

**Bills Committee on
Noise Control (Amendment) Bill 2001**

**Summary of views/concerns put forward by deputations
on the Noise Control (Amendment) Bill 2001
(as at 24 April 2002)**

| Name of deputations | Views/Concerns |
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| The Hong Kong Construction Association Limited | <p><u>Special nature of noise pollution</u></p> <ul style="list-style-type: none"> - Noise pollution is different in nature from all other types of environmental pollution. Noise pollution takes place only depending on the time and place that it happens. The management should not be held personally criminally liable as they are under other environmental legislation. <p><u>Characteristics of construction trade</u></p> <ul style="list-style-type: none"> - As the majority of construction companies undertaking large-scale works are bodies corporate, they will inevitably stand a higher chance of committing offences and being prosecuted than partnerships or sole proprietors. - The contractors may find the equipment designated by the project proponent unsuitable only after they have tendered for the construction works. Given the tight time frame for completing the works, the construction company cannot afford to apply for a new construction noise permit and hence, may carry out works in breach of the Noise Control Ordinance (NCO). - Given the unemployment rate of 12% in the construction trade, the maximum fine at \$200,000 is already a very heavy punishment. Nevertheless, when compared with the imposition of personal criminal liability, the construction trade may prefer a higher level of maximum fine instead. <p><u>Control by management</u></p> <ul style="list-style-type: none"> - Under the current subcontracting system, it is possible that a worker or a subcontractor's worker |

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| | <p>may circumvent the system and violate the NCO despite efforts made by the corporate management. It will be unfair to prosecute the corporate management if a dissenting worker maliciously/deliberately violates the NCO.</p> <p><u>Regulatory environment</u></p> <ul style="list-style-type: none"> - While the Construction Industry Review Committee (CIRC) recommends that the Government should provide a conducive regulatory environment and keep construction legislation to the minimum, the Environmental Protection Department (EPD) fails to give effect to the CIRC's recommendations. - As there are already a number of environmental protection ordinances/regulations and adequate provisions in the NCO to govern noise pollution, it is not necessary to introduce more legislation, which will only put more onus on the construction trade. - The EPD has not provided the construction trade with clear guidance as to how to comply with certain statutory requirements. <p><u>Personal criminal liability of public officers</u></p> <ul style="list-style-type: none"> - It is unfair that public officers are exempted from personal criminal liability while their counterparts in the private sector are subject to such liability. - When public officers are the public regulators protecting the interests of the public, it is understandable that they can be exempted from personal criminal liability under section 38(2) of NCO. However, when government departments are providing services, they should be subject to the laws of Hong Kong. - While government departments operating as Trading Funds can compete with the private sector, it is anomalous that they can enjoy the privilege of being exempted from criminal liability. This appears to be inconsistent with Article 25 of the Basic Law which states that "All Hong Kong residents shall be |

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| | <p>equal before the law".</p> <ul style="list-style-type: none"> - The proposed section 28A further aggravates the anomaly because if a Trading Fund contravenes NCO, managers of the Trading Fund will also be exempted from personal criminal liability. <p><u>Arbitrary dispensing of justice</u></p> <ul style="list-style-type: none"> - The proposed amendment does not define how the individual will be selected from the directors and officers of the company. Any process of selection may involve arbitrary dispensing of justice by someone other than a judicial officer. <p><u>Written warning system</u></p> <ul style="list-style-type: none"> - The construction trade will be under a continuous threat throughout the duration of the construction period if the written warning can be valid for an indefinite period of time. A validity period of 6 months to 12 months should be provided. - The body corporate should be given a two-week or one-month rectification period after the issue of written warning, so that the top management can look into the problem and rectify the breach. <p><u>Tackling construction noise nuisances</u></p> <ul style="list-style-type: none"> - Other feasible ways include: <ul style="list-style-type: none"> • Education and training, pride promotion, implementation of site procedures similar to the "green card system" in site safety improvement; • Given the prevalence of the subcontracting system, enhancing the environmental awareness of all tiers, providing a reasonable time frame to contractors for completing the works and enhancing environmental protection techniques. |
| MTR Corporation Limited | <ul style="list-style-type: none"> - The proposed amendment caters primarily to large companies and it is difficult for an individual to prove the defence if he is no longer employed by that company at the time of trial/hearing. |

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| | <ul style="list-style-type: none"> - No definition has been provided as to what constitutes reasonable precaution or due diligence. A clear definition should be provided by making reference to the "Best Available Technology Not Entailing Excessive Cost" or relying on a professional body, for example, the Hong Kong Institute of Acoustics, to provide definitions. - Increasing the maximum fine levels to \$500,000 or \$1,000,000 may enhance the deterrent effect for noise offences. - A reward system for environmental compliance will be more effective than draconian legislation. |
| The Chinese Manufacturers' Association of Hong Kong | <ul style="list-style-type: none"> - The proposed amendment personalizes offences committed by a body corporate which runs contrary to the spirit of collective responsibility. - Unless there is sufficient evidence to prove that a director of a body corporate deliberately violates the NCO, it is unreasonable to prosecute the director for offences committed by the body corporate. |
| Hong Kong Cable Television Limited | <ul style="list-style-type: none"> - The Bill is not justified as there is no consistent upward trend in construction noise complaints and the number of these complaints has actually fallen twice in the past 5 years in both 1997 and 2000. - The Administration should not introduce the Bill simply because a few construction companies are repeated offenders. It can improve the construction noise problem by stepping up its enforcement action under the existing legislation. - The Administration should make it clear that if a body corporate engages a contractor to carry out construction work, the body corporate should not be liable for the offences committed by the contractor or subcontractor. It should also assure to the utility companies that the Bill is not intended to cover them if the offence is committed by their contractors or subcontractors. - While it agrees that the directors should ensure |

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| | <p>compliance with the NCO at all time, a validity period should be provided to prevent inadvertent violation of the NCO.</p> |
| <p>The Hongkong Electric Company Limited</p> | <ul style="list-style-type: none"> - A written warning should only be served to the corporate management if the specified body corporate has been convicted of an offence under the NCO. - A reasonable validity period should be provided for the warning system because it is unreasonable to keep the management personally liable for an indefinite period of time. - It cannot see why there is no explicit due diligence defence for an offence related to the carrying out of construction work without a construction noise permit. Whether the management concerned has exercised due diligence should be judged case by case by the court irrespective of the kind of offence. |
| <p>Federation of Hong Kong Industries</p> | <ul style="list-style-type: none"> - It is wrong in principle to confuse the criminal responsibility of a body corporate with that of its directors. - It will set a very dangerous precedent if the conviction of a body corporate is automatically extended to its senior management and is also in contravention of the common law spirit that a person is presumed innocent unless proved otherwise. - Instead of imposing personal criminal liability on directors, increasing the fine levels on a progressive scale for repeated offences may be a better option. - Hasty extension of personal criminal liability to directors will cause unnecessary psychological unease among business investors. |
| <p>Hong Kong Environmental Law Association (HKELA)</p> | <p><u>Personal criminal liability of directors</u></p> <ul style="list-style-type: none"> - It is wrong in principle that a written warning may be served to a director of the body corporate even if the latter is not convicted of the offence. - Any person who is a director at the time of the |

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| | <p>offence is guilty only if he has been served with a written warning. No evidence of a "guilty mind" or culpability is required. This power is too excessive.</p> <ul style="list-style-type: none"> - If personal criminal liability under the NCO is to be brought into force, it should not be different in principle from the existing legislation in relation to air and water pollution. - It is difficult to identify the appropriate person to be prosecuted. This can be especially difficult if a defendant argues that he is not the person responsible. <p><u>Defence</u></p> <ul style="list-style-type: none"> - The defence, which will be open to judicial interpretation, is quite narrow as the director has to prove to the Court that he has taken reasonable precautions and exercised due diligence. - <i>However, in practice, not every director has the responsibility for establishing a proper system or has the control over the operation of the system at every site or specified place or even has any knowledge of the measures required.</i> <p><u>Lack of checks and balances</u></p> <ul style="list-style-type: none"> - The content of the codes of practice is entirely within the discretion of the Noise Control Authority. While the codes of practice provide standards by which every director will be judged when deciding whether he has taken precautions and exercised due diligence, there is no limit on the standards. <p><u>Human rights implications</u></p> <ul style="list-style-type: none"> - Unlike the Water Pollution Ordinance and the Air Pollution Ordinance, the prosecution will no longer need to show the "consent, connivance, negligence or omission" on the part of a director. - <i>The defence is not available for directors of companies to offences under sections 6(1)(a), 6(2)(a) or 6(3)(a) of NCO regarding noise from</i> |

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| | <p><i>construction sites. Under the proposed amendments, a director or other officer is guilty of a criminal offence merely by virtue of his office as a director in the company and the receipt of a written warning.</i></p> <ul style="list-style-type: none"> - <i>Individuals can be potentially liable to personal conviction and to receive a criminal record for the offences of their companies without their knowledge or guilt and this may be capable of having human rights implications.</i> <p><u>Other recommendations</u></p> <ul style="list-style-type: none"> - Noises are generated from all quarters and therefore an integrated approach in tackling environmental nuisances will be more effective. - A regulatory impact assessment should be conducted as a matter of priority to assess the cumulative impact of the environmental legislation on the construction trade. - There is procedural uncertainty for whether the individual or the body corporate should be prosecuted at the same time or consecutively. If the NCO is to be amended, such uncertainty should be clarified. <p><u>Stance of HKELA</u></p> <ul style="list-style-type: none"> - <i>Mr Bryan BACHNER, Chairman of the HKELA wrote to the South China Morning Post on 27 February 2000 briefly set out his understanding of the effect of the proposed amendments at the time.</i> - <i>However, having considered the potential legal effect of the proposed amendments in detail, Mr BACHNER shares the concerns raised by the HKELA in its previous paper submitted to the Bills Committee (LC Paper No. CB(1)1359/01-02(01)).</i> |
| Masons International Law Firm | <ul style="list-style-type: none"> - The written warning should be issued within a certain period of the institution of proceedings against a body corporate. The Noise Control Authority should not prosecute the directors and |

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| | <p>officers concerned if the subsequent offence is committed by the body corporate a year or more later.</p> <ul style="list-style-type: none"> - There is no standard on the level of proof which the Noise Control Authority considers sufficient for proof of delegation or immediate authority of a director. - While the construction noise permit is held by a main contractor, there may be circumstances that a sub-contractor repeatedly breaches the NCO. The main contractor is prosecuted even though there is no evidence to prove that he knows or causes the breaches. - The Noise Control Authority should take into account the practicality of the prescribed work methods and equipment against the background of a contractor's obligations when considering whether to grant a construction noise permit. - The defence appears quite narrow as compared with the defences relating to directors' liability under other environmental legislation. It is considered that "works carried out in an emergency" should amount to a defence. |
| Hong Kong Institute of Acoustics | <ul style="list-style-type: none"> - It supports initiatives which aim to provide a better noise environment for the community. - Better and more effective enforcement of the provisions of NCO would be a step forward in maintaining tranquillity. - There are new construction methods and equipment which can reduce the construction noise levels. |
| Tai Po Environmental Association | <ul style="list-style-type: none"> - It supports the Bill but considers that a reasonable grace period should be provided to allow for remedial works. |