

**For discussion
on 8 May 2001**

**Legislative Council
Panel on Environmental Affairs**

Proposed Amendments to the Noise Control Ordinance, Cap. 400

INTRODUCTION

This paper sets out our proposal to amend the Noise Control Ordinance (NCO) to make the management of a body corporate explicitly liable for an offence committed by the body corporate under the NCO.

BACKGROUND

2. At the meeting of the Panel on Environmental Affairs on 20 December 1999, Members considered and supported proposed amendments to the NCO to make the management of a body corporate explicitly liable for an offence committed by the body corporate. The Noise Control (Amendment) Bill 2000 was introduced into the Legislative Council in February 2000. The Legislative Council Brief at Annex is relevant. The Bill lapsed with the end of the 1999/2000 legislative session.

THE BILL

3. Our intention is to re-introduce the Bill as it was drafted within the current legislative session but to add a provision to provide the basis for the issue of written warnings to the management of a body corporate. The rationale behind the additional provision is that the proposal to make the management of a body corporate explicitly liable for an offence committed by the body corporate under the NCO is for the purpose of promoting changes in the corporate philosophy with regard to environmental compliance so as to deter recurrent noise offences. Our original intention was for the Director of Environmental Protection (DEP), in his capacity as the Noise Control Authority in the NCO, to issue as an administrative arrangement written warnings to the directors and officers concerned of a body corporate to warn them of their personal liability under the NCO and remind them of their responsibilities when a noise offence has been committed by the body corporate. This arrangement

was mentioned in the speech made by the Secretary for the Environment and Food moving the Second Reading of the Bill on 16 February 2000. The written warning is to enable the directors and officers concerned to take all reasonable preventive steps before they are prosecuted for noise offences. DEP would prosecute the directors and officers concerned if the body corporate continued to violate the NCO despite the warning.

4. Following further consultation with the Hong Kong Construction Association in our attempt to address the Association's objections (as set out in paragraph 24 of the Legislative Council Brief at Annex) to the original Bill, we now propose that the issue of written warnings be stipulated in the NCO. Since administratively, even if the provision is not added to the NCO, DEP would be issuing the written warnings, we see no problem in adding the provision which will provide more certainty to the construction industry. We **propose** to add a new provision to the Bill to provide that DEP should give a written warning to the directors and officers concerned of a body corporate after the body corporate has committed a noise offence at a particular premise/site. If the body corporate commits any offence under the NCO at the same premise/site, the directors and officers concerned will be prosecuted without further warning.

NOISE COMPLAINTS AND CONVICTIONS

5. The number of complaints and convictions related to construction and commercial/industrial activities for 1996-1998 were provided in the Legislative Council Brief at Annex. Updated statistics for 1999 and 2000 are prepared below for Members' information -

<u>Noise complaints</u>	<u>1999</u>	<u>2000</u>
Construction noise:	2,369	1,777
Commercial/industrial noise:	2,839	3,239
 <u>Noise offence convictions</u>	 <u>1999</u>	 <u>2000</u>
Construction noise:	264	364
Commercial/industrial noise:	73	61

6. For construction and industrial noise offence, individual proprietors were involved in some 29% and 21% of the first convictions in 1999 and 2000 respectively, but dropped to 5% and 2% in 1999 and 2000 for second or subsequent convictions. These figures suggest that individual owners or business proprietors are less likely to repeat an offence, as they are held personally liable for an offence.

7. Violation of the NCO by bodies corporate is considerably more serious. Among the 425 conviction cases related to construction and commercial/industrial activities in 2000, close to 92% (389) involved corporate entities. 39 construction companies were convicted more than five times between 1998 and 2000. 17 of these construction companies had more than 10 convictions. They included one construction company which have been convicted 27 times and two construction companies 24 times for construction noise offences. These repeated offences indicate that some corporate managements tend to give less regard to compliance with NCO due to a lack of personal liability for the actions of their companies. Some of them may even treat the fines imposed on the body corporate as part of the project cost.

8. The proposed amendments to the NCO will enhance the deterrent effect as the management of the corporations would be held explicitly liable for offences committed by the body corporate.

ADVICE SOUGHT

9. Members are requested to give their advice and comments on the proposal to amend the Noise Control Ordinance, Cap 400, as described above. The Administration intends to introduce the proposed legislation into the Legislative Council with the current legislative session.

Environment and Food Bureau
May 2001

LEGISLATIVE COUNCIL BRIEF

**Noise Control Ordinance
(Chapter 400)**

NOISE CONTROL (AMENDMENT) BILL 2000

INTRODUCTION

At the meeting of the Executive Council on 1 February 2000, the Council ADVISED and the Chief Executive ORDERED that the Noise Control (Amendment) Bill 2000 (at Annex) should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

2. The current provisions of the Noise Control Ordinance (NCO) do not contain sufficient deterrent against a body corporate committing noise offences. Under the existing provisions of the NCO, the maximum penalty is a fine of \$100,000 for the first conviction, and \$200,000 for the second or subsequent conviction. There are no terms of imprisonment under the NCO. The existing maximum fine levels have been in effect since 1994 when they were doubled in order to increase the deterrent effect. Notwithstanding the substantial increase in maximum fine levels, efforts to promote good practices and vigorous enforcement actions, there are still many noise complaints and offences under the NCO.

3. Noise complaints amounted to more than 40% of all pollution complaints in the past few years. In particular, complaints and offences arising from construction and commercial/industrial activities have become an increasing concern. The numbers of complaints and convictions related to these activities between 1996 and 1998 are as follows:

<u>Noise complaints</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>
Construction noise:	2,027	1,888	2,201
Commercial/industrial noise:	2,101	2,424	2,356

<u>Noise Offence Convictions</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>
Construction noise:	117	364	299
Commercial/industrial noise:	100	64	81

4. Under the NCO, the Environmental Protection Department (EPD) may initiate proceedings against any person who commits an offence. If an offence is committed, EPD will prosecute either individual owners of non-corporate companies or the corporate company whichever is applicable. These offenders could be the owners of the industrial or commercial premises, or the main contractors and/or the sub-contractors as appropriate in cases involving construction activities. For cases involving owners or contractors who are individual proprietors, they would be personally prosecuted under the NCO. For cases involving bodies corporate, both the bodies corporate and their management could be subject to prosecution under the existing NCO. But in effect only the bodies corporate are prosecuted because of difficulty in holding the management liable, due to a lack of explicit provision for imposing personal liability on the management of the body corporate concerned.

5. Individual proprietors were involved in some 24, 45 and 31 percent of the first convictions in 1996, 1997 and 1998 respectively, but in less than 10 percent in 1996 and less than 3 percent in 1997 and 1998 for second or subsequent convictions. These figures suggest that individual owners or business proprietors are less likely to repeat an offence, as they are held personally liable for an offence.

6. Violations of the NCO by bodies corporate are much more serious. Among the 380 conviction cases related to construction and commercial/industrial activities in 1998, close to 85% (321) involved corporate entities. In the three years between 1996 and 1998, 44 companies were convicted five times or more. Twelve of these companies have more than ten convictions. They included two construction companies which have been convicted 33 times and 24 times for construction noise offences. These repeated offences indicate that some corporate management tend to give less regard to compliance with NCO due to a lack of personal liability for the

actions of their companies. A number of them may even treat the fines imposed on the body corporate as part of the project cost.

7. Under other environmental legislation (i.e. Air Pollution Control Ordinance, Water Pollution Control Ordinance, Waste Disposal Ordinance, Environmental Impact Assessment Ordinance), there are provisions for holding the management of a body corporate liable for an offence committed by the body corporate. These provisions are considered to have good deterrent effect as the management of these corporations could be held personally liable for offences. Indeed, bodies corporate are less likely to commit the offences repeatedly under the other environmental legislation, as compared with NCO.

EFFECTS OF NOISE OFFENCES ON THE COMMUNITY

8. A construction noise permit would normally be issued only if the construction noise in residential areas can be kept within 65 dB(A) up to 11:00pm in the evenings and throughout the day on holidays, and 50 dB(A) from 11:00pm to 7:00 am. Most of the construction noise convictions involved the use of powered mechanical equipment such as cranes, excavation machines or concreting machines in building development sites late in the evening or on public holidays. The typical noise level of these activities may reach 80dB(A) at nearby residential blocks, thus seriously depriving many residents of a period of rest after 7 p.m. or before 7 a.m. on weekdays or on public holidays.

9. For commercial/industrial noise, most convictions involved the operation of ventilation systems, water pumps or workshops. The typical noise levels in nearby residential flats are in the range of 60-75dB(A), affecting people's daily activities at home.

10. The 380 conviction cases in 1998 affected over 100,000 people. Almost all involved substantial and organized work on public holidays or work extending long into restricted hours and creating significant disturbance to the community.

THE NOISE CONTROL (AMENDMENT) BILL 2000

11. To deter noise offences by a body corporate, it is proposed that the NCO be amended to state explicitly that when the offender is a body corporate, the management of that body corporate commits a like offence. This means that both the body corporate and the responsible persons within the body corporate could be prosecuted and fined for the same noise offence committed by the body corporate. The intention is to state explicitly the responsibility of the management of bodies corporate to prevent the violation of the NCO by such bodies. The proposed amendments do not seek to increase the existing maximum fine levels or impose heavier penalties on either the body corporate or the management of that body.

12. Under the proposed amendments, the directors involved in the management of a body corporate are held responsible for offences committed by the body corporate. Directors holding honorary or non-executive posts (i.e. those that are not concerned in the management of the body corporate), will not be held responsible. For the purpose of the proposed amendments, owners corporations registered under the Building Management Ordinance are not regarded as bodies corporate due to their voluntary nature of the office bearers may deter owners from participating in the management committee of an owners corporation if they were held personally liable for environmental offences. Other ordinances such as the Environmental Impact Assessment Ordinance also exclude owners corporations from the definition of "body corporate".

13. The proposed legislative amendments provide for a due diligence defence. In line with international practices, it would be a due diligence defence if the management can demonstrate that a proper system has been established and was in effective operation to prevent the offence. There is no explicit statutory defence provision for the management for offences related to carrying out construction works during restricted hours without a construction noise permit. The permit system has been in operation for nearly 10 years and there should not be any excuse for the management of a body corporate to ignore this basic requirement.

14. To facilitate the management in discharging their statutory

responsibility, EPD will issue a Code of Practice to provide practical guidance on good management practices to prevent violation of the NCO. Compliance with the Code of Practice will constitute valid ground for accepting a due diligence defence. The Code of Practice will be in line with guidelines and practices adopted in many developed countries. It is intended to help the management to prevent, in a proactive manner, the operations and activities of a body corporate from violating the NCO. We have commenced consultation with the trades and professional organisations concerned on a preliminary draft of the Code of Practice since November 1999. We will continue this consultation process in parallel with the legislative amendment exercise with a view to developing an effective and practicable tool for the trades.

15. To enable the management of a body corporate to take all reasonable preventive steps before they are prosecuted for noise offences, EPD will warn the directors and officers concerned of their personal liability under the NCO and will remind them of their responsibilities when a noise offence has been committed by the body corporate. The department will prosecute the directors and officers concerned if the body corporate continues to violate the NCO despite the warning.

16. We propose that the amended provisions should come into operation on a day to be appointed by the Secretary for the Environment and Food by notice in the Gazette. We will give reasonable time for consultation with the trades and professional organisations on the Code of Practice and for the management to put in place a proper system within the body corporate to prevent violations of the NCO before we bring the amended provisions into operation.

HUMAN RIGHTS IMPLICATIONS

17. The Department of Justice advises that the Bill is consistent with the human rights provisions of the Basic Law.

FINANCIAL AND STAFFING IMPLICATION

18. There are no financial and staffing implications.

ECONOMIC IMPLICATIONS

19. There will be no significant economic implications on the trades and industries concerned. The NCO was enacted in 1988 and the current proposal merely spells out explicitly the responsibility of the management of a body corporate to prevent violations of the NCO.

ENVIRONMENTAL IMPLICATIONS

20. The proposed amendments will help to deter repeated violations by a body corporate. This should reduce serious noise disturbance to the community.

PUBLIC CONSULTATION

21. The Advisory Council on the Environment was consulted on 29 November 1999. The Council fully supported the proposal.

22. The Legislative Council Panel on Environmental Affairs (EA panel) was consulted in March 1999 and again in December 1999. The present proposal has, as far as practicable, taken on board the views expressed by the Panel. The Panel indicated support for the proposal at its meeting on 20 December 1999 and asked the Administration to introduce the legislative amendment as soon as possible.

23. We have also consulted and considered the views of various stakeholders including Provisional District Boards (PDBs), labour unions, and the trades, associations and companies concerned on the proposal. Representatives of labour unions of the trades involved in noisy activities such as ship building, steel and construction, generally welcomed the idea of making the management responsible. They considered that the proposal would improve their working environment. Briefing sessions were held to obtain the views of PDBs. Some PDBs also invited us to attend their meetings to discuss the subject. In general, they supported the proposal and suggested that the persons to be held responsible should be clarified in the proposed amendments. Green groups were also consulted. They supported the proposal and urged the Administration to proceed with the amendment as soon as possible.

24. The Hong Kong Construction Association (HKCA) had reservations on the proposed amendments. They suggested that the Administration should adopt a non-punitive approach and look into ways to assist the construction industry to raise awareness through education and training among those engaged in the industry. They also proposed to work with EPD to develop an effective Code of Practice for noise control at construction sites, without amendment to the NCO. In response, we re-affirmed our intention to work in partnership with the HKCA and others in the construction industry to continue to promote awareness and good practice. However, given the serious noise disturbance to the community caused by NCO violations, a multi-pronged approach would need to be adopted. In view of the large number of construction sites under the control of construction companies and their higher incidence of repeated violations, companies which with overall responsibility for the conduct of their subcontractors and workers at construction sites must take steps to ensure compliance with the provisions of the NCO. We indicated that the proposed amendment was to ensure that the company management would take all reasonable preventive steps to prevent violation of the NCO. There was a due diligence defence for management of a body corporate and the authority would issue a Code of Practice under the proposed legislation to guide and facilitate company management in discharging their responsibilities in this regard.

25. The Administration will maintain liaison with the HKCA and representatives of other relevant trades and professional organisations on the proposal. EPD will work with the HKCA and others to strengthen and further develop the draft Code of Practice for the trades on good management practices to prevent NCO violations.

LEGISLATIVE TIMETABLE

26. The legislative timetable of the Amendment Bill will be -

Publication in the Gazette	3 February 2000
First Reading and commencement	16 February 2000

of Second Reading debate

Resumption of Second Reading to be notified
debate, committee stage and Third
Reading

27. A press release will be issued on 3 February 2000.

ENQUIRY

28. For any enquiries on this brief, please contact Mr Howard Chan, Principal Assistant Secretary, Environment and Food Bureau, at 2848 2251.

Environment and Food Bureau
February 2000

A BILL
To

Amend the Noise Control Ordinance.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Noise Control (Amendment) Ordinance 2000.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for the Environment and Food by notice in the Gazette.

2. Sections added

The Noise Control Ordinance (Cap. 400) is amended by adding -

"28A. Liability of directors

(1) Where an offence under this Ordinance has been committed by a body corporate, any person who at the time of the offence 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; or
 - (c) 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,

shall be guilty of the like offence.

(2) For the purpose of subsection (1), a body corporate means any company or other body corporate incorporated in Hong Kong or elsewhere, but does not include any corporation registered under the Building Management Ordinance (Cap. 344).

(3) It is a defence to a charge brought under any provision of this Ordinance (other than section 6(1)(a), (2)(a) or (3)(a)) for a person charged under subsection (1) to prove that he took reasonable precautions and exercised due diligence to prevent the commission of the offence by the body corporate.

(4) Without affecting the generality of subsection (3), a person establishes a defence under that subsection if he proves that he had -

- (a) established a proper system to prevent the commission of the offence concerned; and
- (b) ensured the effective operation of the system.

28B. Codes of practice

(1) The Authority may issue codes of practice containing such practical guidance as he thinks fit for the purpose of providing industries with good management practice in respect of section 28A(3).

(2) The Authority may from time to time revise the whole or any part of any code of practice issued under subsection (1)

by revoking, varying or adding to its provisions or requirements.

(3) A code of practice or any revision to a code of practice shall be published in the Gazette.

(4) A code of practice or any revision to a code of practice commences at the beginning of the day on which it is published."

Explanatory Memorandum

The purpose of this Bill is to amend the Noise Control Ordinance (Cap. 400) to -

- (a) provide that where an offence under the Ordinance has been committed by a body corporate, any person who at the time of the offence was -
 - (i) a director concerned in the management of the body corporate;
 - (ii) a director who has delegated his authority for the management of the body corporate to an officer; or
 - (iii) an officer -
 - (A) concerned in the management of the body corporate; and
 - (B) acting under the immediate authority of a director of the body corporate,shall be guilty of the like offence;
- (b) provide a general defence to a charge brought under any provision of the Ordinance (other than section

6(1)(a), (2)(a) or (3)(a)) for the person charged under the proposed section 28A(1) to prove that he took reasonable precautions and exercised due diligence to prevent the commission of the offence; and
(c) empower the Noise Control Authority to issue codes of practice for the purpose of providing industries with good management practice in respect of the proposed section 28A(3).