

立法會
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the Administration)

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**Subcommittee on
Occupational Safety and Health
(Display Screen Equipment) Regulation**

**Minutes of meeting
held on Monday, 7 May 2001 at 4:30 pm
in the Chamber of the Legislative Council Building**

Members present : Hon Andrew CHENG Kar-foo (Chairman)
Hon Kenneth TING Woo-shou, JP
Hon Cyd HO Sau-lan
Hon LEE Cheuk-yan
Hon HUI Cheung-ching
Hon SIN Chung-kai
Hon YEUNG Yiu-chung
Hon LI Fung-ying, JP
Hon Michael MAK Kwok-fung
Hon LEUNG Fu-wah, MH, JP
Dr Hon LO Wing-lok

Members absent : Ir Dr Hon Raymond HO Chung-tai, JP
Hon Mrs Miriam LAU Kin-ye, JP
Hon Henry WU King-cheong, BBS

Public Officers attending : Mr Samson LAI
Assistant Secretary for Education and Manpower

Dr L M LEUNG
Occupational Health Consultant
Labour Department

Ms Marie SIU
Senior Government Counsel

Staff in attendance : Mr LEE Yu-sang
Senior Assistant Legal Adviser

Miss Betty MA
Senior Assistant Secretary (2)1

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I. Meeting with the Administration

At the invitation of the Chairman, Assistant Secretary for Education and Manpower (AS(EM)) said that the Administration had, in consultation with the Labour Advisory Board (LAB), provided responses to the issues raised by members at the last meeting [LC Paper No. CB(2) 1443/00-01(01)] and revised the Occupational Safety and Health (Display Screen Equipment) Regulation (the proposed Regulation) (version as at 7 May 2001 was table at the meeting). The gist of the Administration's responses was summarised below -

- (a) The Administration did not support the proposal to go through a warning mechanism before initiating any prosecution action. The proposed warning mechanism would work at cross purposes with the self-regulatory approach, which had already been enshrined in the Occupational Safety and Health Ordinance (OSHO), as duty holders would have little incentive to comply with the statutory requirements on their own volition. Non-compliance would likely increase as a result. As it was impossible to introduce across-the-board requirements for display screen equipment (DSE) workstations in different working environment, the Health Guide, which provided guidelines for compliance in office environment, would be published in conjunction with the enactment of the proposed Regulation. Labour Department (LD) would followed the enforcement practice as in the case of OSHO.
- (b) On the provision of rest breaks, the Administration was studying the issue of rest break for all employees under a separate exercise. Given that circumstances in various trades differed from one another, statutory arrangements for rest breaks or alternative tasks might affect the operation of individual trades, in particular the financial services sector. The Administration would encourage employers and employees to make their own arrangements on rest breaks. Recommendations on provisions on rest breaks and alternative tasks had been incorporated in the Health Guide.
- (c) Regarding making some offences under the proposed Regulation strict liability

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offences, based on enforcement experience, explicitly providing offences as strict liability offences would save considerable resources of the court and the parties involved in establishing whether an offence was strict liability. Nevertheless, "strict liability" did not mean that a defendant would have no defence for the offence.

Implications on the trades

2. Mr HUI Cheung-ching asked whether the Administration had estimated how many employers could not be able to comply with the requirements under the proposed Regulation and the cost implications on the small and medium size enterprises.

3. In response, AS(EM) said that the proposed Regulation sought to impose general responsibility on the employers under which the employers were required to perform risk assessment and take improvement measures to reduce the risks identified. He emphasised that the performance of risk assessment was a relatively simple process. The Administration believed that most of the employers should be able to comply with the requirements under the proposed Regulation easily. Occupational Health Consultant (OHC) added that in a survey conducted by the Occupational Safety and Health Council in 1997 on the occupational health of computer operators in various trades, it was revealed that most of the hardware in workplaces were in compliance with the relevant occupational health and safety requirements. However, the survey revealed that there were insufficient training and information provided for employees on how to use the hardware.

Enforcement of the proposed Regulation

4. Mr LEE Cheuk-yan expressed concern about the effectiveness of the proposed Regulation. He pointed out that although the employers were required to perform risk assessment under the proposed Regulation, it might be carried out without giving due regard to the potential risks at the workplace, nor observing the guidelines closely. Once the employers had performed risk assessment, LD could not bring about prosecution against the employers even though the quality of the risk assessment was substandard.

5. AS(EM) said that the object of the proposed Regulation was to set up a mechanism requiring employers or persons responsible for a workplace to perform risk assessment and take appropriate steps to reduce the risks identified so as to ensure that a DSE workstation was suitable for use by users having regard to the latter's safety and health. Hence, the performance of risk assessment was a process for risk identification. When enforcing the proposed Regulation, the performance of risk assessment would not be the only consideration for instituting prosecution, but rather LD would take into account the overall occupational safety and health of DSE users at the workplace. LD would normally issue warning letters and improvement notices for non-compliance with the proposed Regulation as the initial steps of enforcement. The person responsible for a workplace was required under section 7 of the proposed Regulation to ensure the safety and health of users of DSE. In line with the spirit of

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OSHO, the proposed Regulation was to arouse the awareness of the importance of occupational safety and health at workplace and introduce the concept of self-regulation.

6. Mr LEE Cheuk-yan, elected by members attending the meeting, took the chair at this juncture as the Chairman had to leave the meeting due to an urgent commitment.

Offence of strict liability and setting up a warning mechanism

7. Mr Kenneth TING expressed concern about whether making the relevant offences under the proposed Regulation strict liability offences would attribute to an increase in litigation. As it would be a defence to the offences only if a defendant could prove that he had complied with the proposed Regulation, Mr TING asked whether it contradicted the presumption of innocence under the common law unless proven guilty by the prosecution.

8. AS(EM) responded that there was no direct relationship between making an offence as strict liability offence and the number of related court cases. He stressed that the Administration would initiate prosecution only when the employers failed to comply with the requirements after receiving warning letters and improvement notices from LD. Prosecution would be the last step to take.

9. Senior Government Counsel (SGC) said that according to the cases of *Uniglobe Telecom (Far East) Ltd v HKSAR* and *AG v Fong Chin Yue*, it would be a defence to the offences in question if a defendant could prove on a balance of probabilities that he believed for good and sufficient reason that he had complied with the provision of the Regulation.

10. Responding to Mr SIN Chung-kai, Senior Assistant Legal Adviser (SALA) said that under section 10 of the proposed Regulation, the offences under the proposed Regulation were criminal offences. As to whether a criminal record would be kept for an offender upon conviction, SALA informed members that whether a conviction would be kept as a criminal record was an administrative decision made by the Police. Usually it depended on the nature of the offence involved.

11. Mr SIN Chung-kai expressed strong reservations about making the offences under the proposed Regulation criminal offences. He said that as there were currently some hundred thousand DSE users, the proposed Regulation would have wide implications on the use of DSE at work. While he did not oppose the importance to better protect the occupational safety and health of employees, he strongly urged that due consideration should be given to the enforceability of the proposed Regulation bearing in mind that criminalisation of an offence was a very serious matter. Mr SIN was of the view that there were many "traps" under the proposed Regulation. For instance, if an employee lodged a complaint to LD about a DSE workstation, the person responsible for the workplace was liable to committing an offence of strict liability after LD inspected the workplace. As there was no imminent danger arising from the use of DSE at work and that the adverse effect of improper use of DSE would appear in

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the long term, he questioned the need for criminalisation of the offences under the proposed Regulation. Citing the guidelines on temperature and humidity as an example, Mr SIN said that even when an optimal range of room temperature at the work area was laid down, it could not cover all scenarios. For example, in a computer sever room, the room temperature might be kept at 15°C. In the circumstances, he urged that a warning mechanism should be put in place before instituting prosecution so that a responsible person could provide an explanation or take remedial actions after being notified of non-compliance with the requirements. Mr SIN also requested that the Administration should issue prosecution manual to LD for the purpose of the proposed Regulation.

12. AS(EM) reiterated that it was the usual practice for LD to issue warning letters and improvement notices before taking a decision to institute prosecution, which was similar to the warning mechanism put forward by Mr SIN. The prosecution policy in respect of offences related to occupational health and safety was highly transparent. The current practice for instituting prosecution was introduced in 1998 after consultation with LAB.

13. Mr SIN Chung-kai disagreed with AS(EM). He pointed out that the proposed Regulation did not spell out clearly the usual steps adopted by LD, i.e issuing warning letters and improvement notices before instituting prosecutions. He reiterated that as there was no imminent danger about the use of DSE at work, he saw no reason why the warning mechanism could not be incorporated into the proposed Regulation.

14. At the invitation of Mr SIN Chung-kai, SALA advised that under the proposed Regulation, prosecution could be instituted when the person responsible for the workplace failed to comply with the requirements. There was no requirement that a letter of warning must be issued before prosecution.

15. Mr LEUNG Fu-wah enquired whether there were similar provisions in other legislation providing for a warning mechanism before instituting prosecution by the enforcement agencies. He also asked about the amount for a fine at level 5.

16. SALA responded that the fine at level 5 was \$50,000. As regards provisions for warning mechanism, SALA said that under section 9 of OSHO, LD was required to issue improvement notices to the employers or users for non-compliance with the related offences. Prosecution would be instituted if the employers or users failed to take appropriate actions after receiving improvement notices. Similar provisions could be found in the fire safety related legislation.

17. AS(EM) pointed out that although a warning mechanism was laid down in section 9 of OSHO, it did not preclude the Commissioner for Labour to institute prosecution before going through the warning mechanism. The Administration was of the view that no similar mechanism as suggested by members was provided in the statute book, and there was no case to set a precedence by incorporating the warning mechanism into the proposed Regulation. He stressed that the existing prosecution policy in respect of occupational safety and health related offences was highly

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transparent. The current practice was proven effective having regard to the enforcement experience.

18. SALA drew members attention to the word "suitable" in section 7 of the proposed Regulation. He said that there was no criteria as to what was suitable, and the court might have to make reference to expert evidence and the inspection records of LD.

19. Mr SIN Chung-kai agreed with SALA's observation. He strongly requested that the Administration should adopt a warning mechanism in the proposed Regulation. Having regard to the difficulties in adopting across-the-board requirements for various trades, he suggested that a clear and detailed compliance manual be drawn up for specific sectors.

20. Mr Kenneth TING said that unless the risks identified in the workplace posed imminent danger, he preferred that a warning mechanism be incorporated in the proposed Regulation.

21. Mr LEE Cheuk-yan considered that the enforcement of the proposed Regulation would depend very much on the inspection by LD if specific guidelines for various trades were drawn up. As such, it would go against the principle of self-regulatory approach. He was in favour of a set of legally binding guidelines which provided clear and objective compliance standards.

22. Mr LEE Cheuk-yan said that he believed that the Administration's particular concern about Mr SIN's proposal was that the employers would take improvement measures in the workplace only until they had received warning letters or improvement notices issued by LD. As the Administration had fully explained its stance on the matter, Mr LEE said that the discussion on the matter should not be pursued further. Members might consider proposing amendments in their own name if they so wished.

Draft Health Guide

23. Referring to Appendix B of the draft Health Guide, Mr Kenneth TING noted that the environment should be free of noise disturbance at a level below 60 dB(A). He said that as DSE used at a workplace was unlikely to generate such a high level of noise disturbance, he questioned the need for including such a criteria in the risk assessment checklist.

24. AS(EM) replied that the lighting and noise levels were proposed in response to members' concerns about the lack of a clear and objective standard for completing the risk assessment checklist. He pointed out that under section 2 of the proposed Regulation, a workstation meant, amongst others, the immediate working environment around the DSE. The proposed noise level was not limited to the noise generated from a DSE. Nevertheless, the responsible person should not have difficulty in complying with the proposed noise level.

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25. Mr LEE Cheuk-yan enquired whether there were other Regulations governing noise level at the workplace, and if so, how the proposed noise level compared with the other prevailing noise standards for workplace.

26. OHC said that the noise levels for workplaces governed by the Factories and Industrial Undertakings Ordinance (FIUO) were 85dB(A) and 90dB(A). The noise level proposed in the draft Health Guide differed greatly from those in FIUO having regard to the difference in the working environment. Generally speaking, the proposed noise level at 60dB(A) could cover all sources of noise at a DSE workstation and was not difficult to comply with.

27. Ms LI Fung-ying said that as the Health Guide was not legally binding and the examination of the Health Guide had given rise to more heated discussion about the standards to be adopted for performing the risk assessment. She was of the view that the Subcommittee should proceed with the scrutiny of the proposed Regulation, rather than dragging on the content of the Health Guide.

28. Mr LEE Cheuk-yan expressed reservations about the overall effectiveness of the Health Guide. He said that as the Health Guide was not part of the proposed Regulation, there was no penalty for non-compliance. Mr LEE further said that LD could not bring about prosecution for non-compliance if a person responsible for the workplace argued that he had already performed a risk assessment, though it might be conducted without giving due regard to the risks at the workplace, nor observing the guidelines closely. The proposed Regulation would only penalise those employers who had observed the guidelines closely, but failed to comply with the requirements.

29. AS(EM) said that the Health Guide sought to give practical guidance on the statutory requirements under the proposed Regulation. As such, non-compliance with the Health Guide would not be liable to committing an offence. LD would gather evidence and look into the overall impact of the workstation on the occupational health and safety of DSE users in bringing about prosecution action.

30. Mr LEE Cheuk-yan expressed doubt about the practical difficulties in collecting sufficient evidence to institute prosecution for non-compliance. SALA said that a responsible person was required under section 5 of the proposed Regulation to take steps to reduce any risks identified in a risk assessment, otherwise, he had committed an offence.

31. AS(EM) pointed out that under section 7 of the proposed Regulation, a responsible person should so far as reasonably practicable ensure that the workstations were suitable for the use of DSE users having regard to their safety and health. He reiterated that the general prosecution policy of the enforcement agent was to issue warning letters and improvement notices before taking a decision to institute prosecution. As the Administration was aware that it was impossible to introduce across-the-board guidelines for DSE workstations in different working environment, flexibility was intentionally built into the Health Guide.

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32. OHC added that apart from performing risk assessment, a responsible person was also required under the proposed Regulation to ensure that the workstations were suitable for DSE users and to provide sufficient occupational health and safety training to his employees. As regards the enforcement steps to be taken by LD, OHC said that during an inspection, the responsible person would be required to produce a risk assessment record to ascertain whether he had performed the risk assessment in accordance with the steps laid down in section 4(3). The enforcement officer would also conduct an independent assessment to identify risks at the workplace. Should risks be identified, irrespective of whether there were risks identified by the assessment performed by the responsible person, LD would issue an improvement notice requiring the responsible person to take rectification actions within a specified period. Prosecution would be brought about if the responsible person failed to comply with the improvement notice.

33. Mr LEUNG Fu-wah opined that he believed that the compliance standards laid down in the Health Guide was easy-to-follow and would incur little extra cost for employers to take improvement measures to reduce risks. As the Subcommittee had fully discussed the proposed Regulation, he urged that the Subcommittee should expedite its deliberations for early enactment of the proposed Regulation.

34. Mr LEE Cheuk-yan suggested and members agreed that the Subcommittee studied the proposed Regulation clause-by-clause and amendments proposed by members, if any, at the next meeting.

35. There being no other business, the meeting ended at 6 pm.

Legislative Council Secretariat

3 October 2001