

**BILLS COMMITTEE ON
LAND (MISCELLANEOUS PROVISIONS)(AMENDMENT) BILL 2002
MEETING ON 18 MARCH 2003**

Follow-up to meeting on 25 February 2003

In the Bills Committee on Land (Miscellaneous Provisions) (Amendment) Bill 2002 on 25 February 2003, the Administration was requested to follow up on certain issues. The following are the information provided on these issues.

Question (a) To consider providing incentive to permittees of excavation permits to encourage them to complete excavations earlier than the completion date allowed in the permits and to report on the outcome of consultation with the industry.

Answer (a) We consulted the utility undertakers and construction industry on 5 March 2003 about their views on incentive schemes in encouraging early completion. Generally, their opinion was that with the introduction of the systematic method of determining initial periods, there should be little scope for them to complete earlier than as granted in the permit. We agree with this opinion. As such, there was little concrete and practicable scheme proposed, apart from refund of the daily fees of the unused permit period.

Indeed, it is questionable whether it is technically feasibility to devise an incentive scheme without ostensible or hidden financial reward. Such financial reward would either violate the 'user-pays' principle, if the money of discount involves the administrative part of the prescribed fee, or dilute the deterrence to delay in completion of excavations if from the economic cost part of the fee.

The industry agreed that some form of award scheme could be desirable, for the well-performed permittee and

his contractors, although not an absolute necessity. The scheme may be modeled upon the Considerate Contractors Award Scheme, which includes award presentation ceremonies and publicity. We will discuss further with the industry about such a scheme in the Joint Utilities Policy Group.

Question (b) To consider introducing a charging scheme for excavations on pedestrian ways and to report on the outcome of consultation with industry.

Answer (b) In the same occasion we consulted the utility undertakers and construction industry about the charging of economic cost for ensuing timely completion of excavations on pavement. All of them strongly objected to such charging. They all pointed out that delay in completion in any form (whether it is on the carriageway or pavement) would not be in their interest. Therefore there should be no need for any further economic charges. The effect of excavations on shops can never be accurately assessed. Also, effect from excavation on pavement is localized (where it is unlike excavation in the carriageway which may be extensive), and it is rather extreme to charge economic cost for such localized effect. We do not have a scientific basis of assessment of economic cost to the pedestrian, who may easily take alternative route, but if we are to charge economic cost, legally, we must have a reasonable basis.

They said that utility undertakers had now adopted a responsible and cooperative attitude, and they proposed to work out a pledge time for further shortening any idling time arising from utility diversions. We will further explore that proposal in the JUPG. The industry also pointed out that it had been their contractors' practice to schedule their work to avoid inconvenience to shops owners as much as possible, and problems could be solved in an amicable manner without resorting to

charging of economic cost. Government's policy of using paving blocks on pavements has also helped shortening the duration of excavations.

Question (c) To consider refining the draft procedures the Secretary for the Environment, Transport and Works would follow on receiving a report from the Authority about a contravention by a public officer or government department under new section 2A of the Bill (the Procedures), taking into account the views expressed by the industry and civil servants on the proposed operational details, and members' concern about the possible duplication of work between the investigations undertaken by the Secretary for the Environment, Transport and Works and the subsequent formal disciplinary actions against the concerned public officers as well as the lead time required for enforcing the disciplinary actions.

Answer (c) We have raised the issue about the procedures that the Secretary for the Environment, Transport and Works (SETW) should follow in the event there is a contravention of the requirements in the Bill by public officers with the industry. They all agreed that it is an internal matter of the Government and they were not interested. As regards disciplinary matters mentioned in the draft procedures, they do not go beyond what is already provided for in the existing civil service management framework

The draft procedures is just a guideline about how to apply the existing disciplinary framework to situation where breaches of the requirements in the Bill are involved.

It should be noted that Civil Service Branch is proposing changes to the procedures in relation to Section 12 of the Public Service (Administration) Order (PSAO) and they

are consulting staff associations about those changes. We will consider if the draft needs any changes when those procedures are finalized, and may report to the LegCo Planning, Lands and Works Panel about the final version of the procedures after the review is complete.

We have also found that there is NO duplication of work of SETW and the formal disciplinary action against the concerned public officer, for the main objective of the investigations by SETW is to determine, from an engineering or factual point of view, whether there is a breach by the public officer on the excavation permit conditions or the Bill, and ways (again, a matter of engineering, or design of procedure) to stop such continuing or recurring. Whereas, the formal disciplinary actions under the PSAO or Civil Service Regulations (CSR), if required, are aiming at determining whether such a breach is due to any misconduct or incompetence on the part of the concerned public officer. It is normal for departments to conduct separate preliminary investigations in case of alleged misconduct, and have the concerned officer dealt with in less severe manner if so justified, before having him dealt with by a formal disciplinary board, which will also conduct its own investigations (in the form of hearings).

Question (d) To provide a final draft of the Procedures, highlighting the new features to be included vis-à-vis the existing regulations and guidelines governing the behaviour of civil servants, and the operational details of the reporting mechanism under other legislation.

Answer (d) The disciplinary procedures are indeed based on the existing procedures civil service management framework. We have highlighted those matters that are based on the existing procedures in different font (Annex 1). Those not highlighted are related to the engineering investigations to

be conducted by SETW or about new situation.

We cannot draw any reference from operational details of reporting mechanism under other legislations as similar detailed procedures have not been produced.

Question (e) To organize award schemes to encourage utility undertakers to maintain excavation sites in good condition, and complete excavations earlier than the completion date allowed in the permit. Award presentation ceremonies and publicity should also be arranged.

Answer (e) See our answer to (a) above.

Question (f) To clarify what kind of information collected/created for the purpose of implementing the Bill would be disclosed to the general public, including but not limited to details of permittees of excavation permits or their contractors making or maintaining an excavation contravening the permit conditions, and the resulting economic costs charged by the Authority.

Answer (f) Under the Amendment Bill, HyD will possess the following data:

(A) For each permit (based on time and location reference):

- 1) names of permittees
- 2) names of nominated permittees
- 3) total permit days and permit extension days
- 4) assessment details of permit days and extension days
- 5) history of contravention of permit conditions
- 6) permit fees collected
- 7) economic cost charged by the Authority
- 8) any proceedings on the Review Board

- 9) whether the Administrative Appeals Board is involved
 - 10) conviction details under individual excavation permit
- (B) In relation to each permittee or nominated permittee, where applicable:
- 1) number of excavation permits issued
 - 2) statistics on the permit days, and extensions
 - 3) statistics on unreasonable extensions days
 - 4) statistics on fees and economic cost collected
 - 5) contravention statistics, conviction statistics, statistics on unattended sites
 - 6) review board statistics, and number of cases referred to the Administrative Appeals Board (AAB)
 - 7) index to appeal cases handled by the AAB
 - 8) index of court convictions
- (C) Global statistics on (B)(1) to (B)(6) above.

Save as mentioned below, generally, any interested public can enquire on the global statistics under (C), and details (A)(1), (2) and (3) of individual excavation permits (including time and location) are displayed at the excavation site. Contravention and conviction information are released only to the permittee. Other than related permittees, only the court is provided with information about past convictions relating to a particular permittee, and conviction information is treated appropriate to its grading according to procedures within government about handling of confidential information as mentioned in our answer to question (d) in the information on follow up to the Bills Committee meeting on 24 October 2002, LegCo document ref CB(1) 242/02-03(01) for Bills Committee meeting

dated 11 November 2002.

Statistics (but not details about individual permits) on performance of major permittees (the utility undertakers and government departments) will be compiled for review on the Joint Utilities Policy Group, Utilities Technical Liaison Committee, and Road Opening Coordination Committees. Statistical information of ratio of contravention of permit conditions, ratio of unattended site and average permit days have already been made known to the public through the Controlling Officer's Report submitted by the Director of Highways. Upon the enactment of the Amendment Bill, the Administration will add to that report information on economic cost charged.

Question (g) To review the operation mode of the Review Board and the appropriateness of appointing the Director of Highways (the Director) as the Chairman of the Board, taking into account the possible role conflict of the Highways Department as the issuing, enforcing and reviewing authority for the excavation permit system, the need to ensure fairness and transparency of the review system, the merit of inviting collective views of the Board as a whole, and practices under existing legislation. In case an individual other than the Director were appointed as the Chairman of the Board, whether the Director would be bound by the decision of the Board.

Answer (g) We have reviewed the operation of the Review Board, and after discussion with the utility undertakers and construction industry, we come up with the following revised scheme:

- (i) Director of Highways will chair the Review Board;
- (ii) The Review Board shall have a collective view, by voting if necessary, based on simple majority, which

will become the Board's decision. Where there is a need to vote, the Director of Highways will not vote so as to uphold his impartiality;

- (iii) the number of members in the Board will always be an odd number;
- (iv) the Review Board will comprise official and non-official members, with non-official members as majority; and
- (v) the DHy shall then convey the decision of the Board to the applicant.

Amendments to reflect this change will be submitted for the Bills Committee's consideration in due course.

Question (h) To review the mechanism for declaration of interest by member of the Review Panel and Review Board.

Answer (h) We have reviewed new section 10M(4C) and would like to propose to have this section replaced by a revised procedure, whereby before SETW is to nominate a person to the review board, he will ask such person to declare interest in the subject of review, and notify the applicant the name of such person, and will nominate him only if not challenged by the applicant. Furthermore, if it is discovered at any stage of the review, that any of the voting member of the board has an interest of any description, the Authority may terminate the review board, and SETW is to nominate another person to the new review board. In rare cases, any results of hearing which is subsequently discovered to be affected by any interest can be subject to judicial review.

**ETWB
10 March 2003**

DRAFT OUTLINE PROCEDURES TO BE ADOPTED BY THE ADMINISTRATION IN CASE OF A REPORT OF CONTRAVENTION BY A PUBLIC OFFICER IS RECEIVED BY THE SECRETARY FOR THE ENVIRONMENT, TRANSPORT AND WORKS UNDER SECTION 2A OF THE LAND (MISCELLANEOUS PROVISIONS) (AMENDMENT) BILL 2002 ('the Bill')

APPLICATION OF THE ORDINANCE TO GOVERNMENT DEPARTMENTS

1. Section 2A(1) requires Part III of the Land (Miscellaneous Provisions) (Amendment) [Ordinance] to bind government in so far as it relates to excavations in unleased land which is a street maintained by Director of Highways is concerned.
2. Section 2A(3) provides that the Director of Highways (DH_y), being the 'Authority' in relation to unleased land which is a street maintained by the Highways Department should report to the Secretary for the Environment, Transport and Works (SETW) any act or omission in contravention of Part III of the Ordinance by any public officer, in carrying out his duties in the service of Government. The Authority is required to advise SETW in his report whether the act is continuing or has been terminated to his satisfaction.
3. The contraventions under Part III include:
 - a) Government making or maintaining an excavation without a permit (Section 10(2));
 - b) Government as a permittee, making or maintaining an excavation contravening the permit conditions (Section 10(3)); [Government as represented by a public officer, can be a permittee]; and
 - c) Government as a permittee, in contravention of section 10Q(1), fails to (a) provide all necessary safety precautions to protect the public or personnel of the excavation from danger or injury; or (b) provide adequate support to adjacent structures etc. to prevent the public or personnel of the excavation endangered or injured by falling or displacement of earth or other materials.

THE AUTHORITY'S (DIRECTOR OF HIGHWAYS) ACTION

4. Where a government department or an individual public officer has been identified to be involved in a contravention, DHy will submit an immediate report to the SETW including details of the incident and evidence indicating that the government department or a particular public officer is responsible. DHy will also state in his report whether or not the contravention has been terminated.

IMMEDIATE CORRECTIVE ACTION

5. Sections 2A(4) and (5) provide for that SETW, on receipt of the report from the Authority, if the act of contravention is reportedly a continuing one, SETW shall investigate to ascertain if the contravention has been stopped, and if it is not stopped, he should take the best practicable steps to stop the contravention.

6. For the purpose of section 2A(5)(a), SETW will follow the following procedures:

- a) Request DHy to provide further evidence if not already provided to his satisfaction in the report;
- b) Request DHy and the public officer or the relevant government department in default to arrange any site visit as necessary to satisfy himself about the facts of the matter;
- c) Discuss with the DHy and the concerned public officer or government department about any corrective measures required to be taken;
- d) Order the immediate implementation of those corrective measures, or otherwise require the implementation of the corrective measures within an agreed shortest specified practicable time (depending on the nature of the contravention) either by the concerned public officer or government department, or where appropriate by the DHy; and
- e) Require the DHy and the defaulting public officer or department to report to him about the completion of the measures.

SUBSEQUENT INVESTIGATION AND PREVENTION OF RECURRENCE

7. Sections 2A(5)(b) and (6) provide for that the SETW, on receipt of the report, irrespective of the act of contravention is a continuing one or has stopped, shall, if he considers that the public officer concerned or any other public officer is likely to commit the like contravention, ensure the best practicable steps are taken to avoid the recurrence of the contravention.

8. For the purpose of implementing the requirement of this part of the legislation, depending on the nature and severity of the contravention, SETW may decide if an independent inquiry is required on the incident, or he may set up internal meetings or hearings to investigate the reported cases himself, provided always that action on section 2A(5)(a) is not to be delayed. The DHy, the concerned public officer or the heads and senior officials of a government department, as the case may be, will be involved in the investigation together with any other concerned parties.

9. SETW will look into, if he is investigating it personally, or require a report from the independent inquiry so set up to report on, the following matters:

- i) background to the incident;
- ii) how can such an incident occur;
- iii) whether it is a defect in procedure, or negligence or incompetence involving any individuals;
- iv) how to make good the defect in procedure and prevent recurrence;
- v) any conflicting views or facts or opinions received;
- vi) who are the individuals involved, their roles and any evidence of personal liability ; and
- vii) how to deal with the individuals, and whether disciplinary action should be called for, what provision under the various rules, and regulations such as CSR, or Public Service (Administration) Order should be potentially applicable.

10. SETW, on satisfying himself about the facts in the report, and where the contravention is likely to be committed by other public officers or government departments, may circulate the appropriate portion of the report

to the relevant departments, without revealing details of the offender or the offending department. The objective is to provide sufficient information to enable departments to avoid committing the same offence in similar situation in future.

DISCIPLINARY ACTION

11. SETW on satisfying himself or from the report by the independent inquiry about the roles of each individual involved, and that there are indeed individuals need to be personally responsible, shall determine the course of disciplinary action to be taken based on (but not limited to) the following factors

- a) nature of the offence and the circumstance surrounding the case;
- b) whether the offence is job-related (eg. abuse of official position);
- c) whether the offence reflects adversely on the officer's integrity;
- d) whether the offence resulted in any financial gain to the officer or financial loss to government;
- e) whether the offence is premeditated and committed with willful intent;
- f) whether the offence is an isolated or a repeated incident or if it is a continuing one;
- g) how detrimental is the consequence;
- h) the officer's position in the civil service;
- i) whether there is other crime committed at the same time (such as accepting bribes);
- j) whether the officer in the course of the investigation admitted his guilt and shown to be cooperative, or whether he prevaricated and obstructed the investigation, or whether he had shown genuine remorse about the offence; and
- k) what is the penalty set for the offence in the ordinance.

Informal Disciplinary Action

12. Considering the various factors, and in particular (k), that is, if the

offence is one of which may result only a fine of level 5 but not prison terms, then, SETW may advise the relevant disciplinary authority (generally, it is the head of a department or bureau, or head of grade) in the civil service to which the officer relates to consider taking informal disciplinary action.

13. Informal disciplinary action can result in a verbal or written warning, and may have effect on the officer's promotion for one year.

Formal Disciplinary Action

14. If the offence is one that may result in a fine of \$200,000 or imprisonment, then SETW may advise the relevant disciplinary authority (it may be the head of the relevant department, Secretary for the Civil Service (SCS), or the Chief Executive himself, depending on the case) to consider formal disciplinary action.

15. The procedures for formal disciplinary action and the punishment that can be inflicted are described in detail in the Public Service (Administration) Order (PSAO) and Public Service (Disciplinary) Regulations.

Other Forms of Action

16. Where it is determined the contravention is one that involves inadequacy in competency, diligence or integrity, consideration should be given to taking action under PSAO section 12 to require the officer to retire in the public interest. Action may also be taken under Civil Service Regulations 451 and 452 to stop or defer any increment to which the officer may be entitled.

17. Where other forms of crime is revealed in the course of investigation, SETW shall report that to the relevant law enforcement authorities.

REGULAR MONITORING

18. For the purpose of the above provisions, the DHy will submit regular reports to the SETW on the general performance of government departments. The report will include some pertinent statistics and details of non-compliance such as severity, frequency of occurrence and reoccurrence, whether contraventions have been terminated and improvement measures

taken.

19. Irrespective of whether particular public officers are identified as directly involved in a contravention, for departments frequently implicated in such offences, the head of the Department involved or any concerned senior officials may be given a personal warning by SETW, and his performance in terms of his ability to control the activities under his responsibilities properly reflected in his performance appraisal report.

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