities as early as possible.

(c) Officers-in-charge of MSSUs have been reminded to make proper arrangements to manage the work of staff members on leave. Staff are also reminded to be more alert and sensitive to the work priorities through regular training courses and staff meetings.

Case No. 2004/4737：Failing to monitor the services of a residential care home for the elderly, which resulted in the death of the complainant's grandfather, and refusing to launch a full investigation into the matter.

114. The complainant's grandfather was a resident in a care home for the elderly (RCHE). He had difficulty swallowing and had to take mashed food. On 6 July 2003, he was found to have choked while eating a banana and died on the way to the hospital.

115. The complainant attributed the cause of the death of his grandfather to negligence of staff of the RCHE and failure of SWD to monitor its services. Also, he was dissatisfied that SWD refused his request in October 2004 for launching a full investigation into the incident. He lodged a complaint with The Ombudsman against SWD in December 2004.

116. In fact, the Coroner's Court had delivered in July 2004 a

verdict of "Death by Misadventure". SWD had also carried out special and surprise inspections at the RCHE concerned afterwards and considered that the latter had fully complied with the licensing requirements. SWD therefore considered another investigation into the incident unnecessary.

117. The Ombudsman considered it reasonable and appropriate for the SWD's Licensing Office of the Residential Care Homes for the Elderly (LORCHE) to conduct regular and complaint-driven inspections to investigate isolated incidents to ensure RCHEs' compliance with licensing requirements. It noted that LORCHE had carried out 13 inspections on the RCHE concerned from early 2002 to early 2005.

118. The Ombudsman was of the view that it would not be meaningful to ask SWD to conduct an investigation on the incident a year after its occurrence and when Coroner's Court had completed its inquest and the RCHE concerned had implemented the recommendations of the Court.

119. The Ombudsman concluded that the complaint was unsubstantiated.

120. That said, The Ombudsman considered it unsatisfactory that RCHEs were not required to report incidents or deaths to SWD, and that SWD had relied only on complaints and the Coroner's inquest to be informed of significant incidents at RCHEs.

121. In response to The Ombudsman's recommendation for it to re-examine its general approach, re-orientate its staff attitude, and provide clearer guidelines *inter alia* for inspections and monitoring of RCHEs, SWD has -

(a) Established notification and collaboration networks with the Community Geriatric Assessment Teams of the Hospital Authority, the Visiting Health Teams of the Department of Health, and the Labour Department to enhance information exchange and take joint actions against non-compliant RCHEs;

(b) Continued to strengthen the manpower of LORCHE to step up inspections and enforcement action against RCHEs in breach of licensing requirements;

(c) Streamlined the format/content of LORCHE's inspection reports and updated the manuals of operation/internal guidelines of LORCHE, with a view to enhancing the effectiveness in monitoring RCHEs and to dovetailing with the full implementation of the October 2005 edition of the Code of

Practice for Residential Care Homes (Elderly Persons);

(d) Organized tailor-made training, sharing and refresher sessions for current and new LORCHE staff to enhance their sensitivity and skills in identifying irregularities, including major incidents and deaths, in RCHEs during inspections; and

(e) Commissioned the Efficiency Unit in late 2005 to conduct a study on the efficiency of LORCHE, with a view to coming up with recommendations on enhancing LORCHE's monitoring workflow and efficiency by end of 2006.

122. The Ombudsman also recommended that the SWD should draw up departmental guidelines on investigation into significant incidents at RCHEs and revise the Code of Practice to make for RCHEs reporting significant incidents such as deaths by accidents. WD has taken/will take the following follow-up actions -

(a) Requiring RCHEs to report, starting from November 2005, significant incidents, including "unnatural" deaths and serious accidents involving residents, within seven working days to LORCHE to facilitate timely investigations and remedial actions;

(b) Adopting a three-tier scrutiny mechanism in late 2005 which required officers of different ranks in LORCHE to examine the reports on significant incidents from RCHEs, with a view to enhancing the supervision on investigations and follow-up actions. SWD will review the effectiveness and efficiency of this mechanism by end of 2006; and

(c) Will consider adding in the requirements for RCHEs to make timely reports on significant incidents to LORCHE when revising the Code of Practice in future.

123. SWD has reported progress on implementing the aforementioned measures to The Ombudsman in December 2005 and July 2006.

Water Supplies Department (WSD)

124. Between May and June 2005, a number of consumers (the complainants) called the WSD hotline about the accounts or water supply. Allegedly, after they had selected to contact a customer service officer, the telephone system would indicate that all lines were busy and advise them to call later. Often, they had to spend tens of minutes before they could start to join the queue and wait for an officer to answer them. Below are the cases in relation to complaints on the WSD hotline.

Case No. 2005/1529, 2005/1635, 2005/1650, 2005/1666 and 2005/1775：Poor customer hotline service.

Case No. 2005/1529

125. On 23 May 2005, the complainant called the Customer Telephone Enquiry Centre (CTEC) of WSD to enquire about the cause of no flushing supply to his building. He complained that the telephone system required him to press 1,2,9,0 repeatedly for about one hour whilst waiting in the queue. His call was eventually answered by an operator after he waited for three hours.

126. The CTEC informed the WSD regional staff to attend to the complaint. When the WSD regional staff called the complainant back on 24 May 2005, the complainant responded that flushing water supply to his building had been resumed normal.

Case No. 2005/1635

127. The complainant wished to take up the consumership of the water supply to his newly bought flat. He complained that he could not get through to the operator when he called the CTEC on 20, 21 and 23 May 2005. The complainant then sent by post to WSD his application for taking up the consumership which was then processed by WSD on 23 June 2005. The complainant complained against the CTEC for lack of efficiency.

Case No. 2005/1650

128. The complainant wished to terminate the water account of his premises. He complained that he could not get through to the operator when he called the CTEC many times for over a week around end May 2005. Subsequently the complainant faxed his application for termination of account to WSD. WSD then processed his application and sent a final bill to the complainant on 28 June 2005.

Case No. 2005/1666

129. On 1 June 2005, the complainant called the CTEC requesting

for change of consumership on behalf of her client. Her call was received by the operator for handling enquiries about water supply and main burst. (WSD believed that the complainant had selected from the telephone enquiry service menu about water supply or main burst in the first instance.) The operator thus advised the complainant that her request for change of consumership had to be transferred to another team and the request had to be lodged personally by the applicant himself who would become the new registered consumer. The complainant insisted on transferring her call to the "Change of Consumership Team" but she abandoned the call whilst waiting in the queue for the call transfer. The complainant complained against the CTEC for wasting her time.

Case No. 2005/1775

130. The complainant suspected that the meter number on his final bill had been wrongly quoted. He called the CTEC on 9 June 2005 for clarification but could not get through to the operator. After receipt of the complaint referred by the Ombudsman, WSD contacted the complainant on 29 July 2005. The complainant informed WSD that his query had been resolved and no further action from WSD was required.

131. WSD had accepted the Ombudsman's recommendations and taken the following actions -

(a) the performance of the CTEC is being closely monitored by WSD. The CTEC was re-organized on 1 March 2006 with a view to further improving the operational efficiency; and procedures in the Customer Care and Billing System have been examined critically and streamlined/rationalized as necessary. The results were given in the monitoring report to the Ombudsman on 25 May 2006. They showed that the overall performance of the CTEC between February and April 2006 had picked up to a level exceeding that of 2004/05 and about the same as that of 2003/04.

(b) with the regular input from the Customer Account Section, the CTEC can advise callers the current processing time for handling various types of customer account matters.

The performance of services relating to account matters between February and April 2006 was comparable to that of 2003/04. The results were given in the monitoring report to the Ombudsman on 25 May 2006.

(c) The manning level of the CTEC has been reviewed. More contract Customer Services Officers have been recruited to man

the hotline service.

Case No. 2005/1556：(a) Poor customer hotline service; and (b) Delay in refunding deposit.

132. The complainant called the Customer Telephone Enquiry Centre (CTEC) of WSD in April 2005 for giving up of consumership. He complained that he could not get through to the operator of the account enquiry team. He deliberately selected "Main Burst" enquiry service in the telephony menu and was connected to the team handling enquiry on main burst. His call was subsequently transferred to the "Change of Consumership team" in the CTEC who then processed his request for giving up consumership. Despite the issue of the final bill on 20 April 2005, the complainant did not receive a refund of his deposit upon the lapse of WSD's pledged processing time. He kept on calling the CTEC until he received a cheque from the Treasury on 19 May 2005 in refund of his deposit.

133. The complainant complained against the CTEC for lack of efficiency and delay in the refund of water deposit.

134. In response to the Ombudsman's recommendations, WSD had taken the actions listed in paragraph 131 above.

Case No. 2005/1853：(a) Poor customer hotline service; and (b) Delay in replying to enquiries.

135. The complainant called the Customer Telephone Enquiry Centre (CTEC) of WSD between 6 June 2005 and 13 June 2005 for giving up consumership of his sold premises and taking up consumership of his newly bought premises. On failing to get through to the operator in the CTEC for handling change of consumership, the complainant e-mailed his application to WSD on 7 June 2005. Having received no response yet, the complainant then faxed his application to WSD on 13 June 2005. The application was then processed with the final bill for the sold premises and deposit demand note for the newly bought premises issued to the complainant on 14 June 2005 and 21 June 2005 respectively.

136. The complainant complained against the CTEC for lack of efficiency and inadequate number of operators; and WSD for delay in replying to his e-mail and fax enquiries.

137. The complaint against poor customer hotline service is substantiated and that against delay in replying to complainant's enquiries is

unsubstantiated.

138. In response to the Ombudsman's recommendations, WSD had taken the actions listed in paragraph 131 above.

Part II
Direct Investigation Cases

Food and Environmental Hygiene Department (FEHD)

Letting of Market Stalls by Auction

139. There were 104 public markets, managed by FEHD, providing some 15 500 market stalls in early 2005.

140. Such stalls were usually let by auction. In handling complaints, The Ombudsman noted that the auction arrangements could be open to abuse. A tenant might outbid competitors to secure nearby stalls and then terminate the tenancy prematurely, thereby eliminating or reducing competition. As stalls vacated shortly after an auction were not auctioned again until three to five months later, the same bidder might repeat such tactics and so enjoy a *de facto* monopoly. This was unfair to other bidders and particularly to market patrons. After preliminary inquiries, The Ombudsman decided to initiate a direct investigation into the administrative arrangements of FEHD for letting public market stalls by auction.

141. The Ombudsman considered auctioning a fair and open means for opening up business opportunities in public markets and for maximizing public revenues. However, the FEHD procedures had loopholes for unethical parties to advance their self interests. It was imperative that FEHD review the arrangements for auctioning stalls. The Ombudsman has the following opinions -

Award of Tenancy

(a) The Ombudsman noted that it was government policy to phase out itinerant hawker licence (IHL). To encourage holders to give up their licences, FEHD accorded priority in letting public market stalls to those willing to surrender their licences. However, in anticipation of the natural attrition of remaining IHL holders, FEHD should review the return rate of ballot forms;

(b) FEHD should consider when it would be appropriate to revise the policy for priority to IHL holders in the selection of vacant market stalls;

(c) The Ombudsman accepted the policy for priority to IHL holders

but considered the time for processing a vacated stall for auction to be far too long. FEHD should cut considerably the lead time for preparing for auctions of vacant stalls;

Termination of Tenancy

(d) Under the current system, a tenancy binds FEHD for three years unless the tenant is found to have breached tenancy conditions or committed an offence. However, it is easy for the tenant to quit prematurely without reason and there is no penalty to deter wilful termination. The Ombudsman considered this not a fair balance of the prospective bidders, market patrons and FEHD or Government. Furthermore, it breeds abuse. Hence, The Ombudsman suggested reviewing the terms of the tenancy agreement to set a minimum period, within which tenancies could be terminated only on a penalty payment;

(e) FEHD should set a minimum period in the tenancy agreement for market stalls during which termination would attract a penalty payment. Bidders would be informed of such minimum period and penalty payment for early termination;

(f) FEHD should focus on cases of early termination and keep records for reference;

Notice of Termination

(g) To increase the cost of early termination and deter abuse, FEHD should consider requiring longer notice of premature termination or a larger deposit;

Ban on Bidders

(h) FEHD should establish mechanism to impose restrictions in future auctions on tenants who had previously applied for premature termination.

142. FEHD has implemented The Ombudsman's recommendations as follows -

Award of Tenancy

(a) the Alignment Policy on IHL endorsed by the Legislative Council Panel on Food Safety and Environmental Hygiene has given IHL holders the options to select a vacant fixed pitch, a

vacant market stall or receive ex-gratia payment in return for voluntary surrender of their licences. Under the policy, they have until 31 December 2007 to exercise these options. FEHD has implemented measures to shorten the time taken to include vacant market stalls in open auctions (please see details under item (b) below), and will continue to monitor the return rate of ballot forms;

(b) with effect from March 2005, newly available vacant market stalls that have been offered for selection by IHL holders in Restricted Ballot and Selection Exercise (RBSE) in the past 12 months will be put up for open auction immediately should they become vacant again within the 12-month period;

Since the second quarter of 2005, FEHD has expedited the process to complete the selection of market stalls by IHL holders under the quarterly RBSE within the first six weeks of the quarter so that newly available vacant market stalls not selected by IHL holders can be released for open auction in the last month of the same quarter;

Termination of Tenancy

(c) FEHD has added a new clause which specifies a minimum leasing period of three months to all new 3-year tenancy agreements commencing on or after 1 June 2005. If a tenant terminates the tenancy within the first three months, he will have to pay rent for the three months and, where applicable, the air-conditioning charge for the same duration, as well as a deposit equivalent to one month's rent in the event that one-month notice is not given for the termination;

(d) FEHD has revised the new auction rules in relation to the 3-month minimum leasing period and the penalty for termination within the first three months in May 2005. They are announced for prospective bidders' information before every open auction for market stalls;

(e) since FEHD stipulates a minimum tenancy period of three months rather than a longer duration, the need to provide for genuine exceptional circumstances under which a tenancy may be terminated prematurely without penalty payment should seldom arise. Nevertheless, FEHD is prepared to consider each case which may warrant exceptional arrangement on its own merits;

(f) FEHD has been keeping record of persons who surrender their tenancies within the first three months in a computerized Market Stall Rental System. The System will highlight any termination within three months from the date of commencement of a market stall tenancy agreement. Case officers will be alerted to blacklist a person who has terminated the tenancy of the same stall twice within a period of 12 months;

Notice of Termination

(g) the setting of a minimum leasing period of three months for all new tenancies has already increased the cost for early termination to three months' rent, plus air-conditioning charges if applicable, and one-month's deposit in case one-month notice of termination is not given. In cost terms, this has the same effect of imposing a longer period for notice of termination;

(h) for tenants of all new markets commissioned since July 2002 such as Luen Wo Hui Market and Tai Po Hui Market, FEHD has revised the amount of deposit to an amount equivalent to two months' rental with payment of rent on a monthly basis. FEHD will consider aligning the above practice for existing markets in due course;

Ban on Bidders

(i) a successful bidder who rents the same stall twice each time for a period of three months or less within a period of 12 months will be blacklisted and prohibited from bidding any stall in the same market for a period of 12 months counting from the date of termination of the second tenancy. FEHD has implemented the above measure in open auctions since May 2005 and there has not been any tenant blacklisted on this basis so far. FEHD will closely monitor the situation;

(j) FEHD has sought advice from the Department of Justice which states that FEHD may consider imposing administrative sanction in line with the new mechanism described in item (i) above against bidders found to have abused the system in The Ombudsman's case studies. On this basis, FEHD has checked the bidding records of the bidders concerned and found that the dates of termination of their last market tenancy after renting the same stall for a period of three months or less for more than

once within a period of 12 months were 1 October 2003, 1 July 2004 and 1 August 2004 respectively. If FEHD were to apply sanction on the bidders concerned according to the new mechanism, the periods of restriction would be from 1 October 2003 to 30 September 2004, 1 July 2004 to 30 June 2005 and 1 August 2004 to 31 July 2005 respectively. As the above periods have already expired, no further action would be required.

Hospital Authority and Social Welfare Department

Medical Fee Waiver System

143. It is government policy that no one should be denied medical care because of lack of means. To assist low-income and other vulnerable groups, Government has long had a waiver system administered by the Hospital Authority (HA) and the Social Welfare Department (SWD).

144. As public resources are finite, the community expects the authorities to ensure public resources are used for those genuinely in need and to guard against abuse. Prompted by a complaint alleging abuse of the fee waiver system, The Ombudsman declared a direct investigation on 27 October 2005, to examine -

(a) the role of HA and SWD in administering the medical fee waiver system;

(b) the existing mechanism for detecting, deterring and preventing abuse; and

(c) the adequacy and effectiveness of the existing mechanism.

145. After investigation, The Ombudsman has the following observations and comments -

(a) The case Medical Social Worker (MSW) is the first, and often the only line of defence in the system to scrutinize a wavier application. In the direct investigation report, The Ombudsman commented on a case, in which an MSW was said to have vetted a waiver application properly and pointed out an earlier error made on the previous waiver application on the same case. This was not only not appreciated by the supervisors but also “gagged” with threat of discipline;

(b) Under the existing wavier system, no abuse case was detected. The fact that there was no statistics on declined cases and the almost 100% approval of waiver applications suggested the possibility of insufficient focus on genuine need for waiver or inadequate care in scrutiny of applicants. The criteria for waiver on non-financial grounds were considered vague and might lead to inconsistencies among MSWs in their decision.

(c) The Ombudsman accepted the need for an honour system in

view of the volume of the waiving applicants but the system should be supported by post-approval random check and action of deterrent.

146. SWD welcomed the recommendations made by The Ombudsman which were in line with what the department has been doing but considered that the comment that HA and SWD had been complacent about the current waiver system as unfair and not reflecting the true picture. In fact, both HA and SWD have conscientiously and continuously addressed issues relating to the waiver system in order to strive for continuous improvements in such areas as documentation, data collection and quality checking. This was evidenced by the revision of the waiving system guidelines for frontline social workers in May 2005 and a further revision in March 2006. In addition, every effort has been made to implement the recommendations in The Ombudsman's report as far as practicable, a detailed account of which is in paragraph 150 below.

147. Regarding the case highlighted in the report, SWD did not agree to The Ombudsman's comment on the handling of the case quoted above. SWD, at both headquarters and district management level, had conducted assessment and investigation into the case in accordance with the existing departmental guidelines and concluded that the case involved staff management issue instead of any fraudulent application for waiver by the applicant who was a mental patient.

148. In response to the above-mentioned case in The Ombudsman's report, the Chairman of the Legislative Council Panel on Public Service requested the Civil Service Bureau (CSB) to report its findings on whether the complaint from the MSW had been handled in accordance with the guidelines prescribed in CSB Circular No. 20/91 and if so, what improvement measures would be introduced to enhance the effectiveness of the existing mechanism for handling staff complaints. In July 2006, CSB completed the investigation and submitted its report to the Panel with the findings that there was no evidence to suggest that CSB Circular No. 20/91 was less than adequate for meeting the intended purposes. In addition, there was also no evidence to suggest that the primary guideline in the Circular, namely, that an officer would not be penalized for a complaint made in good faith, had been breached.

149. The Ombudsman supports government policy for accessible and affordable medical care for all needy patients. However, The Ombudsman considered that improvement measures should be stepped up to safeguard the waiver system and address the deficiencies identified.

150. HA always strives to enhance and improve its administrative

procedures. HA generally accepted The Ombudsman's recommendations for further improvement of the medical fee waiver system and many of which had already been addressed as part of its continuous quality improvement measures. These include continual efforts to tighten safeguards, including incorporating a counter-checking mechanism for all high risk cases, such as those approved on non-financial grounds, introduction of an e-waiving system and ensuring officers-in-charge select a sample of approved cases for regular checking and quality assurance purposes. A set of revised operational guidelines were promulgated on 28 March 2006 to provide more explicit and clear guidance to MSWs to further enhance the procedures and quality of the assessment process. In addition, the system is and will continue to be under constant review, both to meet the evolving needs of patients and their families, as well as to ensure the integrity of the system. SWD has also adopted and implemented The Ombudsman's recommendations. Specifically, the progress of implementation of The Ombudsman's recommendations in HA and SWD are as follows -

Adherence to Waiver Objective

(a) HA – A set of revised guidelines was promulgated on 28 March 2006 to provide more explicit and clear guidance to MSWs to enhance the procedures and quality of the assessment process. Two training sessions had been conducted on 15 March 2006 and 27 April 2006 to familiarize MSWs with the enhanced procedures and to remind them of the importance of exercising due care in processing applications.

SWD – The importance of processing waiver applications with due care has always been and will continue to be emphasized as part of the regular training for the MSWs to ensure the proper implementation of the waiving guidelines.

(b) HA – A set of more explicit and clear criteria on the non-financial factors to be considered for the vulnerable groups was incorporated in the revised guidelines.

SWD – The requirement for supervisors to check all cases with medical waiver granted on non-financial criteria have been introduced since June 2005, i.e. during The Ombudsman's investigation on the waiver system, to tighten up case monitoring. The related requirement has been incorporated into the revised waiving guidelines issued in March 2006.

(c) HA – Clear guidance and checking mechanism had been

incorporated in the revised guidelines.

SWD – The requirement to document properly any special consideration in processing waiving application of psychiatric patients has been incorporated into the revised waiving guidelines issued in March 2006.

(d) HA – A mechanism has been developed requiring the MSW units to conduct sample checking on these approved cases at regular intervals and report the checking results to the HA Head Office. The responsible department in the HA Head Office has been generating statistical reports and conducting review with the front-line supervisors on a regular basis to monitor the operation of the waiver mechanism. The HA Group Internal Audit will also conduct audit checking on a sample of cases to ensure overall compliance of the operational guidelines.

SWD – The requirement to conduct 1% random check on all waiving cases, including those full waivers granted to patients whose income is above 50% of Median Monthly Domestic House Income, once every six months has been incorporated into the revised waiving guidelines issued in March 2006.

(e) HA – Proper guidance was given in the revised guidelines on the handling procedure of suspected abuse cases.

SWD – A new section on "Reporting Suspected Fraud and Abuse Cases" has been incorporated into the revised waiving guidelines issued in March 2006 to advise MSWs on reporting suspected abuse cases.

Prevention of Abuse

(f) HA – Adequate guidance had been incorporated in the operational guidelines all along. Further reinforcement was made in the recent two training sessions and in the revised guidelines.

SWD – The requirement for MSWs to examine carefully information supplied by applicants has been incorporated into the revised waiving guidelines issued in March 2006.

(g) HA – Safeguards had been built to ensure proper handling of waiver applications, which include counter-checking of all waiver applications and post-approval checking on a sample of

cases.

SWD – It has already been the existing practice of MSW to grant one-off waiver for indeterminable cases and to require the applicants to bring along sufficient documents when they request waiver next time. HA is also considering the setting up of a post-approval checking mechanism for a limited number of cases as a deterrent measure.

(h) HA – Will explore the feasibility of commissioning or setting up a small investigation team to check on the doubtful cases.

SWD – The requirement to conduct post-approval random check on 1% of all waiving cases once every six months has been in place with effect from March 2006.

(i) HA – Consideration will be given to arranging suitable publicity when the random checking system is established.

SWD – The arrangement for random checks has been included in the information leaflet on medical waiving system for the public. Information posters have also been posted up in the information counters of all Medical Social Services Offices in hospitals and Special Out-patient Clinics to promote public awareness.

(j) HA – MSWs will continue with the current practice of reading out the warning notice to all applicants of the legal consequences of providing knowingly false, inaccurate or incomplete information.

SWD – The assessment form for waiver application contains a section on "Declaration and Undertaking" to remind applicants of the legal consequences of providing false, inaccurate or incomplete information. MSWs have been reminded to explain to the applicants the contents of the declaration before the latter sign the form.

(k) HA – Will adopt a firm approach in handling and publicising fraudulent cases if identified and supported by evidence.

SWD – A new section on "Reporting Suspected Fraud and Abuse Cases" has been incorporated into the revised waiving guidelines issued in March 2006. Action would be taken if defraud cases are established.

Validity Period of Waiver

(l) HA – Will review the validity period of waivers for some patient groups. Due consideration will be given on the balance between patients' convenience and administrative efforts/cost involved to ensure cost-effectiveness of the system.

SWD – The revised waiving guidelines provide sufficient advice on determining the duration of waivers in accordance with the types of medical services received by patients. The guidelines also indicate that period waivers of 12 months could only be issued to eligible chronically ill patients or elderly who needed frequent follow-up.

Psychiatric Patients

(m) HA – Will review the arrangements having regard to the objectives of encouraging affordable patients to pay whilst ensuring that patients will not be deterred to continue to receive appropriate psychiatric treatment.

SWD – Special consideration in processing waiving applications of psychiatric patients has been incorporated into the revised waiving guidelines issued in March 2006.

151. SWD has generally accepted the recommendations made by The Ombudsman on the medical wavier system. However, while continuous and cost-effective improvements would be made to the waiver system, flexibility must be given to consider non-financial factors of applications to ensure that vulnerable groups in the community have timely access to proper medical care.

Housing Department (HD)

Monitoring of Property Services Agents

152. As the Housing Authority's executive arm, HD is responsible for managing its public rental housing ("PRH") estates. Since 1996, management of some PRH estates has been outsourced to management agents. As at August 2005, there were 153 PRH estates with about 590 000 domestic units. Management of 84 of them with some 290 000 units has been outsourced to property services agents ("PSAs").

153. Many complaints against HD related to the management of public rental housing ("PRH") estates. Concerned that HD monitoring of the agents' performance be effective and efficient in ensuring proper tenant services, The Ombudsman initiated a direct investigation.

154. HD provided support to PSAs mainly through handing-over meetings and Best Practice Notes ("BPN"). However, it expected PSAs to be conversant with all HD internal circulars, instructions as well as BPN in their day-to day work.

155. PSAs were required to operate independently by setting up their own offices in PRH estates. They were expected to deal with all estate management-related complaints in accordance with HD internal instructions. They were to attend to minor repair or maintenance independently, without HD's prior approval. Where the service contract also covered major repair and planned maintenance, a PSA was required to be project manager and to supervise HD works contractors.

156. Although HD retained its statutory authority, it expected PSAs to assist in the exercise of such authority.

157. HD monitored the performance of PSAs mainly through an assessment scheme comprising three components: (a) HD assessment on a monthly basis; (b) Estate Management Advisory Committee ("EMAC") assessment on a bimonthly basis and (c) tenant assessment on a quarterly basis.

158. HD had a PSA Administration Unit ("PSAU") in each of its five geographical regions. Every Unit had four to five PSA monitoring teams, each overseeing six to eight estates managed by two to three PSAs. The monitoring teams carried out scheduled monthly inspections in each estate. They also conducted surprise inspections at least once a month, but on specific aspects only. As a moderation mechanism, the head of each

Unit reviewed the monthly assessments of his teams to ensure consistency in standards.

159. The investigation focused on whether, in outsourcing the management of PRH estates, HD recognized that it retained ultimate accountability for the provision of quality services to PRH tenants.

160. The Ombudsman endorsed outsourcing as capable of delivering efficient, flexible and cost-effective tenant services in PRH estates. It also accepted that it would not be realistic or reasonable for HD to supervise every detail of PSA operations or to deal with all tenant requests or complaints directly. However, given HD's ultimate responsibility for the management of PRH estates, HD should be firmer, more positive and more proactive in monitoring PSA performance to ensure quality services to tenants. HD should give PSAs proper guidance and active support where appropriate (e.g. in enforcement matters).

161. HD generally accepted the recommendations and has implemented the following measures -

Principle of Accountability

(a) four workshops were arranged for the staff of PSAU in the Estate Management Division of the Department in January 2006 to ensure that they were fully aware of the ultimate responsibilities of HD in PRH management. A BPN was also issued to remind staff to fully discharge statutory functions not delegated to PSAs;

(b) from December 2005, information on HD's monitoring role and responsibility in PRH management has been provided to tenants living in estates managed by out-sourced contractors through the HD's Housing Channel (in the form of text messages running on the LCD monitors installed in the lift lobby of PRH blocks). The messages are broadcasted repeatedly at regular intervals to draw the attention of tenants.

Support to Both HD and PSA Staff

(c) forums are being arranged for HD staff to share their experience and discuss the handling skills of special incidents. In the workshops held in January 2006, discussions were focused on how, when and to what extent should HD staff intervene or support PSAs on management issues;

(d) instructions to HD staff and PSAs are reviewed and updated from time to time to ensure that they are comprehensive and meeting current needs as well as comprehensible. Such instructions are included in BPNs issued to frontline staff and seven BPNs have been issued recently; and

(e) regular briefings, seminars and forums are arranged for staff of HD and PSAs to enhance their understanding of HD guidelines, procedures and instructions. In January 2006 alone, four workshops were held.

Supervision of Maintenance Works

(f) HD is reviewing the scope of outsourcing and assessing the feasibility of removing major improvement projects from the contract scope of PSAs, with HD staff taking over the responsibility. This is being considered in parallel with HD's staff resources;

(g) PSA tenders issued from July 2005 onwards require tenderers to submit a proposal on minor maintenance and repair works. Scores will be given to the proposals so that more accurate assessment on the tenderers' aptitude for maintenance works can be made;

(h) briefing sessions on HD's works procedures are organized for PSAs from time to time. Starting from August 2005, for example, hands-on training sessions have been arranged for the staff of HD and PSAs on the new, computerized "payment templates";

(i) reporting on HD's Term Contractors with poor performance has become a regular agenda at the monthly PSA meetings. When necessary, PSAU staff will request HD's Contract Administration team to assist in monitoring these Term Contractors;

(j) HD will closely monitor PSAs who have got an adverse report (AR) for their performance and adopt a progressive approach in regulating these companies. It will also consider terminating part of the services when a PSA has been given three ARs in four quarters.

Assessment and Remedies

(k) the "Management Assessment Score" (MAS) has been introduced as a component of HD's performance assessment mechanism since April 2006. Results obtained from "Surprise Audit", organizational stability, and the overall competency and commitment of the PSA in delivering services required under the PS contract will be used to build up the MAS, which enables the Contract Administration team to make more objective assessments;

(l) HD's Senior Property Services Manager in each geographic region is responsible for moderating the assessment standards within his region at the monthly Regional PSA Meetings while a PSA Monitoring Working Group was set up in 2005 to align the assessment standards among the five regions;

(m) regular forums are organized for PSA Monitoring Teams to share experience and to promote common understanding;

(n) a computerized Complaints and Requests Management System has been developed and implemented since November 2005 for better monitoring and analysis of complaints received.

(o) to ensure fair assessment of PSAs' performance, HD has reviewed the assessment components and the EMAC weighting has been reduced from 20% to 10% since April 2006 to mitigate the effect of extreme scores. A BPN has been issued to remind EMAC members to give rational scores for the performance of PSAs. Estate-based tenant surveys on PSAs' performance were conducted from October to December 2005;

(p) more stringent list-regulatory measures, including progressive regulatory actions, will be imposed upon non-performing PSAs who have received AR rating either in the same or different property service contracts.

Legal Aid Department

Monitoring of Assigned-out Cases

162. Access to the courts and the right to confidential legal advice are enshrined in Article 35 of the Basic Law. Set up in 1970, LAD administers publicly funded legal aid schemes for those who satisfy the means test and the merits test but cannot afford the costs of litigation.

163. Legal aid cases are dealt with by in-house counsel or assigned to lawyers in private practice ("assigned lawyers"). The Ombudsman's investigation focused on how LAD monitored civil cases assigned out, to ensure efficient service to aided persons and cost-effective use of the Legal Aid Fund.

164. In 2004/05, about 5,300 (comprising two-thirds of) civil cases were assigned out, incurring expenditure of $285 million.

165. After investigation, The Ombudsman had the following observations and opinions -

(a) there was a tripartite relationship among LAD, the aided person and the assigned lawyer. As a Government department, LAD had administrative accountability for service to aided persons as well as the efficient and cost-effective operation of the legal aid schemes;

(b) a Government department might contract out their services, but not the accountability for the quality, efficiency and effectiveness of such services;

(c) many aided persons did not know or could not understand the first charge and its implications;

(d) cases studies showed that LAD guidelines, though well formulated in theory and on paper, were not always followed in practice. LAD's guidelines and actions had failed to protect the aided persons' interests or the public purse. Departmental Monitoring Committee "DMC" also seemed ineffective as a deterrent to incompetent or ineffectual assigned lawyers;

(e) it was good practice to ensure that all cases receive timely attention. However, after reviewing cases files, individual officers had a great deal of latitude in deciding whether or not

to call for progress reports. In one case, the assigned lawyer simply ignored all 15 reminders and letters over almost three years. Far more positive and firmer action by LAD should be in order;

(f) commendably, LAD had an evaluation proforma for assessing unsatisfactory performance of assigned lawyers. However, the description of and criteria for unsatisfactory performance were too vague. Defined trigger points would help to identify possible problems and ensure a clearer and more consistent approach in evaluation;

(g) unsatisfactory evaluation reports were few and far between. There should be more stringent standards in such evaluation. The current "negative" evaluation should be supplemented by some effective yet simple appraisal systems under the DMC for an overall grading of individual assigned lawyers on conclusion of a case;

(h) in one case where the assigned lawyer first hinted his cash flow problem in April 2003, LAD chose to be sympathetic and did not act. In the event, the assigned lawyer absconded in January 2005. It was both an unfair blow to the aided person, who was then unable to recover anything, and a sheer waste of public funds;

(i) in case of professional misconduct, LAD might report to the two legal professional bodies. However, only one report had been made in the past three years. The Ombudsman considered the current guidelines too vague and LAD practice too lax;

(j) LAD should be ready to take firm action to enforce Court judgments. In particular, it should institute legal proceedings after due warning has been given. Otherwise, not only would the aided person not get his due, the credibility of Government and indeed the judicial system could be at stake; and

(k) despite earnest supervision for almost a decade, efforts by the Legal Aid Services Council (LASC) seemed to have made little impact on LAD's monitoring of assigned lawyers.

166. On 18 March 2005, The Ombudsman initiated a direct investigation into LAD's administrative arrangements for assigning out legal aid cases; mechanism for monitoring progress of assigned-out legal aid

cases and evaluation system of assigned lawyers. The investigation completed on 17 January 2006. During the investigation, the Ombudsman has looked at 36 files which took over five years to complete and commented on seven of the cases in her Investigation Report which was published on 19 January 2006.

167. The Ombudsman considered that a fundamental change was needed in LAD's concept of and approach to monitoring of legal aid cases, and made a number of recommendations to DLA.

168. LAD has taken the following actions in response to The Ombudsman's recommendations -

First Charge

(a) LAD has examined its publications about first charge including the first charge pamphlet and poster and compared its materials with those from other jurisdictions. LAD is of the view that its publications are already couched in simple layman terms. The first charge pamphlet (revised in January 2006), which is given to every successful legal aid applicant, contains no less than seven most common examples of the circumstances under which the first charge may arise. In addition, LAD's staff are aware of the need to issue a standard letter requesting the assigned solicitor to advise the aided person of the operation and implications of the first charge in any case where there is a possibility of property being recovered/preserved for the aided person. Aided persons are informed of the operation and implications of the first charge at different stages of the proceedings. LAD will remain vigilant and continue to look for areas of improvement as an on-going process;

Monitoring

(b) LAD conducted briefings in January 2006 to remind staff that monitoring is a very important aspect of their duties in terms of protecting the public fund as well as serving and safeguarding the interest of aided persons.

(c) LAD has been closely working with LASC in its discussions on a more formal "contractual" arrangement with assigned lawyers and it will continue to do so.

Progress Reports

(d) DLA has reminded staff to adhere to the "bring up" system as far as practicable and to request assigned lawyers to prepare progress reports as appropriate. Where requests or reminders for progress reports are ignored or not adequately responded to by assigned lawyers, LAD staff would be mindful of the need to escalate matters.

(e) LAD has enhanced its Case Management System so that case files would be brought up to senior directorate officers for review at regular intervals. In addition, LAD has in consultation with the LASC aided by its Interest Group on Assignment System and Monitoring of Assigned-out Cases (Interest Group), examined possible areas of improvements in this aspect. One area is for LAD to alert senior partners of solicitor firms if any solicitor of the firms handling legal aid cases has repeatedly ignored LAD's requests for progress reports or reminders. This is being implemented.

(f) In June 2006, LAD revised the forms used for the evaluation of performance of assigned lawyers and has simplified the procedures for reporting unsatisfactory performance of assigned lawyers.

Evaluation and Appraisal of Assigned Lawyers

(g) LAD has identified a few trigger points to have assigned lawyers' performance evaluated e.g. when there are complaints made by aided persons or adverse comments by the Courts. LAD is in the course of finalizing the list and will issue guidelines to its staff.

(h) With the improvement in (g) above, DLA considers that it is not necessary to introduce an overall performance grade for assigned lawyers. In any case, awarding an overall grading is not a simple matter and is practically difficult to introduce. The Ombudsman has been advised and is satisfied.

Intervention by LAD

(i) A working party headed by a senior directorate has been set up to take forward the Ombudsman's recommendations in this regard.

Enforcement of Judgments

(j) LAD always takes all necessary steps to enforce judgments when the circumstances of the cases so warrant and closely monitor the recovery process and it will continue to do so. In deciding whether to take enforcement proceedings or legal proceedings for contempt, it is incumbent upon LAD to consider factors such as the amount of judgment due, the cost of proceedings involved, and the opposite party's financial circumstances, etc.

Checklist

(k) LAD has detailed discussions with the LASC and its Interest Group on this recommendation. LASC has in its meeting in July 2006 agreed in principle that LAD's checklists be made available to assigned solicitors to assist them to report on progress provided that no extra costs would be incurred or borne by the aided persons or the public fund. This will be followed up in future LASC's meetings.

Administration of Legal Aid Services

(l) LAD has always worked closely with the LASC, providing it with the necessary assistance that it requires. This will continue to be done.