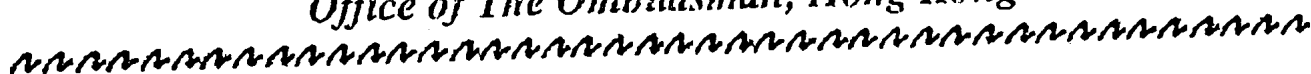




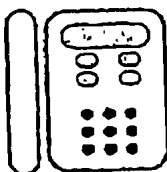
*Issue No. 4 of Reporting Year 2007/08
(10 April 2008)*

Office of The Ombudsman, Hong Kong



*Direct Investigation on Handling of Water Seepage Complaints
by the Food and Environmental Hygiene Department,
Buildings Department and Water Supplies Department*

The executive summary of the investigation report is at Annex A.



Enquiries

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Office of The Ombudsman, Hong Kong
10 April 2008

EXECUTIVE SUMMARY

Direct Investigation Handling of Water Seepage Complaints

Introduction

Seepage is basically a matter of building management and maintenance for property owners. However, if it causes public health nuisance, building safety risks or wastage of water, Government has a statutory responsibility to intervene.

2. The departments concerned are the Food and Environmental Hygiene Department ("FEHD"), the Buildings Department ("BD"), the Water Supplies Department ("WSD"). Since mid-2006, the Joint Office of BD and FEHD ("JO") has been set up for better interdepartmental coordination¹.

3. The handling of seepage matters has been a perennial source for complaints. The Ombudsman has expressed concern in her Annual Reports since 2003. However, complaints about the issue have continued even after establishment of JO. Against this background, The Ombudsman declared, on 5 July 2007, a direct investigation under section 7(1)(a)(ii) of The Ombudsman Ordinance, Cap. 397 to examine the effectiveness of the JO scheme in handling seepage complaints.

4. The JO scheme has been set up for review in three years. At the time of writing of this report, Government is conducting an interim review of the scheme.

Background

Government Powers and Responsibilities

5. Maintenance of private buildings is the responsibility of property owners. Water seepage is often a maintenance problem which owners should deal with themselves. In practice, owners sometimes have difficulties in obtaining neighbours' cooperation and turn to Government

¹ After a pilot JO set up in December 2004 in Shamshuipo district, the JO scheme was extended in mid-2006 to the whole territory.

for assistance. Government powers and responsibilities on seepage issues emanate from the following statutes:

- Public Health and Municipal Services Ordinance, Cap. 132 ("PHMSO"), section 127 of which confers on FEHD the power to issue nuisance notices;
- Buildings Ordinance, Cap 123 ("BO"), which confers on BD powers to issue orders requiring owners to demolish unauthorised building works (section 24), to make safe dangerous buildings (section 26), to investigate and remedy building defects (section 26A), and to investigate and remedy drainage defects (section 28); and
- Waterworks Ordinance, Cap 102 ("WO"), section 16 of which confers on Water Services Department ("WSD") the power to issue notices requiring repairs in case of wastage of water.

6. Government has no legal powers to enforce against seepage that does not constitute public health nuisance, building safety risks or wastage of water.

Operation of JO

7. JO is to replace the previous Tripartite Arrangement² and provide a one-stop service in handling seepage complaints. It comprises staff from BD and FEHD, but not WSD as Government considered that WSD has only a limited role in such complaints.

8. JO investigates seepage complaints in three stages. Stage I (Confirmation of Nuisance) is a screening process by FEHD staff while Stages II (Initial Investigation) and III (Professional Investigation) are attempts by FEHD staff and BD staff respectively to identify the source of seepage.

9. Where the source is identified and enforcement action under PHMSO is considered appropriate, JO will issue a nuisance notice to the liable party. Where enforcement action under BO or WO is considered appropriate, the case will be referred to BD Headquarters or WSD for follow-up action.

² Where FEHD acted as the first contact point and, where appropriate, referred cases to BD and WSD for further investigation.

10. However, the three departments do not always agree on enforcement responsibilities. For example, on seepage from water supply pipes:

- WSD considers that enforcement is for FEHD under PHMSO, unless the leakage is so serious as to amount to wastage of water;
- Where the source is potable water, FEHD considers that this does not constitute public health nuisance and, therefore, enforcement under PHMSO is not appropriate; and
- BD considers that enforcement can be taken under either WO or PHMSO.

Structure of JO

11. JO comprises 19 District Offices grouped under two Regional Offices, as shown in Annex 1. It should be noted that:

- although the two Regional Offices are under BD officers, there is no formal head of JO;
- combined District Offices are provided in six districts where BD and FEHD staff work together under one roof; and
- “split” District Offices are provided in the remaining 13 districts where FEHD staff in the districts are supported by BD staff at the Regional Offices and other District Offices.

Reporting System within JO

12. The operational reporting system of JO is shown in Annex 2 and the staff management reporting system in Annex 3. It should be noted that:

- the heads of JO Regional Offices are only nominal, as FEHD staff in JO do not report to them;
- BD staff and FEHD staff have separate reporting systems, both on operational and on staff management matters; and

- management of FEHD staff, including postings and transfers, is decided by senior FEHD officers who do not have a role in the operation of JO.

Management of Consultants

13. Consultants play an important role in JO's Stage III investigative work. JO has awarded 19 term contracts of not more than 12-month duration to eight consultants. All contracts are re-tendered upon expiry.

14. JO requires consultants to submit bi-weekly progress reports and attend bi-weekly progress meetings. For consultants who under-perform, JO will issue warning letter or recommend to BD Headquarters the issue of adverse report. Where warranted, BD Headquarters may terminate contracts or suspend consultants from bidding for new contracts.

15. From June 2005 to November 2007, JO has issued 57 warning letters and six adverse reports to its eight consultants.

Performance of JO

16. During the first 12 months of full JO operation from July 2006 to June 2007 ("our study period"), JO investigated 5,787 complaints with a success rate of 54%. This compared with 14% before the establishment of JO. The calculation of the success rates is given in Annex 4.

17. During our study period, JO issued a total of 487 nuisance notices under PHMSO, BD Headquarters issued 17 repair orders under BO and WSD issued 33 repair notices under WO. These enforcement figures and the number of complaints in para. 16 represent actions taken during our study period and do not necessarily relate to the same complaints. JO keeps statistics only on cases of nuisance notices issued under PHMSO, but not on cases enforced by BD and WSD.

Solving Seepage Problems through Private Efforts

18. Some property owners do solve their seepage problems through their own efforts, often with the cooperation of their neighbours. Many others come to JO for assistance or demand Government remedy, or choose to take legal proceedings.

Case Studies

19. We have studied over 30 cases and summarised seven cases in our report as being illustrative of the problems in handling seepage complaints:

Case No.	Problems revealed
Case 1	Ineffective progress monitoring
Case 2	JO staff failing to comply with guidelines; ineffective progress monitoring; and frequent changes in JO staff
Case 3	BD, FEHD and WSD disagreeing on enforcement responsibilities; and JO failing to resolve disagreement in a timely manner
Case 4	Inefficiency and incompetence of the consultant; failure to manage the consultant effectively; and no attempt to intervene to redress an extreme situation
Case 5	Private owners' initiative more effective and efficient than JO in resolving the seepage problem; JO staff failing to comply with guidelines on entry; and ineffective management of consultants
Case 6	BD and FEHD staff holding different views on the action required of JO's consultant before referral to FEHD for applying for a Warrant of Entry; lack of cooperation and coordination between BD and FEHD staff
Case 7	Lack of coordination between BD and FEHD in handling public requests for JO information and in responding to inquiries of this Office

Recent Developments

20. JO is undergoing an interim review (see para. 4). Meanwhile, it has already introduced certain improvement measures to procedures concerning operational timelines, entry to suspected premises and management and monitoring of consultants.

Observations and Opinions

21. Our study has identified the following deficiencies in Government's arrangements in handling seepage complaints.

Difficulty in Identifying Source of Seepage

22. We note that the success rate of investigation as calculated by JO has increased significantly from 14% before JO to 54% for our study period. However, the comparison is not like with like, as JO has adopted new criteria to screen out complaints since its establishment. Moreover, in the 12-month study period, JO had been unable to identify the source in 98 cases (see Annex 4).

23. The increase in success rate is, therefore, no cause for complacency. JO should explore ways to further improve its investigative capability and techniques.

Insufficient Operational Timelines

24. There is need for improvement in the way JO monitors the progress of its cases. This is well illustrated by the long periods of inaction by JO staff in Case 1 (23 months) and by JO(BD)'s consultant in Case 4 (five months).

25. Examination of JO's operational guidelines reveals that there were no target timelines or performance pledges for many tasks. There was also no stated requirement to inform complainants of progress.

26. In this connection, JO has recently established major milestones for monitoring progress in Stage III and intends to introduce working guidelines to inform complainants regularly of progress.

27. We note JO's recent improvement measures and consider that, in addition:

- JO should establish milestones also for monitoring progress in Stages I and II; and
- milestones for all Stages should be developed as performance pledges for public information.

Difficulty in Entering Suspected Premises

28. Practical difficulty in gaining entry often causes delays in investigation. During our study period, the longest time taken to gain entry was seven months.

29. In some cases, repeated unproductive visits were made and JO staff still did not initiate action to exercise their statutory power of entry. Meanwhile, difficulty in gaining entry is sometimes compounded by interface problems between the different parties undertaking different steps in exercising the powers of entry. In Case 6, FEHD staff and BD staff in JO disagreed on whether the requisite procedures had been followed before referral to FEHD staff for follow-up action on applying for a Warrant of Entry.

30. To expedite the process, JO has recently introduced a number of improvement measures, including adoption of a standard checklist to ensure all procedures have been followed before referral to FEHD staff for follow-up action.

31. Further to these improvements, we consider that:

- JO should review the guidelines for entry with particular focus on clarifying for staff and consultants interpretation of the requirements and improving the interface between the different parties concerned;
- JO staff should take prompt, proactive and decisive action in exercising their statutory powers of entry, particularly as it becomes apparent that cooperation would be unlikely; and
- JO should establish a system for monitoring progress to guard against delays.

Disagreement over Enforcement Responsibilities

32. Although JO is to coordinate enforcement, failure of FEHD, BD and WSD to agree on their enforcement responsibilities (see para. 10) defers and even hinders action. Some cases have dragged on for an inordinately long time (18 months of disagreement in Case 3), without any consideration for the plight of the affected parties.

33. We consider that the departments, together with their bureaux if necessary, should work out a mechanism to resolve their differences without delay.

Divergent Interpretation of "Nuisance"

34. Departmental disagreement, or uncertainty, over responsibilities is complicated by the diverse interpretation of "nuisance". While FEHD excludes seepage of rainwater or potable water

from nuisance cases, BD and WSD tend to treat seepage cases not enforceable under BO and WO as nuisances enforceable by FEHD under PHMSO.

35. To resolve this, FEHD should develop a clear, precise and publicly defensible definition of "nuisance". It should establish practical guidelines for staff on the issue of nuisance notices. In pinning this "lead" responsibility on FEHD, we recognize that it will have to invoke inter-departmental consultation and coordination, to clarify the legal position and then establish an overall Government position on the way forward.

Failure to Enforce against Multiple Owners

36. Where the point of entry for water is the communal part of a building under multiple ownership, e.g. external wall or roof, JO will not take enforcement action because of the resources required to ascertain responsibilities for carrying out repair (e.g. checking the Deed of Mutual Covenant) and identifying and serving nuisance notices on all owners concerned. Moreover, JO considers it odd for the complainant, as an owner/occupier having a share of the collective responsibility of repairs, to be served a nuisance notice.

37. JO has a statutory responsibility to issue notices for abatement of nuisances, whether the liable party is a single owner or multiple owners. This responsibility does not diminish in cases where the complainant is one of the multiple owners; nor is resource constraint a good reason for not taking enforcement action where such is warranted.

Deficiency in JO's Management Information on Enforcement

38. JO's approach in measuring its performance using only the success rate of investigation is insufficient. In particular, no comprehensive statistics are kept to monitor actions taken after the source of seepage has been successfully identified (see paras. 16-17). This is a serious gap in management information which needs to be filled if JO to monitor adequately its overall performance.

Disjointed Organisational Structure of JO

39. A major reason for the problems in investigation and enforcement is JO's deficient organisational structure. Firstly, given that 12% of seepage cases are related to water supply pipes, excluding WSD from JO makes enforcement in these cases incomplete, and even difficult. In **Case 3**, for instance, WSD would not accept JO's investigation results.

40. Secondly, out of the 19 District JOs, 13 are “split” JOs where BD and FEHD work in separate offices (see para. 11). Such *modus operandi* is not conducive to efficient internal communication or *esprit de corp*, and may cause confusion to the public.

41. Thirdly, JO is a loose assortment of BD and FEHD staff in uneasy partnership (see para. 12). Neither BD nor FEHD is in a position to exercise proper authority over all JO staff, or to take full responsibility for JO’s performance. Furthermore, the disjointed organisation is hardly conducive to the two grades of staff working together efficiently or communicating effectively and cultivating a mutual bond in service.

Need for Formal Head

42. To facilitate coordination and improve efficiency, we urge the three departments, together with their bureaux, to review seriously the organisation and staffing of JO to designate a department to be the acknowledged head of JO with formal authority and clear lines of command over staff secondment and office management. As part of this review, consideration should be given to including WSD in JO.

Frequent Turnover of JO Staff

43. Frequent turnover of staff is another reason leading to inefficient operation and long delays. While the causes of this phenomenon are many and diverse, it may be related to the fact that decisions on postings and transfers of FEHD staff in JO are made by FEHD officers not responsible for the operation of JO. Designation of a formal head of JO with authority for staff (see para. 41) should help in this regard.

Ineffective Management of Consultants

44. JO monitoring of the consultants leaves much to be desired. For example, in Case 4, despite the contractual requirement to submit the technical report within six weeks and many verbal and written reminders issued by JO(BD), Consultant A took four months to submit its initial report, 13 months to submit its revised report and 18 months to submit its second revised report. Despite bi-weekly progress meetings, there were five months of total inaction by Consultant A.

45. To strengthen its management of consultants, JO has revised the conditions of the consultant contracts awarded in 2007. BD Headquarters has recently set up bi-monthly meetings with the consultants to enhance monitoring.

46. Also, JO intends to introduce other improvement measures including setting timeframes for the major deliverables in future contracts, requiring consultants to adopt standardised reports for monitoring, and standardising the format of warning letters to consultants.

47. In addition, we consider that:

- JO(BD) should be more vigilant and more outcome-oriented in its operational monitoring of its seepage consultants; and
- in cases of serious under-performance or serious delay, JO(BD) should consider intervention to redress the situation.

Short Duration of Consultant Contracts

48. One of the causes of the poor performance of some consultants could be the short duration of their contracts (maximum 12 months). We appreciate that the short duration has the advantage of giving JO greater flexibility in revising contract conditions and in getting rid of non-performing consultants. On the other hand, the short duration often means that by the time the consultant and his staff gain knowledge and experience in the work, the contract is coming to an end. It is also relatively difficult for the consultant to recruit and retain good staff under the short contracts. We consider that JO should consider awarding contracts for longer duration, but with effective control over job allocation on the basis of performance.

Problems in Resolving Civil Disputes in Building Maintenance

49. For property owners who choose to initiate legal proceedings, the existing channels for dispute resolution have disadvantages:

- Generally legal proceedings are expensive both in terms of time and money.
- The Small Claims Tribunal can handle cases only where damage has actually been sustained and the claim does not exceed \$50,000. It is particularly not useful in cases where the party suspected to be the source of seepage does not allow investigation or facilitate repairs.

50. This clearly points to the need for more effective and efficient avenue for resolving seepage disputes.

51. We note that Government has, since 2005, been giving consideration to setting up a Building Affairs Tribunal ("BAT") as an alternative channel to settle disputes on matters of building management and maintenance, including water seepage. We urge Government to give priority to this proposal.

52. Furthermore, we consider that the new tribunal should have the following two key features:

- it should have simple procedures and legal representation should be disallowed³; and
- it should be empowered to order investigation as well as repairs.

Recommendations

53. Government initiative is commendable in setting up JO as a one-stop service and in exploring ways for improving its operation. For further improvement, The Ombudsman makes the following recommendations:

Investigation of Seepage

- (1) JO to explore ways to further improve its investigative capability and techniques (see paras. 22-23).

Work Procedures of JO

- (2) JO to establish milestones for monitoring progress not only for Stage III investigation but also for Stages I and II (see paras. 24-27).
- (3) JO to develop its internal milestones into performance pledges for public information (see para. 27).

³ Reference may be drawn to section 19 of the Small Claims Tribunal Ordinance, Cap. 338 and section 23 of the Labour Tribunal Ordinance, Cap. 25, which provide that no barrister or solicitor, unless himself a claimant or defendant, shall have a right of audience before the tribunals.

Entry into Premises

- (4) JO to review the guidelines for entry with particular focus on clarifying for staff and consultants interpretation of the requirements and improving the interface between the different parties concerned (see paras. 28-31).
- (5) JO staff to take prompt, proactive and decisive action in exercising their statutory powers of entry (see para. 31).
- (6) JO to establish a system for monitoring progress to guard against delays (see para. 31).

Disagreement over Enforcement Responsibilities

- (7) BD, FEHD and WSD, together with their bureaux if necessary, to work out some mechanism to resolve their differences on enforcement responsibilities (see paras. 32-33).

Interpretation of "Nuisance"

- (8) FEHD to develop a clear, precise and publicly defensible definition of "nuisance" (see paras. 34-35).
- (9) FEHD to establish practical guidelines for staff on the issue of nuisance notices (see para. 35).

Enforcement against Multiple Owners

- (10) JO to take enforcement action against multiple owners where warranted once advisory measures do not achieve results (see paras. 36-37).

Improving JO's Management Information on Enforcement

- (11) JO to improve its management information by maintaining comprehensive statistics on the outcome of successful investigations and execution of remedial or enforcement action (see para. 38).

Organisation and Staffing of JO

- (12) BD, FEHD and WSD, together with their bureaux if necessary, to seriously review the organisation and staffing of JO with a view to designating a department to be the acknowledged head of JO with formal authority and clear lines of command over staff and office management (see paras. 39-43).
- (13) As part of the review in (12) above, consideration should be given to including WSD as part of JO operation (see para. 42).

Management of Consultants

- (14) JO to be more vigilant and more outcome-oriented in its operational monitoring of its seepage consultants (see paras. 44-47).
- (15) In cases of significant under-performance or serious delay, JO to intervene to redress the situation (see para. 47).
- (16) JO to consider granting consultant contracts of longer duration (see paras. 48).

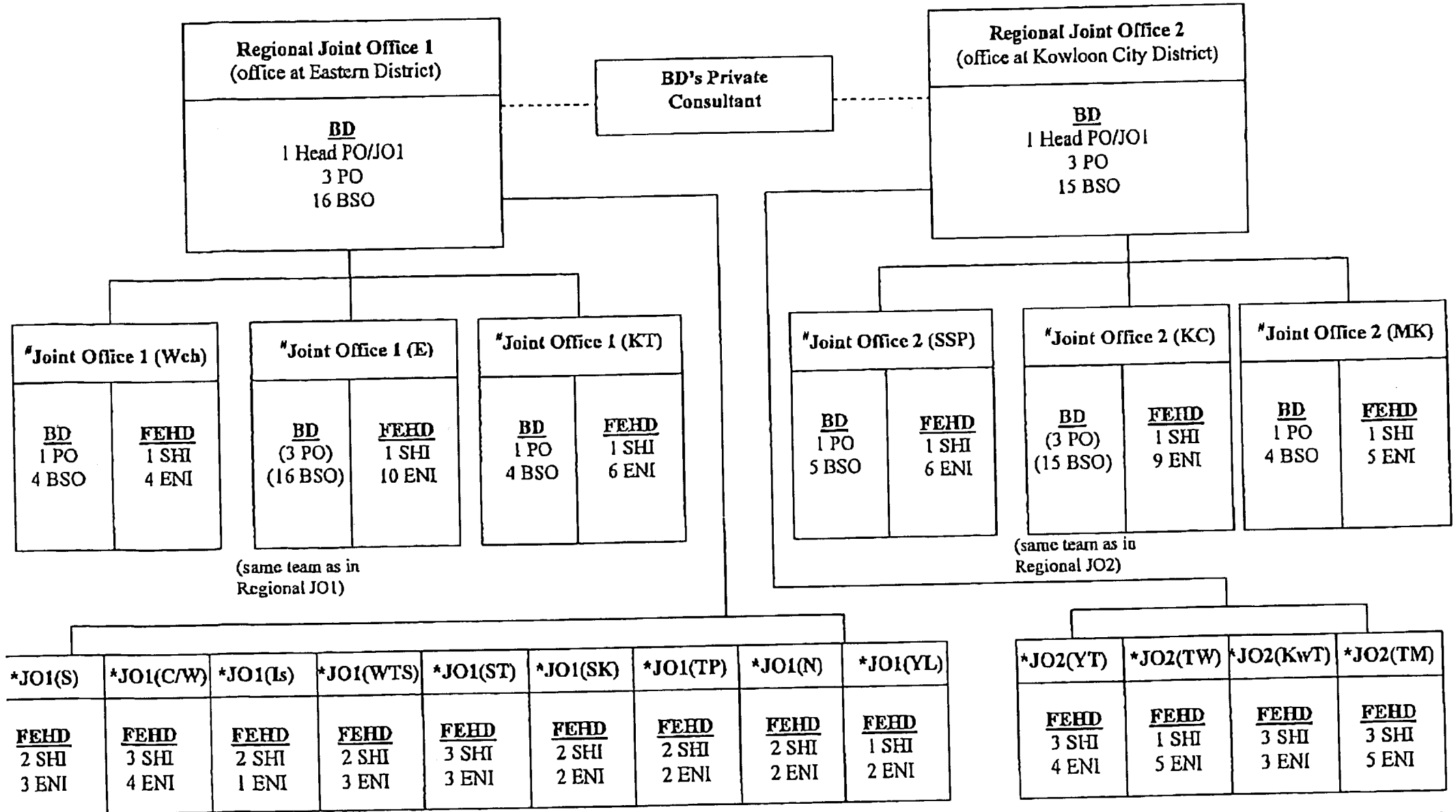
Resolution of Disputes on Building Maintenance

- (17) BD to discuss with its bureau on according priority to the BAT proposal (see paras. 49-52).

Office of The Ombudsman

March 2008

Organisation and Staffing of Joint Office

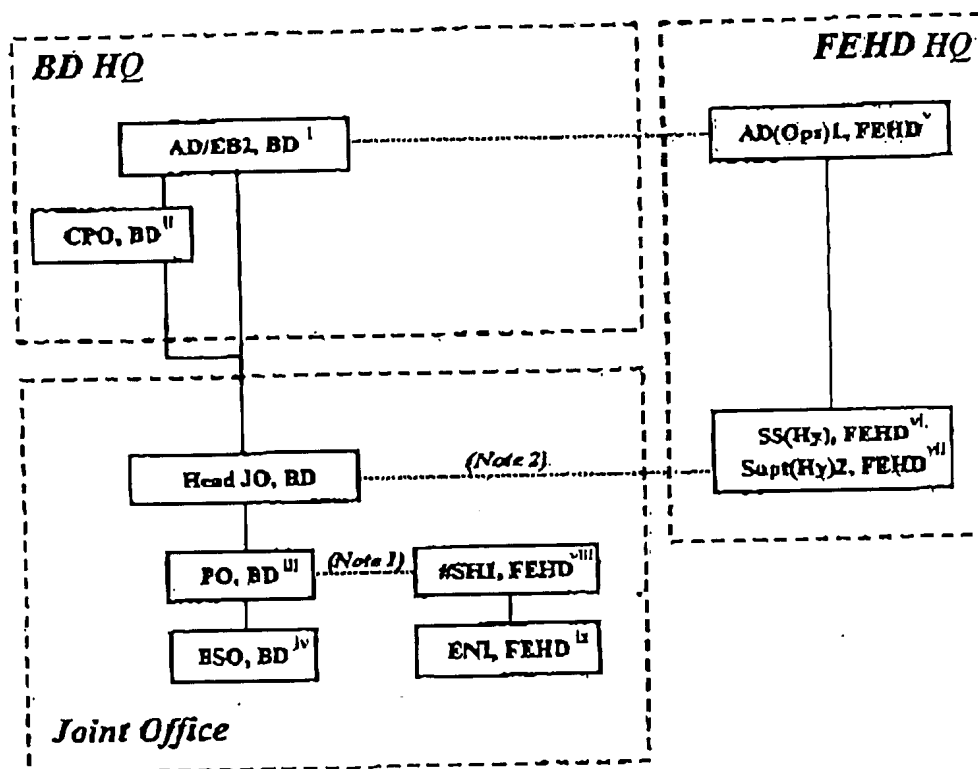


These 6 District JOs are combined offices with BD and FEHD officers working under one roof.
 * These 13 District JOs are "split" offices with BD officers working in Regional JOs and other District JOs.

PO – Professional Officer
 BSO – Building Safety Officer

ENI – Environmental Nuisance Investigator
 SHI – Senior Health Inspector (part-time)

Operational Reporting System of JO



Remarks

working on part-time basis.

Note 1: - SHI and ENI of FEHD are responsible for Stage I & II investigation.
 - If there is a need for technical support in Stage I and II investigations, ENI / SHI will seek advice from PO.
 - If necessary, PO may seek assistance from FEHD in Stage III investigation, e.g. ENI / SHI to render assistance in gaining entry of premises and taking enforcement actions under the Public Health and Municipal Services Ordinance, Cap. 132.

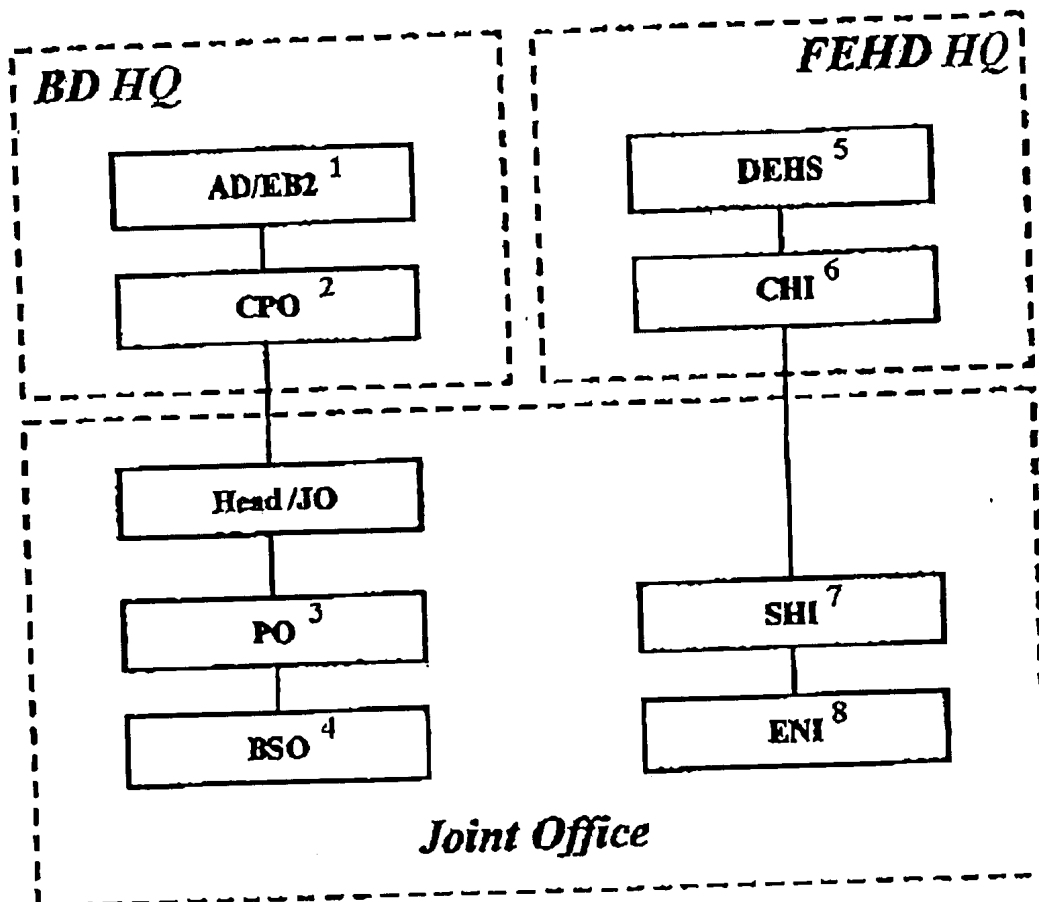
Note 2: Playing a coordinating role in the review of policy matters and procedural guides concerning the operation of Joint Office.

Key:

- | | | |
|------|-----------------|--|
| i | AD/EB2, BD | Assistant Director/Existing Buildings 2, BD |
| ii | CPO, BD | Chief Professional Officer, BD |
| iii | PO, BD | Professional Officer, BD |
| iv | BSO, BD | Building Safety Officer, BD |
| v | AD(Ops)1, FEHD | Assistant Director (Operations) 1, FEHD |
| vi | SS(Hy), FEHD | Senior Superintendent (Hygiene), FEHD |
| vii | Supt(Hy)2, FEHD | Superintendent (Hygiene) 2, FEHD |
| viii | SHI, FEHD | Senior Health Inspector, FEHD (working on part-time basis) |
| ix | ENI, FEHD | Environmental Nuisance Investigator, FEHD |

Source: Chart received from BD who has incorporated FEHD's input

Staff Management Reporting System of JO



Key:

- | | | |
|---|--------|---|
| 1 | AD/EB2 | Assistant Director/Existing Buildings 2, BD |
| 2 | CPO | Chief Professional Officer, BD |
| 3 | PO | Professional Officer, BD |
| 4 | BSO | Building Safety Officer, BD |
| 5 | DEHS | District Environmental Hygiene Superintendent, FEHD |
| 6 | CHI | Chief Health Inspector |
| 7 | SHI | Senior Health Inspector, FEHD |
| 8 | ENI | Environmental Nuisance Investigator, FEHD |

Source: Chart received from BD who has incorporated FEHD's input

Success Rate of Investigation by JO

Breakdown of complaints concluded	No. of complaints	
	Before JO in Shanshuiipo district in 2004	Under JO for the whole territory during our study period
Complaints concluded	609	11,371
Complaints screened out ⁴	97	5,584
Complaints investigated	512 [100%]	5,787 [100%]
(Source identified) [success rate]	(73) [14%]	(3,103) [54%]
(Seepage ceased)	(54) [11%]	(2,586) [44%]
(Source not identified)	(385) [75%]	(98) [2%]

Source: JO

⁴ Since its establishment, JO has adopted the new criteria of screening out complaints with dry marks only or moisture content below 35, by formalising previous screening practice.