立法會 Legislative Council

LC Paper No. CB(2)913/19-20(04)

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Panel on Home Affairs

Updated background brief prepared by the Legislative Council Secretariat for the meeting on 11 May 2020

Review of the Building Management Ordinance

Purpose

This paper summarizes previous discussions of the Panel on Home Affairs ("the Panel") on the review of the Building Management Ordinance (Cap. 344) ("BMO").

Background

- 2. BMO provides a legal framework for owners to form owners' corporations ("OCs") and to manage their buildings properly in accordance with the requirements of the legislation. BMO was last amended in 2007. In order to keep pace with changing circumstances and to address public concerns, the Secretary for Home Affairs appointed the Review Committee on the Building Management Ordinance ("the Review Committee") in January 2011 to conduct a comprehensive review of BMO.
- 3. In the light of the Review Committee's recommendations, the Administration published in November 2014 the consultation document entitled "Review of the Building Management Ordinance (Cap. 344)" ("Consultation Document") setting out a number of legislative and administrative proposals aiming to address concerns raised by the public in recent years, including the disputes arising from large-scale maintenance projects, use of proxies at OC meetings, as well as appointment and remuneration of deed of mutual covenant ("DMC") managers. The public consultation exercise was conducted between 11 November 2014 and 2 February 2015.

Panel's discussion

4. The Panel discussed the Consultation Document at its meeting on 17 November 2014 and held a special meeting on 24 January 2015 to receive views from deputations. At its meeting on 17 May 2016, the Panel was briefed by the Administration on the outcome of the public consultation exercise, and

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the proposed way forward regarding the amendments to BMO. The Panel was subsequently consulted on the Administration's further legislative proposals and administrative measures at the meeting on 27 March 2017, and received public views at the special meeting on 4 May 2017. At the meeting on 27 November 2017, the Administration briefed the Panel on the proposed enhancements to its proposals. The major views and concerns of members expressed at these meetings are summarized in the ensuing paragraphs.

Bid-rigging and disputes relating to large-scale maintenance projects

Prevention of bid-rigging

- 5. Some members considered that the crux of the problem of bid-rigging in building maintenance projects laid in OCs' and owners' lack of expertise in planning building maintenance works, and queried whether the Administration's existing measures could adequately assist owners/OCs in the prevention of bid-rigging. It was suggested that these measures had to be complemented by corresponding amendments to BMO.
- 6. The Administration advised that it would continue to adopt a multi-pronged approach, including legislation, law enforcement, support and assistance to property owners to prevent bid-rigging. The Administration informed members that the Development Bureau was working closely with the Buildings Department, the Hong Kong Housing Society and the Urban Renewal Authority ("URA") to implement a number of schemes to help owners maintain and repair their buildings. URA would launch the Building Rehabilitation Facilitating Services in May 2016 to enhance technical and professional support for owners, which included providing guidelines and contract samples, arranging professionals to provide independent advice, establishing a tendering platform, etc. to help reduce the risk of bid-rigging. On the law enforcement front, the Hong Kong Police Force and the Independent Commission Against Corruption would continue with their investigation and enforcement work, as appropriate, to combat illegal activities relating to large-scale maintenance projects.

Definition of "large-scale maintenance projects"

7. At the Panel meeting on 17 May 2016, some members suggested that the tiered system in respect of the definition of "large-scale maintenance projects" proposed by the Administration should be revised to take into account the fact that many building estates contained as many as 10 000 or more flats. They proposed that the tiered system should be divided into, say, small, medium and large housing estates or "100-1 000 flats", "1 001-5 000 flats", "5 001-10 000 flats" etc., based on which different project costs for the definition of

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"large-scale maintenance projects" should be set. These members also expressed concern about the proposed high threshold of "40% of the annual budget of the OC" for the definition of "large-scale maintenance projects" which would mean that in some cases, only projects that cost over \$100 million could be regarded as a "large-scale maintenance project". There was also a view that a seven-day cooling-off period should be introduced in respect of large-scale maintenance projects to allow time for prudent consideration by owners.

- At the Panel meeting on 27 March 2017, members noted that the 8. Administration proposed to refine the tiered system by introducing a three-tier system, and to link the definition of "large-scale maintenance projects" with the average audited annual expenditure of OC for the past three years immediately before the maintenance proposal. However, some members considered the proposed threshold for "Tier 1" (i.e. where the building contained more than 500 flats) too low, which would mean that some buildings classified as "Tier 1" with high annual expenditure would need to convene OC meetings very frequently to discuss "large-scale maintenance projects". Besides, some members expressed concerns that for "Tier 3" (i.e. where buildings contained not more than 100 flats), the proposed threshold was too high. There was also a view that as most of the buildings with less than 50 flats did not hire property management companies ("PMCs"), there would be practical difficulties for their OCs to comply with the proposed requirement that the financial statements of OCs be audited.
- 9. Having regard to members' views, the Administration refined its proposal and submitted it to the Panel for discussion at its meeting on 27 November 2017. The Administration proposed to enhance the definition of "large-scale maintenance projects" by replacing the proposed three-tier system with a five-tier system, and adjusting the relevant thresholds for medium and large The Administration explained that it proposed to maintain housing estates.¹ the definition of "large-scale maintenance projects" for small housing estates with 100 flats or below, as the stakeholders generally considered the proposed threshold reasonable. Meanwhile, the Administration proposed to add another tier each for medium and large housing estates, taking into account the views of stakeholders during the public engagement, the policy objective to encourage more owners to participate in important matters of OCs in person, as well as the actual circumstances of large housing estates. The Administration had also made reference to, among others, the statistics collected from the Operation Building Bright by URA. Some members considered the proposed five-tier definition acceptable.

For details of the five-tier system under the enhanced proposal, please refer to paragraph 11 of the Administration's paper (LC Paper No. CB(2)378/17-18(03)).

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10. Some members took the view that regular service contracts of housing estates, such as those of property management, cleansing or security, should be excluded from the definition of "large-scale maintenance projects". The Administration advised that under BMO, whether any "supplies, goods and services" would require to be procured by invitation to tender depended on their monetary amount rather than their nature, and there was no distinction between maintenance projects and regular service contracts. The Administration undertook to explore whether a refined definition should be provided during the drafting of the legislative proposals.

Quorum of general meeting for passage of resolutions on large-scale maintenance projects

- 11. The Administration proposed raising the quorum of the general meeting for passing resolutions on large-scale maintenance projects from 10% to 20% of the owners to encourage owners' participation in making such important decisions. At the Panel meeting on 27 March 2017, members noted that the Administration further proposed that at least 10% of the owners had to attend the OC meeting in person to decide on large-scale maintenance projects. Some members expressed concern that it was difficult to meet this requirement given the high threshold, and there would also be practical difficulties in arranging venues to accommodate the attendance of a large number of owners particularly for large housing estates. Some members suggested that the Administration might consider introducing a tiered system in respect of the quorum requirement which should be set based on the number of flats.
- 12. The Administration explained that the additional proposal that at least 10% of the owners had to attend the meeting in person aimed to address concerns about the appointment of a large number of proxies and the potential manipulation of proxies in connection with large-scale maintenance projects. At the meeting on 27 November 2017, the Administration informed the Panel that having considered the views received, the distribution of existing OCs by the number of flats, and the actual circumstances of common meeting venues, the above proposal would be enhanced.² The Administration advised that its enhanced proposal sought to strike a balance between encouraging owners' participation in making important decisions and fulfilling the quorum requirement of general OC meetings.

Under the Administration's enhanced proposal, in respect of OCs for 4 000 flats or below, at least 10% of the owners should attend the OC meeting and vote in person when the resolutions on "large-scale maintenance projects" are passed. In respect of OCs for 4 001 flats or above, at least 10% of the owners or 400 owners, whichever is less, should attend the OC meeting and vote in person when the resolutions on "large-scale maintenance

projects" are passed.

Enforcement and criminal sanctions

- 13. Some members considered that the mere provision of mediation and advisory services under various schemes launched by HAD could hardly address the issue of bid-rigging and the problems faced by property owners in the event that management committees ("MCs") of OCs failed to perform the duties under BMO or their members acted with wilful negligence/made unreasonable decisions, thus causing losses to individual owners. In these members' view, criminal sanctions should be provided in BMO to deter people, including MC members, from breaching the requirements of BMO. Some other members, however, considered that adding more criminal sanctions to BMO might deter people from serving as MC members.
- 14. The Administration advised that BMO sought to provide a legal framework for owners to organize themselves to discharge their building management responsibilities. For example, there were penalty provisions in BMO with respect to OCs' non-compliance with the registration requirements, their furnishing of false information and failure to maintain proper records of account and procure third party risks insurance for the common parts of the building. Law enforcement agencies would investigate into any suspected unlawful activities in the course of building management and maintenance works in accordance with the law. The Competition Commission might also launch investigations into anti-competitive conducts such as bid-rigging pursuant to the Competition Ordinance (Cap. 619), and apply to the Competition Tribunal for imposing penalties.
- At the Panel meeting on 27 March 2017, members noted that the 15. Administration proposed to extend the criminal liability (currently applicable to MC members) to DMC Manager/PMC in case of failure to produce annual audited accounts or audited accounts as required by contract. contravention would be an offence and the party concerned would be liable on conviction to a fine at level 5. Furthermore, the Administration proposed to impose a criminal liability on DMC Manager/PMC/MC members for non-compliance with the requirements for proper safekeeping and circulation of minutes of MC/OC meetings as well as safekeeping of tender documents. contravention would be an offence and the party concerned would be liable on conviction to a fine at level 2. There was a view that these provisions were rather narrow in scope and the penalty level too lenient to achieve adequate deterrent effect. However, some members considered that as owners served as MC members on a voluntary basis, adding too many criminal sanctions in BMO might discourage owners from serving on MC.
- 16. At the Panel meeting on 27 November 2017, members noted the Administration's enhanced proposals of raising the level of penalty for

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non-compliance with the requirements for proper safekeeping and circulation of minutes of MC/OC meetings and safekeeping of tender documents to a fine of level 4, and imposing criminal liability on DMC Managers/PMC/MC members for non-compliance with the requirement for keeping all the proxies and relevant declarations.³ Some members, however, took the view that a more stringent penalty (such as imprisonment) should be introduced, particularly for the MC Chairman who contravened relevant requirements of BMO so as to achieve greater deterrence.

- 17. The Administration advised that in addition to ensuring the proportionality of the level of penalty, the enhanced proposals had struck a proper balance between the deterrent effect of the proposed penalty and its impact on owners' motivation to take up OC duties. Moreover, under the Administration's enhanced proposal, the Authority might, at the request of not less than 10% of the owners, and after issuing a warning, dissolve a non-performing MC. Some members suggested that the Administration should set out the definition of a non-performing MC and that the Administration should dissolve non-performing MCs in a timely manner.
- 18. The Administration advised that BMO currently set a high threshold (i.e. only when there was "a danger or risk of danger" to the occupiers or owners of the buildings) for the Administration to initiate the relevant procedures for appointing a building management agent for the purpose of managing a building if its MC was non-performing. The Administration considered it important to ensure the continuous operation of the OC concerned. Therefore, in addition to empowering the Authority to, after issuing a warning, dissolve a non-performing MC, the Administration proposed to empower the Authority to appoint an administrator to (a) chair an OC meeting to re-elect an MC; and (b) look after the operation of the OC concerned before a new MC was elected by the owners under BMO. The Administration would formulate procedures for invoking the above power, and would issue warning(s) requesting an explanation from the MC concerned before dissolving a non-performing MC.
- 19. Some members suggested that the Administration should consider setting up a Building Affairs Tribunal to hear relevant cases so as to avoid incurring large amount of litigation costs to owners. They also considered that the Liaison Officers ("LOs") lacked the authority and power to resolve disputes relating to building management and maintenance. While expressing support

⁴ Under the enhanced proposal, unless there are exceptional grounds, the Authority would only exercise this power in respect of any OC once every 12 months.

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The Administration considered that the requirement for keeping all the proxies was similar in nature to the requirements for safekeeping of minutes of meetings and tender documents. Therefore, the proposed level of penalty for non-compliance with the requirement for keeping all the proxies would also be a fine at level 4.

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for strengthening the manpower of LOs, members suggested that enhanced training should be provided to LOs so that they would provide better support in handling building management disputes.

20. The Administration advised that the Home Affairs Department ("HAD") had been encouraging the parties in dispute to resolve their conflicts through mediation and other dispute resolution arrangements. In addition, training would be provided for LOs to facilitate their effective implementation of building management work. The Administration would continue to examine ways to better support the work of LOs, and would deploy additional resources as appropriate. Furthermore, to facilitate the resolution of some building management disputes, the Administration proposed in March 2017 to launch the Building Management Dispute Resolution Service as a pilot scheme for two years. The service, to be chaired by a retired Judge, would assume a "quasi-adjudication" function in offering neutral, authoritative, written pre-litigation advice to case applicant(s).

Collection and verification of proxy instruments

- 21. Regarding the Administration's proposed amendments **BMO** stipulating that the proxy instrument should be lodged with the MC Secretary at least 72 hours before the OC meeting, some members suggested that this new measure should be complemented with the introduction of sanctions in order to ensure compliance. As regards the proposed requirement that the list of flats with proxy instruments lodged should be displayed in a prominent place of the building at least 24 hours before the meeting and until seven days after the meeting, some members considered that to facilitate verification, the 24 hour-requirement should be further extended. The Administration subsequently enhanced its proposal that the proxy instrument should be lodged with the MC Secretary at least six days (144 hours) before the meeting, and the list of flats with proxy instruments lodged should be displayed at least three days (72 hours) before the meeting and until seven days after the meeting.⁵
- 22. Some members expressed support for the proposed arrangement that the maximum number of proxy instruments a person could hold should not exceed 5% of the owners. It was suggested that a random checking mechanism should be put in place to ensure compliance, and that the name of the person holding 5% of proxy instrument should be disclosed to enhance transparency. Concern was also raised as to how to ensure that the holder of the proxy really voted in accordance with the owner's voting instruction in the proxy instrument, and whether the Administration would prohibit improper practices, such as

⁵ For details of the enhanced proposals on proxy arrangements, please refer to Part (III) of Annex 1 to the Administration's paper (LC Paper No. CB(2)378/17-18(03)).

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involvement of monetary interests in soliciting proxy instruments from owners. There was a suggestion that the Administration should designate its staff to collect and verify proxy instruments for the OC meetings concerned at the request of not less than 5% of the owners.

23. The Administration advised that under section 36 of BMO, furnishing false information under BMO was criminally liable. To make any manipulation of proxy instruments more difficult, the Administration had further proposed a set of new requirements⁶ which sought to enhance the transparency of the use of proxy instruments, facilitate owners to verify proxy instruments, and facilitate investigation into and prosecution against the use of fabricated proxy instruments. In addition, the Administration considered that future proxy instruments should be divided into three parts as follows: "Part 1: Instrument of Proxy for Meetings of Corporation"; "Part 2: Owners' Voting Instructions" and; "Part 3: Proxy's Declaration". The Administration added that in order to ensure that the voting instructions of the owner would be followed, MC and/or PMCs would hand over Part 2 of the proxy instrument, affixed with proper markings (e.g. chop) for verification earlier on to the proxy attending the meeting for voting at the meeting. Furthermore, the bottom of the proxy instrument would also have a warning of criminal liability for making false statement or information.

Termination of DMC managers

24. Members expressed grave concern about the difficulties encountered by owners in terminating the appointment of DMC managers. Some members expressed support for lowering the threshold for terminating the appointment of DMC managers from 50% to 30% of shares in aggregate, as well as limiting the term of appointment of DMC managers to five years. However, concern was

⁶ To make any manipulation of proxies more difficult, the Administration further proposed to implement the following requirements:

(i) owners may include their voting instructions in the proxy instruments;

(ii) the proxy instrument should be countersigned by the proxy, so that the proxy would know the percentage of owners appointing him;

(iii) holders of the proxies should make a declaration that the proxies they hold are honestly procured from the respective owners concerned and are true and accurate representation of the said owners' voting instruction;

(iv) MC Secretary should disclose the name of any person holding proxies of 5% of the owners (and any person, whether attending in person or appointing proxy, holding 5% or more of the aggregate shares) on a list to be displayed pursuant to paragraph 4(5)(a)(ii) of Schedule 3 to BMO; and

(v) OC should keep the record of the proxies and the declaration in item (iii) above for at least three years.

A draft sample of the proxy instrument is at Annex 2 to the Administration's paper (LC Paper No. CB(2)378/17-18(03)).

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raised that lowering the threshold for terminating the appointment of DMC managers to 30% of shares in aggregate might result in a paradox that the decision of appointing the DMC manager previously supported by owners of not less than 50% of the shares in aggregate was overruled by a resolution with 30% of shares in aggregate.

- 25. At the Panel meeting on 17 May 2016, the Administration advised that in order to strike a proper balance between ensuring stability in building management and provision of services and allowing owners to terminate the appointment of non-performing DMC managers when needed, it was proposed to maintain the existing threshold for terminating the appointment of DMC managers. The Administration also proposed an additional arrangement that the term of appointment of DMC managers would be automatically terminated five years after the formation of OC, and by then the OC might enter into a new contract and negotiate new contract terms (such as the tenure of appointment, remuneration, etc.) with the existing DMC manager or engage a new manager/ service provider through open tender.
- 26. Some members, however, considered that the threshold should be lowered to 30% of shares of owners, as they noted that section 3 of BMO only required a resolution of owners of not less than 30% of the shares for the formation of OC. In response to members' enquiry as to whether the shares of common areas would be counted when calculating the threshold of "50% of the owners" in the context of termination of appointment of DMC managers, the Administration advised that it was already stipulated in DMCs of some new buildings that only owners of shares who were liable to pay management fees would be entitled to vote in the resolution on the appointment of MC and the formation of OC.
- 27. Regarding the proposed arrangement that the term of appointment of DMC managers would be automatically terminated five years after the formation of OC, concern was raised that, for those buildings which were unable to form OC, the appointment of the DMC managers might continue indefinitely.

Legislative timetable

28. At the meeting on 27 March 2017, the Administration advised that it would consult the Department of Justice on the legal aspects for implementation of the proposals. The Administration would prepare the draft amendment bill to be introduced into the Legislative Council and consult the relevant stakeholders. The Administration further advised that given the time required to amend BMO, the Administration planned to include those proposals, which

were not in conflict with BMO, in the Code of Practice ("CoP")⁸ as best practices, so as to address public concerns on the arrangements for procurement and proxy instruments by OCs as soon as practicable. The Administration would encourage OCs to adopt those proposals as far as practicable.

Relevant Legislative Council question

29. At the Council meeting of 24 October 2018, Hon CHU Hoi-dick raised a written question on, among other things, support measures provided to owners' organizations to prevent and combat the problem of bid-rigging. Mr CHU's question and the Administration's reply are in **Appendix I**.

Latest developments

- 30. On 17 August 2018, the Administration published the revised CoP on Procurement of Supplies, Goods and Services, and CoP on Building Management and Safety. These revised CoPs came into effect on 1 September 2018 and have been circulated to members vide LC Paper No. CB(2)1943/17-18(01).
- 31. The Administration will brief the Panel on the progress of the review of BMO and related administrative measures at the next meeting on 11 May 2020.

Relevant papers

32. A list of relevant papers on the Legislative Council website is in **Appendix II**.

Council Business Division 2
<u>Legislative Council Secretariat</u>
6 May 2020

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Pursuant to section 44 of BMO, the Authority may issue CoP to give guidance and direction as to the standards and practices of management, among others, to be observed and followed by an OC. While a failure to observe any CoP per se is not liable to criminal proceedings, any such failure may, in any proceedings whether civil or criminal including proceedings for an offence under BMO, be relied upon as tending to establish or to negative any liability which is in question in those proceedings.

Appendix I

Press Releases

LCQ19: Assisting owners' organisations in inviting tenders for consultancy, cleaning and security services

Following is a question by the Hon Chu Hoidick and a written reply by the Secretary for Development, Mr Michael Wong, in the Legislative Council today (October 24):

Question:

In May 2016, the Urban Renewal Authority launched the "Smart Tender" Building Rehabilitation Facilitating Services to strengthen the technical assistance and professional advice provided to property owners in respect of carrying out building repair and maintenance works. "Smart Tender" provides owners' organisations with a DIY tool-kit with guidance on arranging building rehabilitation, arranges independent professionals to provide technical advice and a market estimate on the cost of works, and has put in place an electronic tendering platform to engage contractors, so that owners may make appropriate decisions in arranging building rehabilitation works. In this connection, will the Government inform this Council:

- (1) as the Secretary for Development indicated in October last year that the authorities would consider expanding the functions of the "Smart Tender" electronic tendering platform so that owners' organisations might engage consultants through the platform, of the progress of such work; and
- (2) as the media have uncovered in recent years that bid-rigging was suspected to have been involved in the tender exercises for cleaning services of certain housing estates, whether the authorities will consider providing owners' organisations with services similar to those of "Smart Tender" in respect of cleaning and security services; if so, of the details (including the government department/public organisation responsible and the implementation timetable); if not, the reasons for that?

Reply:

President,

In consultation with the Urban Renewal Authority (URA) and the Home Affairs Bureau (HAB) which is responsible for building management policy, the Development Bureau provides a consolidated reply as follows:

- (1) To assist owners to engage consultants for their building repair and maintenance works through the electronic tendering (e-tendering) platform under "Smart Tender", the URA is arranging interested and qualified consultancy firms to register under the e-tendering platform and plans to implement the initiative from early 2019 onwards.
- (2) Bid-rigging involves complicated issues. Currently, various government departments and organisations have been adopting a multi-pronged approach to provide support to owners, with a view to preventing and combating the problem of bid-rigging.

Separately, the Government has been providing a legal framework through the Building Management Ordinance (Cap. 344) (BMO) to assist owners in discharging their responsibilities on building management effectively. To ensure that the BMO keeps pace with societal changes, the Home Affairs Department (HAD) under the HAB has reviewed the BMO and will introduce amendments on various aspects, including procurement of largescale maintenance projects. Although the proposed amendments to the BMO cannot solve the problem of bid-rigging and the associated crimes at source, the relevant amendments seek to enhance owners' participation and transparency and accountability in building management, with a view to raising owners' awareness and better protecting their interests.

Meanwhile, the HAD has also enhanced support to owners' corporations and owners in discharging their responsibilities on building management. For example, the HAD has launched the Central Platform on Building Management in September 2018, under which one-stop briefings on building management and maintenance are organised

regularly. At each briefing, representatives from relevant government departments and organisations will provide information and introduce their services and schemes on building management and maintenance. The Government has been providing assistance through various means to owners in properly managing their buildings. The Government will keep under review the existing services for building owners and introduce new support services as appropriate.

Ends/Wednesday, October 24, 2018 Issued at HKT 14:30

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Relevant papers on Review of the Building Management Ordinance

Committee	Date of meeting	Paper
Panel on Home Affairs ("HA Panel")	28.5.2013 (Item V)	Agenda Minutes Administration's follow-up paper on the specific provisions of the Building Management Ordinance (Cap. 344) which prevail over the terms of deeds of mutual covenant in the event of inconsistency between the two (LC Paper No. CB(2)1459/12-13(01))
	17.11.2014 (Item IV)	Agenda Minutes
	24.1.2015 (Item I)	Agenda Minutes
Legislative Council	10.6.2015	Motion on "Stepping up regulation on the repair and maintenance works of private buildings" Progress report on the motion
	2.12.2015	Motion on "Combating acts of bid-rigging in repair works of private residential buildings" Progress report on the motion
HA Panel	17.5.2016 (Item III)	Agenda Minutes
	27.3.2017 (Item IV)	Agenda Minutes

Legislative Council	7.6.2017	Motion on "Combating bid-rigging to defend the rights and interests of property owners" Progress report on the motion
HA Panel	4.5.2017	<u>Agenda</u>
	(Item I)	Minutes
Legislative Council	24.10.2018	Official Record of Proceedings (Pages 181-182)
HA Panel	27.11.2017	<u>Agenda</u>
	(Item III)	<u>Minutes</u>
		Revised Codes of Practice under the Building Management Ordinance (LC Paper No. CB(2)1943/17-18(01)) (issued on 17 August 2018)

Council Business Division 2 <u>Legislative Council Secretariat</u> 6 May 2020