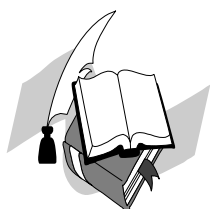


*Issue No. 2 of Reporting Year 2004/2005  
(30 June 2004)  
Office of The Ombudsman, Hong Kong*

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*16<sup>th</sup> Annual Report of The Ombudsman, Hong Kong*

On 23 June 2004, The Ombudsman submitted to the Chief Executive of the Hong Kong Special Administrative Region the Annual Report for the year of April 2003 to March 2004, in accordance with The Ombudsman Ordinance. The report was tabled at the Legislative Council by the Administration on 30 June 2004.

The Summary of the 16<sup>th</sup> Annual Report is at **Annex A**.



*Direct Investigation into the Administration  
of Urn Grave Cemeteries*

This Office will conduct a direct investigation into the administration of urn grave cemeteries under section 7(1)(a)(ii) of The Ombudsman Ordinance. The background, purpose and scope of this direct investigation are at **Annex B**.



*Direct Investigation into the Enforcement  
of the Building Management Ordinance*

The executive summary of the investigation report is at **Annex C**. An “Epilogue” rounding off our three direct investigations on building management matters is at **Annex D**.



*Enquiries*

For press enquiries, please contact Ms Kathleen CHAN, Senior External Relations Officer at 2629 0565.

**Office of The Ombudsman, Hong Kong**  
**30 June 2004**

## **OMBUDSMAN PROBES URN GRAVE CEMETERIES ADMINISTRATION**

The Office of The Ombudsman will conduct a direct investigation into the administration of urn grave cemeteries by the Food and Environmental Hygiene Department (FEHD).

“Complaints and media reports have raised concern over the effective management of urn grave cemeteries. In one case, a complainant had been sweeping his relative’s grave for over ten years. When he applied for removal of the remains, he found that the remains had already been removed by a stranger. He had been visiting an empty grave all these years,” Alice Tai, The Ombudsman, said today (30 June 2004).

“Maintenance issues, such as dilapidated headstones, have also raised public concern.” Ms Tai added.

The Ombudsman has, therefore, decided to initiate a direct investigation pursuant to section 7(1)(a)(ii) of The Ombudsman Ordinance. The ambit of the investigation will be administrative arrangements relating to:

- the process of removal of remains from urn graves;
- post-removal follow-up action;
- the process of allocating new and vacated urn graves; and
- the system of maintenance of urn grave cemetery.

The Office of The Ombudsman welcomes views from members of the public on the matter. Comments should reach the Office of The Ombudsman at 30/F, China Merchants Tower, Shun Tak Centre, 168-200 Connaught Road Central, Hong Kong (or by fax to 2882 8149 or e-mail to [complaints@ombudsman.gov.hk](mailto:complaints@ombudsman.gov.hk)) by 30 July 2004.

**Office of The Ombudsman  
June 2004**

## **Executive Summary of Investigation Report on Enforcement of the Building Management Ordinance**

### **The Investigation**

In view of considerable community concern, The Ombudsman decided to conduct a direct investigation into the adequacy and effectiveness of the enforcement of the Building Management Ordinance (“BMO”) by the Home Affairs Bureau (“HAB”) and the Home Affairs Department (“HAD”). This is our third direct investigation into Government’s support and services for private building management.

2. This direct investigation :

- examines the mechanism through which HAB and HAD enforces the provisions of the BMO;
- takes stock of the efforts made in enforcement;
- evaluates the adequacy and effectiveness of such mechanism and efforts; and
- assesses the need for improvement.

### **Government Policy**

3. It is Government’s policy to facilitate owners’ management and maintenance of private buildings. To this end, Government provides a legal framework through the BMO. Government also provides, mainly through HAD, advisory support and training programmes. HAD also deals with building management complaints and helps resolve building management disputes.

### **Building Management Ordinance, Cap.344**

4. The BMO provides for the incorporation of owners and the management and maintenance of their buildings. It sets out the duties, rights and powers of Owners’ Corporations (“OCs”), Management Committees (“MCs”), owners and the Authority. The Secretary for Home Affairs (“SHA”) is the Authority for the Ordinance and HAD, his executive arm.

5. The Ordinance defines the duties and powers of OCs and MCs with regard to the management and maintenance of common parts of a building, preparation of budgets and accounts, keeping of financial and meeting records, etc. It also confers on owners the rights to monitor the operations of their OC/MC, which include the rights to inspect and/or obtain a copy of OC budgets

and accounts and to require the MC chairman to convene an OC general meeting for specified purposes at the request of not less than 5% of the owners.

6. SHA as the Authority is empowered under section 40A to inspect common parts of a building, attend OC general meetings and inspect and/or obtain a copy of OC budgets, accounts, documents and records. He may order the MC of a building to appoint a building management agent to manage the building, institute prosecution for offences under the BMO and apply to the Lands Tribunal for an order to dissolve an MC and appoint an administrator.

### **Enforcement Mechanism**

7. HAD staff visit private buildings at least once a year, for an understanding of the general condition of the building and the functioning of the OC/MC. HAD considers that owners should monitor the operations of their OC/MC and the Department should not intervene in its daily operations. However, if HAD staff should spot possible contravention of the BMO, they would remind the OC/MC concerned of the requirements of the Ordinance and the importance of compliance.

8. A similar approach is adopted when handling building management enquiries and complaints. HAD staff are under instruction to advise or informally mediate in disputes, but not to arbitrate or take a policing role.

9. According to the prosecution guidelines, HAD staff are to investigate to see if there is adequate evidence to substantiate an alleged breach of the BMO. They are to consider **the nature of the offence, the intention of the offender(s) and public interest**, before making a recommendation to SHA for prosecution or not.

10. In deciding whether SHA's powers of inspection under section 40A should be invoked, HAD would consider if there is *prima facie* evidence of breach of the BMO or of serious management problems in the building. Documents and information obtained under section 40A are for SHA's use only, and not to be divulged to owners.

### **Resolution of Disputes**

11. Besides conducting informal mediation by its own staff, HAD has been providing since mid-2002 a free mediation service under a pilot scheme with the assistance of two professional mediation bodies. HAD refers cases to a Joint Assessment Panel with representatives from both

mediation bodies. In the past two years, 13 cases have been assessed. Only five were actually mediated, two of which were successfully resolved.

12. If HAD's advice is not taken or mediation fails, HAD would advise the affected party to consider taking one or both courses of action prescribed in the BMO :

- to require the MC chairman to convene an OC general meeting for specified purposes at the request of not less than 5% of the owners
- to bring the case to the Lands Tribunal for adjudication

### **Enforcement Records**

13. Since the enactment of the BMO, SHA has :

- never instituted prosecution against anyone;
- never invoked his powers; and
- never applied to the Lands Tribunal for a court order.

Moreover, no survey has ever been conducted to ascertain the degree of compliance with the BMO.

### **Case Studies**

14. We have examined all six requests for prosecution received by HAB/HAD between August 2000 and July 2003. All of them related to alleged breach of section 27(1) – failure of MCs to prepare and table the OC accounts at general meetings of the OCs. All such requests were turned down. In the most blatant case :

- The requestor had made ten written requests to the MC for inspecting the OC accounts.
- HAB/HAD had issued six written and numerous verbal reminders urging the MC to comply with section 27(1).
- More than 5% of owners had requested a general meeting of the OC for dissolving the MC.
- Numerous owners had complained bitterly to HAD, HAB and the Chief Executive's Office for HAB's/HAD's failure to prosecute the MC.

All such efforts were in vain. The MC eventually only tabled the OC accounts for one 12-month period in 36 months. HAB/HAD's inaction is disappointing.

**15.** We have also examined all eight requests for invoking SHA's powers received by HAB/HAD in the same period. All of them were turned down for the same reason : the state of the building did not warrant the invocation of SHA's powers.

**16.** We find that all requests for enforcement were screened by relatively junior HAB/HAD staff without proper delegation of authority from SHA. None has been submitted to SHA for his decision, contrary to the requirements in the guidelines. There was also no regular reporting to SHA on the handling of the requests. Furthermore, we note serious delays in processing and replying to some of the requests.

## **Observations and Opinions**

### *Inspections*

**17.** Since HAB/HAD has an enforcement/execution role under the BMO, we consider that HAD staff should be expected to look out for non-compliance during site visits and meetings. Many owners are not familiar with the BMO and may not be sufficiently aware to notice and report non-compliance. HAD's existing booklet provides general guidance on various aspects of OC/MC operations but fails to offer ready reference on the key requirements of the BMO.

### *Prosecutions*

**18.** HAB/HAD has made no attempt to prosecute even in blatant cases. HAD adopts an attitude of indefinite, or even infinite, latitude towards offenders. It interprets the three factors in paragraph 9 in such a way as to justify its reluctance to recommend prosecution. Consistent non-enforcement can only breed disregard for enforcement and disrespect for the law. Allowing blatant breach of the BMO to go unchecked is not in accord with either the basic principle of legislation or Government's declared policy. This is certainly not in the public interest.

**19.** HAD's prosecution guidelines are inadequate in that they have not spelt out clearly when SHA's powers of inspection under the BMO should be invoked for investigating an alleged breach. They have also not made specific reference to the role of the Department of Justice ("D of J").

### *Invocation of SHA's Powers*

**20.** We find that HAD's guidelines on invoking section 40A have left out the considerations and constraints outlined in paragraph 10. It is also not clear how HAD determines the degree or

extent of management problems which would warrant the exercise of SHA's powers under that section. Furthermore, there are no guidelines for invoking SHA's powers under other sections of the BMO.

### *Complaints and Disputes*

**21.** HAD's recent efforts to promote corporate governance of OCs and to reinforce the training to MC members have helped to reduce building management complaints and disputes. HAD should keep up these good efforts.

**22.** Theoretically, the two courses of action mentioned in paragraph 12 could go a long way towards resolving disputes. In practice, there are inherent drawbacks and limitations in these statutory avenues, as shown in paragraphs 25 and 27 below.

### *Mediation*

**23.** Compared with statutory avenues, there are obvious advantages in mediation. It can resolve a dispute more speedily, at lower cost and without damage to the relationship of the parties involved. The process is confidential, with simple and flexible rules and procedures. However, mediation also has limitations. Participation is entirely voluntary. Parties with a history of adversarial relations or prior litigation are unlikely to agree to mediate.

**24.** HAD's pilot mediation scheme has not been thoroughly tested. The limit of 3½ hours set for mediating each case is barely adequate for simple and straightforward cases. HAD does not have a comprehensive plan for administering the scheme, nor dedicated pamphlets to publicise it.

### *Convening an OC general meeting*

**25.** It may be difficult to obtain the consent of 5% of owners required to convene an OC general meeting. Forming a quorum for the meeting is even more difficult. MC chairmen may refuse to convene such meetings, and there is no penalty for so refusing. Reluctant MC chairmen may also employ various tactics to delay or frustrate legitimate requests for such meetings.

**26.** Such malpractices are not uncommon. Unfortunately, HAD is unable to help the owners or provide relevant statistics to us. To protect owners' interests, SHA should be empowered to order an MC to convene an OC general meeting if owners' legitimate request for such a meeting is unreasonably refused or frustrated.



### *Adjudication by Lands Tribunal*

**27.** Adjudication by the Lands Tribunal can be costly and time-consuming as legal formalities apply. The range of solutions is limited. Neighbourly relationship is prone to damage under a “win-lose” situation. Worse, the losing party may appeal to a higher court, adding even greater burden on cost, time and energy.

**28.** For these reasons, owners are often reluctant to bring their case to the Lands Tribunal. There are calls for simplifying the mechanism for adjudicating building management disputes. Two suggestions have been considered by HAD for some time, viz. a Building Management Tribunal and a Wise Men Panel.

### **Conclusions**

**29.** On the basis of our investigation, we have the following conclusions :

- (a) HAB/HAD has failed to enforce the BMO.
- (b) HAB’s/HAD’s guidelines and procedures for enforcing the BMO are either inadequate or non-existent.
- (c) HAD has been “deciding” on requests for enforcement without proper delegation of authority or reporting to SHA.
- (d) SHA, as the Authority for the BMO, has not shown sufficient interest in the enforcement of the Ordinance or monitored HAD’s execution on his behalf.
- (e) HAB/HAD has no statistics or firm data to help formulate an efficient and effective strategy for handling building management disputes.
- (f) The use of mediation as a means of settling building management disputes has not been fully tested.
- (g) There are deficiencies in the BMO which have been exploited by a small number of persons. HAD is not sufficiently empowered to protect the interests of individual owners in the face of such exploitations.

- (h) The present mechanism for adjudicating building management disputes is not sufficiently user-friendly.

## **Recommendations**

**30.** The Ombudsman makes the following recommendations to HAB and HAD :

### *Enforcement*

- (a) To look out proactively for non-compliance and draw up clearer guidelines and procedures for checks and follow-up action.
- (b) To promote among OCs/MCs and owners better understanding of the BMO by producing a separate guide or revise the existing one.
- (c) To review and revise HAB's/HAD's interpretation of the factors affecting recommendation for prosecution and to take prosecution actions against blatant offenders accordingly.
- (d) To make reference in the guidelines to SHA's powers of inspection under the BMO and D of J's role in prosecution.
- (e) To spell out clearly in the guidelines the important considerations and constraints for invoking section 40A.

### *Systems and Procedures*

- (f) To make proper delegation of authority for processing requests for enforcement and to devise systems for regular reporting to SHA.
- (g) To introduce administrative measures, including pledges for issue of replies, into the guidelines to ensure proper and timely handling of requests for enforcement.
- (h) To draw up specific instructions on the handling of complaints of non-compliance and take steps to ensure timely processing of such complaints and proper keeping and analysis of relevant statistics and data.

### *Mediation*

- (i) To extend the pilot mediation scheme and to improve its operations so as to properly try out public acceptance and effectiveness of mediation in resolving building management disputes.

### *Statutory Avenues*

- (j) To amend the BMO to enable the Authority to order an MC to convene a general meeting of the OC for specified purposes.
- (k) To expedite discussion and consultation with parties concerned and develop an early proposal for a simple and effective mechanism for adjudicating building management disputes.

## **Final Remarks**

31. HAB/HAD undertakes to consider our recommendations carefully and work out how best to implement them. The Ombudsman is pleased to learn that HAB/HAD has generally accepted our recommendations.

## **Epilogue**

32. This rounds off our three direct investigations on Government's services and actions in building management :

- Role of HAD in facilitating formation of OCs (published in March 2003)
- Assistance by HAD to owners and OCs in managing and maintaining their buildings (published in November 2003)
- Enforcement of the BMO (published in June 2004)

- End -

**Office of The Ombudsman  
June 2004**

(Reproduced from Chapter 9 of the Investigation Report)

# 9

## EPILOGUE

**9.1** Good building management has been a matter for Government attention since the 1970's. In the new millennium, Government's implementation strategy on building safety and timely maintenance in April 2001 and the outbreak of the Severe Acute Respiratory Syndrome in early 2003 have brought into even sharper focus the importance of effective management for a safe and hygienic living environment. We firmly support Government's emphasis on this key aspect of our community life.

### Rounding Off

**9.2** Against this background, we have examined Government services and actions in building management by three direct investigations :

	<u>Subject</u>	<u>Published</u>
I	Role of HAD in facilitating formation of OCs	March 2003
II	Assistance by HAD to owners and OCs in managing and maintaining their buildings	November 2003
III	Enforcement of the BMO	June 2004

**9.3** We take this opportunity to sum up briefly our findings and overall impressions from these three investigations :

#### (a) Formation of OCs

- The increase of new OCs was a mere 1% even after a lowering of the requirement from 50% to 30% of owners' shares for OC formation in 2000 and a considerable increase in staff resources in 2001.
- HAD's assistance to owners fell short of their expectations.
- There was much room for service improvement and for speeding up OC

formation as a large number of private buildings have yet to incorporate themselves for organised action in management.

**(b) Support and Services to OCs**

- In view of community criticism of HAD staff being not sufficiently professional or full-time, Government had in 2001 allocated \$43.9 million a year for 90 posts to address these deficiencies.
- Regrettably, HAD started in early 2003 to delete by phases professional and housing grade posts.
- This was tantamount to turning the clock back and partially rescinding Government's strategy of April 2001 (paragraph 9.1).

**(c) Enforcement of BMO**

- HAB/HAD have not enforced the BMO even when confronted with a blatant breach.
- SHA has not shown much interest in enforcement or given HAD sufficient guidance in execution, and has not even delegated the authority to HAD.
- Enforcement procedures are inadequate or non-existent.

**9.4** For ease of reference, our recommendations based on the first and second investigations are reproduced at **Annexes 8 and 9** of this report. Those on the present investigation are in paragraph 7.3 of the report.

**9.5** It is evident that there has been no serious attempt to enforce the BMO. Even clearly blatant breach of the law has not persuaded the authorities to take prosecution action. There is an apparent lack of will, or courage, to take that step. Consequently, questions are raised as to Government's sincerity and determination in its pronouncements on building management over the years. These are perceived by many in the public as merely lip service and empty promises.

**9.6** Such perceptions are most unfortunate, as is the organisational culture of "positive non-intervention" permeating from HAD HQ to the DOs.

**Recent Developments**

**9.7** Since the publication of our first investigation report, HAD has been improving its building management services :

- extending the opening hours of BMRCs;
- revamping its guides and website on building management to be more informative and easier for use;
- producing more guidelines and checklists for owners and OCs/MCs;
- strengthening training programmes;
- stepping up publicity on services; and
- improving the support and training for frontline staff.

These should foster a more client-oriented service culture in the Department.

**9.8** Regrettably, the phased deletion of virtually all professional and housing grade posts as an economy measure has diluted staff expertise and adversely affected the quality of services. Unless HAD is able to make up for this loss, maintenance of its service standards in building management will be at risk, contrary to Government's intention.

### **Looking Ahead**

**9.9** Public consultation on HPLB's proposals to improve building management and maintenance (paragraphs 2.19 and 2.20) has just ended. The Bureau is now actively analysing the views collected. The community awaits its final proposals to promote effective management and proper maintenance of buildings.

**9.10** We appreciate HAB and HAD's acceptance of our reports and recommendations. We hope that HAB and HAD, as the authorities for building management, review their attitude and revise their approach to the BMO and related matters. A new culture must evolve to inspire staff and to reassure responsible OCs/MCs, to deter uncooperative owners and to bring to book those in breach of the law. This is the challenge of change Government must take up to ensure a safe and healthy living environment.