

BILLS COMMITTEE

NOISE CONTROL (AMENDMENT) BILL 2001

INTRODUCTION

At the third meeting of the Bills Committee held on 22 April 2002, Members requested the Administration to -

- (a) consider imposing a validity period on the warning system;
 - (b) consider the suggestions of some Members for handling contraventions of the Noise Control Ordinance (NCO) by public officers;
 - (c) comment on the written advice given by the Legal Advisor of the Legislative Council;
 - (d) respond to the further submission from the Hong Kong Environmental Law Association; and
 - (e) provide a copy of the draft code of practice agreed with the Hong Kong Construction Association.
2. This paper provides the Administration's response to the above.

Imposing a validity period on the warning system

3. Bodies corporate including the directors and officers concerned should comply with the NCO at all times. Strictly from the point of view of protecting the public at large from excessive noise, imposing a validity period on the warning system would be inappropriate. However, we note the concerns of the construction trade in particular over complex works projects that might span over a longer period than other average contracts. If Members consider that a balance should be struck between the interests of the trade and the community at

large, we are prepared to consider imposing a validity period of a reasonable length on the warning system.

4. We could consider imposing a validity period of two years on the warning system. This could be done by adding “but before the 2nd anniversary of that date” after “...served on the specified person” in the proposed section 28B(1)(c)(ii) of the NCO Amendment Bill. With this change, the director or officer concerned who has been served a warning notice by the Noise Control Authority under section 28B(1)(b) will only be liable for any further offence committed by the body corporate at the same construction site if that offence is committed within two years from the date on which the director or officer was served the warning notice. A draft CSA is at Annex A.

5. In suggesting the two-year validity period, we have made reference to the following -

- (a) According to information compiled by the relevant departments, over the past few years, the average construction period of private building projects was 25 months and that of public civil engineering works projects was 29 months. Setting the validity period at 24 months will deter repeated offence in projects of average duration and provide the contractors concerned a chance to be “rehabilitated” in projects with a longer construction period.
- (b) For some of the existing legislations which contain “rehabilitation” provisions, the validity period is generally set at two years or longer. For instance, under section 8 of the Road Traffic (Driving-Offence Points) Ordinance, Cap 375, a driver shall be liable to be disqualified from driving if he committed driving offences where 15 or more points have been incurred within a period of two years of each other. Under section 2(1) of the Rehabilitation of Offenders Ordinance, Cap 297, an individual who has been convicted of a first offence in respect of which he was not sentenced to imprisonment exceeding 3 months or to a fine exceeding \$10,000 can be rehabilitated if he has not been convicted again of an offence within 3 years. The conviction record cannot be used against the individual connected with office, profession, occupation or employment.

For the warning system in the NCO Amendment Bill, we consider a validity period of two years to be reasonable.

Handling contraventions of the NCO by public officers

6. Sections 38(3) to (6) of the NCO set out the mechanism for handling contraventions by public officers. If the contravention is not terminated to the satisfaction of the Noise Control Authority, he would report the matter to the Chief Secretary for Administration (CS), who has a statutory responsibility to enquire into the circumstances and, if his enquiry shows that a contravention is continuing or likely to recur, CS shall ensure that the best practicable steps are taken to terminate the contravention or avoid the recurrence. While one of the best practicable steps that the CS could consider may involve disciplinary action against the officer concerned, it would be inappropriate to bind him to that particular course of action which may not be the best practicable steps to deal with the situation. The current system has proven to be effective and there has not been any case where Government departments were found to be in breach of the NCO.

Comments on LegCo Legal Advisor's views

7. On the question of whether developers and principal contractors would be liable to prosecution for construction noise offences under sections 6 and 7 of the NCO, we agree with the view set out by the Legislative Council Senior Assistant Legal Adviser in his paper dated 14 May 2002 that "ultimately, whether a person has carried out, or caused or permitted to be carried out a prohibited act would be determined according to the applicable law and the facts of the individual case."

Further Submission from Environmental Law Association/ Draft Code of Practice

8. Annexes B and C set out respectively the Administration's response to the further submission from the Hong Kong Environmental Law Association and the draft code of practice agreed with the Hong Kong Construction Association.

Further Committee Stage Amendment

9. Clause 1(2) of the Bill provides that the legislation shall come into operation on a day to be appointed by the Secretary for the Environment and Food by notice published in the Gazette. As the implementation of the accountability system will be accompanied by a reorganization of a number of policy bureaux including the Environment and Food Bureau, we may need to move a consequential CSA to reflect the new nomenclature of the Head of Bureau after the relevant Resolution to effect the transfer of statutory functions has been approved by the Legislative Council.

Environment and Food Bureau

May 2002

(EFB 9/55/02/28)

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NOISE CONTROL (AMENDMENT) BILL 2001

COMMITTEE STAGE

Amendments to be moved by
the Secretary for Environment and Food

<u>Clause</u>	<u>Amendment Proposed</u>
2	In the proposed section 28B (1) (c) (ii), by adding “but before the 2nd anniversary of that date” after “person”.
3	In the Schedule, in paragraph 1 (c) (i), by adding “but before the 2nd anniversary of that date” after “you”.

Further submission from the Hong Kong Environmental Law Association	Administration's Response
1. The prosecution would no longer need to show a "guilty mind". Under the present drafting, a director or other officer is guilty of a criminal offence merely by virtue of his office as a director in the company and receipt of a s.28B notice.	A body corporate, like anybody else, should comply with the NCO at all times. The warning provision is to draw to the attention of the management concerned offences committed by its body corporate and provide them with an early opportunity to rectify any potential noise problems at a particular construction site. The management concerned would only be held personally liable for offences committed by the body corporate after the warning has been served.
2. The statutory defence is not available for directors of companies to offences under Sections 6(1)(a), 6(2)(a) or 6(3)(a).	The permit system under Sections 6(1)(a), 6(2)(a) and 6(3)(a) for carrying out construction works during restricted hours has been in operation since 1988. There should not be any excuse for the management of a body corporate to ignore this basic requirement.
3. The prosecution would no longer need to show the "consent, connivance, negligence or omission of a director as they do with air and water offences.	Compared with air and water pollution offences, there is a more serious problem of repeated noise offences committed by bodies corporate. We believe that there exist corporate managements who are continuing to pay little regard to compliance with the NCO due to a lack of personal liability for the offences committed by their bodies corporate. Adding a strict liability provision into the NCO would more effectively deter bodies corporate from repeating noise offences.

<p>4. Not every director has responsibility for establishing a proper system or control over the operation of the system at every site or specified place or even has any knowledge of the measure required.</p>	<p>The categories of 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 proposed section 28A(1) of the Amendment Bill. EPD will issue a written warning to each of the directors and officers named in the above section, before they will be prosecuted for any subsequent offences committed by the body corporate at the same site in question. A statutory due diligence defence is also available to them in most cases. If they can show that they have established a proper system to prevent the commission of the offences and that they have ensured the effective operation of the system, they have established the defence.</p>
<p>5. Individuals could be potentially liable to personal conviction and to receive a criminal record for the offences of their companies without their knowledge or guilt. This might be capable of having human rights implications.</p>	<p>The Department of Justice has advised that the proposed amendment does not have any human rights implications because -</p> <p>(a) offences relating to noise control are concerned with public well-being and are very closely related to concerns of public health and are therefore matters of social concern;</p> <p>(b) the imposition of strict liability on a director or officer concerned in the management of a body corporate, is considered to be effective in promoting the objective of the proposed statutory amendments through encouraging greater vigilance on the part of directors/officers concerned in the management of the body corporate to ensure observance of the compliance requirements by the body corporate; and-</p> <p>(c) the proposed provision of a due diligence defence would be in accordance with the requirement of a strict liability offence, as this would advance the objective of the proposed amendment without convicting blameless persons.</p>

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**Code of Practice on Good Management Practice
to Prevent Violation of the Noise Control Ordinance (Chapter 400)
(for construction industry)**

Management Practice for the Top Management

Persons described in the proposed amendment of the Noise Control Ordinance (collectively called the top management) shall apply the following practices in managing the operation or activity of the body corporate:

1. Prepare and issue a policy statement ratified by the Board of Directors committing all staff to :
 - (a) compliance with all relevant provisions of the Noise Control Ordinance; and
 - (b) prevention of noise pollution.
2. Establish, put in operation, and periodically review a management system to address issues related to the Noise Control Ordinance.
3. Establish noise management responsibility for different levels of staff, with an organization chart, job and duty description, for co-ordination, policy implementation and adherence to statutory noise control requirements, including the provision of regular noise control performance reporting.
4. Ensure that the officer who coordinates the noise control activities described in item 2 and 3 remains current with regard to statutory ordinances and regulations and keeps the Board of Directors up to date on significant noise control activities affecting the company.
5. Include an item for noise control matters on the agenda of the Top Management Meetings that address the performance of each project.
6. Establish a regular meeting to review significant construction noise incidents and the operation and effectiveness of the associated noise control activities. Ensure that significant construction noise incidents and issues are reported to the Top Management.
7. Regularly check and review via reports or personally that a practical noise pollution prevention system sufficient to ensure compliance with legislation and regulations is operating on each Project.
8. Ensure that a report is prepared for the personal attention of the Top Manager / Director (such as General Manager and Chief Executive Officer) advising whether each Project is properly addressing noise concerns raised by Government Agencies and other concerned parties.

9. Establish a notification system for significant construction noise incidents (including non-compliance with the Noise Control Ordinance) to ensure that the relevant Top Manager / Director is personally advised immediately and in any case within 3 days of an incident occurring on a Project.

10. Take actions to correct any incident and non-compliance as described in item 9 which is not forthwith satisfactorily rectified or effectively prevented from recurrence.

11. Ensure a report is prepared for the Top Manager's / Director 's personal attention that the necessary corrective action related to the incident and non-compliance as described in item 9 has been taken to his satisfaction.

Explanatory Notes

Top Management

The top management are persons in a body corporate described under the proposed new section 28A(1) of the Noise Control Ordinance, i.e.

any person who was -

- (a) a director concerned in the management of the body corporate;
- (b) a director who has delegated his authority for the management of the body corporate to an officer;
- (c) an officer mentioned in paragraph (b); or
- (d) an officer -
 - (i) concerned in the management of the body corporate; and
 - (ii) acting under the immediate authority of a director of the body corporate.

Noise Control Activities

Noise control activities are activities which shall be adopted to:

- prevent violation of the Noise Control Ordinance; or
- rectify any non-compliance with the management system.

Construction Noise Incidents

Construction noise incidents are incidents which:

- have generated or may generate complaints, or
- may lead to violations of the Noise Control Ordinance, or
- have resulted in warning or prosecution by the Noise Control Authority

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