

The Hong Kong Construction Association Ltd

Bills Committee on Noise Control (Amendment) Bill 2001

Background

1. The Noise Control (Amendment) Bill 2001 was introduced into the Legislative Council in June 2001. The Bill seeks to amend certain provisions in the Noise Control Ordinance (Cap.400) to provide, inter alia, that where an offence under the Noise Control Ordinance has been committed by a body corporate, certain directors and officers of the body corporate shall be guilty of the like offence where the body corporate commits a further offence at the same site.

Noise Pollution is Different

2. Noise pollution is different in nature from all other types of environmental pollution. Noise pollution is committed on two determination factors, namely time and place. For the same noise generated from the same source, it would be a pollutant during the quiet night hours but not so during the noisy day hours. Similarly, for the same noise generated from the same source, it would be a pollutant in a quiet locality but not so in a noisy street.

No Absolute Control

3. In construction sites, many workers from the main contractor and the subcontractors of all tiers are involved in the works. No matter how much effort the management of a company devotes itself in developing and enforcing management controls on work sites, there is always the possibility that a worker or a subcontractor's worker bypasses the system and violates the NCO. The director, manager, or secretary of the management has no absolute control to stop that from happening.

The Offender is Not Prosecuted

4. If the NCO were amended to hold directors, managers and secretaries of body

corporate personal liable, it would be unfair to them since they do not have absolute control over the violations.

5. On the contrary, the true offender, who may be an individual worker at a construction site, is not punished for his wrongdoing.
6. Furthermore, it must be said that a dissenting worker may deliberately violate the NCO, as it would result in the company's directors, managers and secretaries committing a personal criminal offence. This could open a gate for abuses, causing injustice in the society.

CIRC Report

7. It was recommended in the CIRC (Construction Industry Review Committee) Report that Government should provide a conducive regulatory environment to enable the industry to thrive and as far as possible, construction legislation should be kept to a minimum that is necessary for the protection of the environment or other public interest. It was also suggested that Government should rely on market forces to drive the necessary changes in the practices and processes in local construction.

The Report also recommended that where regulations are necessary, they should clearly and fairly set out the responsibilities of the concerned parties and the following example is quoted from the Report:

“Taking site safety as an example, we note that under the existing regulatory framework, the main contractor is held liable for safety offences committed on his site. Given the prevalence of subcontracting in local construction, this approach means that where the offence is actually committed by a subcontractor, the sanction fails to target the party that is at fault. This should be rectified in order to bring the full force of the regulation to bear on those who abuse the system.”

Changing for the Wrong

8. It was argued that other environmental protection legislations (e.g. Air Pollution Ordinance, Water Pollution Control Ordinance and Environmental Impact Assessment Ordinance) contain provisions for imposing personal liability on the

top management of a body corporate, but not the NCO. This has been due to the fact that the legislators all along recognized the characteristics of noise pollution mentioned in paragraphs 2 and 3 above and therefore have never arbitrarily placed the management liable. The proposed NCO amendment ignored the fundamental characteristics of noise pollution.

9. Even then, under the Air Pollution Control Ordinance and other similar legislation, the director, manager or secretary is only liable if “it is proved that the offence was committed with the consent or connivance of, or was attributable to any neglect or omission on the part of, a director, manager, secretary...”

Too Many Legislation

10. Currently, there are several environment protection legislations in force governing noise, namely the Noise Control Ordinance (Cap 400) enacted in 1988, the Noise Control (Construction Work) Regulations enacted in 1996 and the Environment Impact Assessment Ordinance enacted in 1998. We do not need more legislations which will put more onus on the construction companies in this difficult business environment without serving the intended purpose.

Question of Civil Liberty

11. It is noted that the current NCO permits prosecution of any individual who causes or permits violation of the Ordinance. So if it has been proved that a director, manager or secretary of a company has caused or permitted violation of the Ordinance, the current NCO permits prosecution of the individual officer.
12. It follows that there are already adequate provisions in the NCO to deal with the circumstances where a director, manager, or secretary of a construction company has been identified to be the person responsible for the commission of an offence. It would appear, therefore, that the proposed amendment to the NCO is intended for prosecution of the directors, managers and secretaries where they did not cause or permit the offence; at least it cannot be proved that they did.
13. The proposed amendment does not define how the individual or individuals to be

prosecuted will be selected from amongst the directors, managers and secretaries of the company. Any process of selection may involve an arbitrary dispensing of justice by someone other than a judicial officer. There are potentially serious ramifications for civil liberties of the individuals concerned.

No Personal Criminal Liability placed on Public Officers

14. We suggest that great care should be exercised when the question of personal criminal liability of body corporate is to be considered. It should be noted, for example, that whilst the Chief Secretary is the head of the Civil Service, he is not expected to shoulder personal criminal liability of the wrongdoings of his subordinate civil servants. Furthermore, it will be absolutely ridiculous if the Chief Secretary is required to shoulder the wrongdoings of the workers of a subcontractor that is conducting Government work.
15. It is noted that Section 38 of the NCO exempts public officers from any proceeding being taken against him and any criminal liability being imposed on him. This means that the Director for Highways, for example, does not have personal criminal liability on the offences committed by his workers. How can it be shown that fair and just are being practiced when a director of a private company is called to shoulder personal criminal liability for what a worker of a subcontractor does and public officers are exempted from such personal criminal liability?

Construction An Important Production Industry

16. With the manufacturing industry moved to South China, the construction industry has become Hong Kong's most important industry that produces physical goods. The construction industry uses local labour and local management. It employs a large number of people and has an annual production of hundreds of billions of dollars.
17. It is suggested that the Government should spend effort to assist the construction industry in the same way as it has assisted the manufacturing industry in the past. Legislation with the objective of pure punishment is not considered to be a

productive approach to assist this very important industry and its participants.

18. Education and training, awareness enhancement and pride promotion are some of the positive approaches to the problem. We would like to suggest that the Government and the industry should strive to act positively to face the challenge. The proposed amendment to the NCO will not only fail to achieve the intended effect, but also generate bad sentiment in the industry at large.

Flaws in the Proposed NCO Amendment Bill

19. (a) Time for Improvement Action

Under the proposed NCO Amendment Bill, there is provision for the issue of a written warning to the offender but no time is allowed for improvement action. The body corporate should be allowed for a two week or one month rectification period such that the top management can really look into the problem and have it rectified.

- (b) Warning Be of Limited Validity

Under the proposed NCO Amendment Bill, the director, manager or secretary in charge will be prosecuted without further warning if the body corporate is prosecuted again for the same offence at the same premises or site after issue of the written warning. There is no time limit for the validity of the warning notice issued. It is threatening that a written warning could last forever and this is particularly worrying in cases where construction projects are of large scale nature and with long durations.

HKCA's Position

20. a) HKCA objects to the proposed amendment to the NCO as currently drafted.
- b) HKCA believes that there is no need to legislate the proposed amendment bill in the form currently intended. The noise control problem could be dealt with by implementation of site procedure, similar to the “green card system” in site safety improvement, which has proved very effective and

has resulted in much improved site safety record.

- c) HKCA believes that the right approach would be to help the construction companies to establish good noise control practices by education, training, awareness enhancement and pride promotion.