

BILLS COMMITTEE

NOISE CONTROL (AMENDMENT) BILL 2001

Purpose

Annexed to this paper is a table setting out the Administration's detailed response to the submissions made by the following organizations on the Noise Control (Amendment) Bill 2001:

The Chinese Manufacturers' Association of Hong Kong
Hong Kong Cable Television Limited
Hong Kong Construction Association Limited
Mass Transit Corporation Limited
Hong Kong Electric Company Limited

Environment and Food Bureau

March 2002

(EFB 9/55/02/28)

**Administration's Response to Submissions on
Noise Control (Amendment) Bill 2001**

Submissions	Administration's Response
<p>A. The Chinese Manufacturers' Association of Hong Kong:</p> <p>1. The proposed amendment personalize offences made by body corporate which run contrary to the spirit of collective responsibility. If the body corporate commits offences, it should be the body corporate which should be penalized and make amends.</p> <p>2. Unless there are sufficient evidence to prove that the directors or staff of a body corporate deliberately violate the law, otherwise it is unreasonable to prosecute the directors and staff for offences committed by their body corporate.</p>	<p>A body corporate is already held liable for its offences under the Noise Control Ordinance (NCO). But repeat noise offences persistently committed by bodies corporate indicate that there is insufficient collective responsibility among the corporate management of some of these bodies corporate due to a lack of personal responsibility. The proposed amendment aims to reinforce the spirit of collective responsibility by placing the onus of compliance with NCO on the corporate management.</p> <p>The proposed amendment clearly defines the environmental responsibility of the corporate management who has the ability and responsibility to improve the management, operation and supervision of the body corporate in order to prevent noise offences from being committed by the body corporate. A warning provision has been added so that the corporate management concerned of the body corporate will be given a written warning after the body corporate has committed a noise offence at a particular site. The corporate management concerned would be prosecuted only if the body corporate has committed further noise offences at the same site after the warning. A statutory due diligence defence is also made available to the corporate management concerned who can show that a proper system has been established and has been in effective operation to prevent the offences.</p>
<p>B. Hong Kong Cable Television Limited:</p> <p>1. There is no consistent upward trend in construction noise complaints. Number of complaints has fallen twice in past five years.</p>	<p>The number of noise complaints and convictions have remained at a very high level over the past few years. Violations of the NCO by bodies corporate are considerably more serious than</p>

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<p>2. Government should not introduce Amendment Bill simply because a few construction companies are repeated offenders. Government can improve the construction noise problem by stepping up enforcement action.</p> <p>3. But if the Bill proceeds, Government should state clearly that if a body corporate engages a contractor to carry out construction work, then the body corporate should not be liable for the offences committed by the contractor or subcontractor.</p> <p>4. Alternatively Government should assure that the Bill is not intended to cover utility companies if the offence is committed by their contractors or sub-contractors.</p>	<p>individual proprietors. In the three years between 1999 and 2001, over 85% of conviction cases related to construction and commercial/industrial activities involved bodies corporate. During the same period, 51 companies were convicted 5 times or more. 18 of these companies have more than 10 convictions. They included one company which has been convicted 31 times and two companies over 22 times for construction noise offences.</p> <p>Under the existing provisions of the NCO, the penalty for offences is a fine. The significantly higher number of conviction cases involving bodies corporate indicate that the fine provision lacks sufficient deterrent effect against bodies corporate as some of them may just treat the fines imposed on the body corporate as part of the project cost. Much more serious problem of repeated offences committed by bodies corporate also indicate that individual proprietors give more serious regard to compliance with the NCO since they are personally liable while some corporate management continue to give little regard to compliance with the NCO due to a lack of personal liability for the actions of their companies.</p> <p>The proposed amendment does not change the existing legislative control. Under the existing NCO provisions, EPD may institute proceedings against any person who commits an offence. The proposed amendment only seek to specify the responsibility of the corporate management of those bodies corporate which are already liable for prosecution under the existing NCO provisions.</p> <p>Utility companies, like other bodies corporate, have the same environmental responsibility to take all reasonable steps in order to prevent a violation of the NCO. We do not see any justifications for them to be treated differently.</p>

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<p>5. A validity period for the written warning to be given to the top management of a body corporate under the Bill should help to prevent inadvertent violation of the NCO and will not weaken the deterrent effect of the Bill</p>	<p>To address the trades' concern, we have already modified the original legislative proposal put forward in 2000 by adding a warning provision and holding corporate management concerned liable only when the body corporate commits further offence at the same site. Imposing a time limit on the warning system will weaken the deterrent effect significantly and run counter to the principle that the corporate management of a body corporate should comply with the NCO at all times.</p>
<p>C. Hong Kong Construction Association:</p> <p>1. The corporate management of a body corporate has no absolute control to stop workers from the main contractor or subcontractors bypassing the system and violating the NCO. It would be unfair to hold the corporate management personally liable.</p> <p>2. The Construction Industry Review Committee (CIRC) recommended that Government should provide a conducive regulatory environment to enable the industry to thrive and construction legislation should be kept to a minimum that is necessary for the</p>	<p>The proposed amendment does not change the existing legislative control. Under the existing NCO provisions, EPD may institute proceedings against any person who commits an offence. The proposed amendment only seeks to specify the responsibility of the corporate management of those bodies corporate which are already liable for prosecution under the existing NCO provisions. The proposed amendment includes a warning provision so that the corporate management concerned of the body corporate will be given a written warning after the body corporate has committed a noise offence at a particular site. The corporate management concerned would be prosecuted only if the body corporate has committed further noise offences at the same site after the warning. A statutory due diligence defense is also made available to the corporate management concerned who can show that a proper system has been established and has been in effective operation to prevent the offences.</p> <p>It remains the Administration's firm intention to provide a conducive regulatory environment. The proposed amendment is necessary for the protection of the environment and public interest.</p>

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<p>protection of the environment and other public interest.</p>	
<p>3. CIRC also recommended that where regulations are necessary, they should clearly and fairly set out the responsibilities of the concerned parties.</p>	<p>The proposed amendment clearly specify the parties within the corporate management responsible for noise offences committed by the body corporate. Under the proposed amendment, EPD will also issue Codes of Practice, in consultation with the relevant trades, to provide practical guidelines on good management practices to prevent a violation of the NCO.</p>
<p>4. The characteristics of noise pollution is different from other types of environmental pollution. Noise pollution takes place only depending on the time and place that it happens. As such, the management should not be held personally liable just as they do in other environmental legislation.</p>	<p>The NCO is drawn up to protect the environment just like other environmental legislation. Most of the construction noise offences involve the use of powered mechanical equipment such as cranes, excavation machine, etc which may reach 80 dB(A) at nearby residential blocks, thus depriving many residents of a quiet environment at evening hours or on holidays. It should be noted that the number of noise complaints lodged by the public amounted to more than 40% of the total number of pollution complaints.</p>
<p>5. There are adequate provisions in the NCO to deal with the circumstances where individual director or officer of a construction company has been identified to be the person responsible for an offence. The proposed amendment is intended to prosecute the directors or officers where they did not cause or permit the offence, or at least it cannot be proved that they did.</p>	<p>Without an explicit provision holding the corporate management liable for noise offences committed by the body corporate, it is extremely difficult if not impossible to prosecute these corporate managements who have the ability and responsibility to improve the management, operation and supervision of the bodies corporate in order to prevent noise offences from being committed. As a result, the corporate management of some of these bodies corporate continue to give little regard to compliance with the NCO due to a lack of personal liability for the actions of their companies. The proposed amendment aims to encourage the corporate management to adopt on a proactive basis good management practices to prevent a violation of the NCO by the body corporate.</p>
<p>6. The proposed amendment does not define how the individual will be selected from among the directors and</p>	<p>The directors and officers concerned who are to be held liable for a noise offence committed by the body corporate are clearly set out in the</p>

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<p>officers of the company. Any process of selection may involve arbitrary dispensing of justice by someone other than a judicial officer, with potentially serious ramifications for the individual's civil liberties.</p>	<p>proposed section 28A(1) in the Amendment Bill. EPD will issue a written warning to each of the directors and officers named in the above section, before they are prosecuted for any subsequent offences committed by the body corporate at the same site in question. A statutory due diligence defense is also made available to the corporate management concerned who can show that a proper system has been established and has been in effective operation to prevent the offences.</p>
<p>7. Not fair if the director of a private company holds personal criminal liability for a worker of a subcontractor but public officers are exempted from such personal criminal liability.</p>	<p>There are well established and effective mechanism in dealing with contraventions of NCO made by public officers in the course of carrying out his official duties. If it appears that such contraventions made by any public officer is not terminated to the satisfaction of the Noise Authority, the latter shall report the matter to the Chief Secretary who shall ensure that the best practicable steps are taken to terminate the contravention or avoid the recurrence.</p>
<p>8. There is no need to legislate the proposed amendment 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.</p>	<p>Please see response to B2 and B3 above. The proposed amendment aims to ensure that good management practices to prevent noise violations will be implemented.</p>
<p>9. Body corporate should be allowed for a two week or one month rectification period after the issue of a written warning.</p>	<p>Given the serious effect of noise offences on the community as set out in the response to C4 above, rectifications should be made without any delay.</p>
<p>10. There is no time limit for the validity of the warning notice issued. This is particularly worrying in cases where construction projects are of large scale nature and with long durations.</p>	<p>Please see response to B5.</p>
<p>11. The right approach would be to help the construction companies to establish good noise control practices by education, training, awareness enhancement and pride promotion.</p>	<p>EPD has been adopting a partnership approach with the trades concerned in order to assist them to better comply with NCO and other environmental legislations. Over the past three years, over 110 seminars for 12,000 participants</p>

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<p>D. Mass Transit Railway Corporation:</p> <ol style="list-style-type: none"> 1. The proposed amendment caters primarily to large companies and it is difficult to see how an individual would be able to prove this if that individual is no longer in the employ of the company at the time of the trial. 2. No definition has been provided as to what constitutes reasonable precaution or due diligence. The Bill should provide clear definition possibly by giving reference to "Best Available Technology Not Entailing Excessive Cost" or reliance on a professional body, for example the Hong Kong Institute of Acoustics, to provide definitions for what constitutes reasonable precaution and due diligence. 3. Clarification that the defense is an additional defense rather than an only defense for director's and officer's liability under the NCO. 	<p>from various trades, including the construction trade, to promote good practices have been organized. The proposed amendment will complement this effort by enhancing the deterrent effect and ensure a level playing field for law abiding members of the trades.</p> <p>Under the proposed amendment, an individual will not be held liable if he doesn't fall within the description of the proposed section 28A(1) at the time when the subsequent offence is committed by the body corporate after a written warning has been issued. If an individual who is held liable for the noise offence committed by the body corporate but is no longer in the employ of the company concerned, it would be up to him to decide how best he would want to defend his case.</p> <p>The proposed section 28A(3) and (4) clearly sets out how the due diligence defense could be brought. It would be up to the Court to decide on whether to accept a defense put up by the defendants having regard to the facts of the case.</p> <p>The due diligence defense as set out in the proposed section 28A(3) and (4) is the only explicit defense provided for directors and officers charged under section 28A(1).</p>
<p>E. Hong Kong Electric Co. Ltd:</p> <ol style="list-style-type: none"> 1. A warning notice should be served only if the specified body corporate has been convicted of an offence. 	<p>Under the proposed amendment, the directors and officers concerned will not be held liable until proceedings have been instituted against the body corporate for a noise offence in relation to a specific site and EPD has served on the directors</p>

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<p>2. A reasonable validity period should be applied for a warning notice.</p> <p>3. Cannot see why there is no explicit due diligence defence for the carrying out of construction work without a construction noise permit.</p>	<p>and officers concerned alerting them of the problem and reminding them of their responsibilities. The directors and officers concerned will be prosecuted for offences committed by the body corporate at the same site in question, after the warning has been issued and only in respect of the subsequent offences. Waiting until after the body corporate is convicted of the first offence will mean a lapse of months if not years before the directors and officers concerned could be held liable for subsequent offences committed by the body corporate. This would significantly weaken the deterrent effect of the proposed amendment and defeat the intention to encourage the corporate management to take immediate steps to prevent further offences from being committed by the body corporate at the same site.</p> <p>Please see response to B5</p> <p>There is no explicit statutory defense provision for the carrying out of construction work without a construction noise permit because the permit system for carrying out construction works during restricted hours has been in operation for more than 10 years. There should not be any excuse for the management of a body corporate to ignore this basic requirement.</p>