

**BILLS COMMITTEE ON
LAND (MISCELLANEOUS PROVISIONS)(AMENDMENT) BILL 2002
MEETING ON 11 NOVEMBER 2002**

Follow-up to meeting on 24 October 2002

In the Bills Committee on Land (Miscellaneous Provisions) (Amendment) Bill 2002 on 24 October 2002, the Administration was requested to follow up on certain issues. The following are the information provided on these issues.

Question (a) To provide a detailed breakdown of the work involved in the administration of the excavation permit system.

Answer (a) The administration of the excavation permit system can be divided into five stages viz : Registration, Coordination and Seeking traffic advice, Issuance of permits, Audit Inspection and Reinstatement Inspection.

The distribution of total cost is as follows:

- (a) Registration- this accounts for about 7% of the total cost
- (b) Coordination and Seeking traffic advice - this accounts for about 35% of the total cost
- (c) Issuance of permits- this accounts for about 9% of the total cost
- (d) Audit inspections- this accounts for about 26% of the total cost
- (e) Reinstatement inspection- this accounts for about 4% of the total cost
- (f) Computer equipment and related cost – this accounts for about 12% of the total cost
- (g) Departmental overhead - this accounts for about 7% of the total cost

Question (b) To provide information on whether an ordinary citizen could bring an action to compel the public officers concerned to perform the duties as provided for in the new section 2A.

Answer (b) Regarding duties under new section 2A, there are duties to be performed by the Authority (i.e. the Director of Highways or the Director of Lands depending upon whether the unleased land is a street as defined) and the Secretary for Environment Transport and Works (Secretary) under section 2A(3) and 2A(4) respectively. Under section 2A(3), there is a duty on the part of the Authority to consider whether a public officer has contravened any provision in part III, and to report the matter to the Secretary if the contravention is not immediately terminated to the satisfaction of the Authority. Under section 2A(4), there is a duty on the part of the Secretary that where such report is made, the Secretary shall enquire into the matter and if the contravention is continuing or is likely to recur, then he shall ensure that the best practicable steps are taken to terminate the contravention or avoid the recurrence (as the case may be).

The remedy of mandamus provides the normal means of enforcing the performance of public duties by public authorities of all kinds. Disobedience to a mandamus is a contempt of court, punishable by fine or imprisonment. Thus, an ordinary citizen may, subject to satisfying the court that he has sufficient interest to bring the matter before the court, be permitted by the court to bring proceeding for judicial review if the Secretary does not perform his duty of taking "best practicable steps" in accordance with section 2A(4) or the Authority does not perform his duty of reporting the matter to the Secretary in accordance with section 2A(3).

Apart from the legal action for judicial review as aforesaid, in view of section 2A, there are two other ways to make the relevant officials accountable for any contravention of the Ordinance by the government. Firstly, an affected citizen may lodge a complaint with the Ombudsman on grounds of maladministration. Secondly, the affected citizen may complain to the LegCo and the Secretary for Environment Transport and Works will have to account to the LegCo for any contravention of the Ordinance by the government.

Question (c) To provide information on past cases and the statutory reporting mechanism provided for under the existing ordinances whereby the relevant Authority would report the matter to the Chief Secretary for Administration who would ensure that the best practicable steps are taken to terminate the contravention.

Answer (c) There are provisions in 7 of the environmental ordinances for Director of Environment and Protection (DEP) to report a contravention of a government facility to the Chief Secretary for Administration (CS) if the contravention is not forthwith terminated to DEP's satisfaction.

Regarding the mechanism of reporting, DEP would submit a report to CS upon having written to the Directors of the responsible departments but subsequently the contraventions are not being rectified. These reports have been brought up for discussion in a CS Committee Policy Group as many of the rectifications required heavy involvement of and coordination amongst the works departments. And for the sake of facilitating smoother

rectification, the then Works Bureau (and now Environment, Transport and Works Bureau) had assumed a coordination role to check the progress as well as to oversee the funding issues. Any envisaged unsatisfactory rectification performance would be reported by DEP on a quarterly to half yearly basis to the CS. The mechanism has been functioning very effectively.

During the past years of enforcement of the environmental ordinances, a total of 135 cases were reported to seven CS Committee meetings between January 1999 and June 2001. 129 cases were resolved. Since rectification of the remaining 6 larger projects requires longer period to complete, three are scheduled to complete in late 2002, two in 2003 and one in 2004.

Question (d) To provide information on the guiding principles on which the Director of Highways to request the police to record or not to record an offence, and the safeguards for the confidentiality of such information.

Answer (d) We have in the last information paper dated 19 September 2002 to this Bills Committee said that we have as a matter of policy NO intention to request the police to record ANY offence committed under provisions of the Bill. The 'guiding principle' is that the Highways Department should like other law enforcement department should keep the record of such offences within their purview instead of the police.

Records of conviction will be used by Highways Department for providing reference to the Court for sentencing. Highways Department will observe all the latest standard procedures appropriate to its grading within Government about the handling of confidential documents when handling such records. Where such records involve personal data, they will be handled in accordance with the Personal Data (Privacy) Ordinance (PDPO) (Cap. 486).

Question (e) To consider whether it was necessary to include a new provision to reflect the Administration's intent that the Director of Highways would not request the police to record conviction of offence(s) under the Bill.

Answer (e) Keeping of criminal record is an administrative arrangement. Administration has as a matter of policy No intention for the Highways Department to request the police to record ANY offence committed under the provisions of the Bill. It is not necessary to add an express statutory provision in the Bill prohibiting the Director of Highways from requesting the police to make a record of conviction under the Bill. In fact there is no similar express provision in any ordinance. It is a principle of legal policy that Law should be coherent and self-consistent -- the departure from the norm may require justification, but there is no such justification. It will be inconsistent with the overall scheme as no ordinance contains such a provision.

Question (f) To provide information on similar offences with a fine of \$200,000 or less including the scope and seriousness of such offences, and the basis for pitching the fine at such level for offences under section 10(Q)1 of the Bill.

Answer (f) In the Bill, the penalty for failing to provide sufficient safety measures under section 10Q(1) was originally proposed to be a fine at level 5 plus imprisonment of 6 months as stated in section 10Q(2). It is well understood that the real deterrence lies in the prison term, as the maximum fine is only \$50,000.

As it is understood that practically, most of the permittees or nominated permittees are companies or organisations (promoters or contractors alike), and as a company cannot be given a prison sentence, the jail sentence will be ineffective against companies. Although the stigma of imprisonment of corporate directors could prove effective in changing the corporate behaviour where the company directors could be prosecuted under section 101E of the Criminal Procedure Ordinance (Cap. 221) for their consent or connivance, the chance of prosecuting the individual corporate managers is slim. This is because it is often difficult to find sufficient evidence of their consent or connivance. We believe companies want to take short cuts and fail to provide support or safety precautions out of economic reasons, only a heavy fine in those cases will be effective.

But what level of heavy fine is suitable? When pitching the level of fine, one has to consider the question of consistency and deterrent effect.

On 15 January 2002, we provided to the LegCo Planning, Lands and Works Panel the following examples of ordinances which involve issue of permits for regulating commercial activities to prevent such activities from causing disturbance or nuisance and which carries fines or imprisonment:

- (i) Under section 7 of the AIR POLLUTION CONTROL (OPEN BURNING) REGULATIONS (Cap. 311 sub.leg. O), any person who without a permit, carries out open burning for which a permit may be issued, or being a permit holder contravenes any condition to which the permit is subject, commits an offence, and the liability on conviction is a fine at level 5.

- (ii) Under Regulation 21 of the ROAD TRAFFIC (PUBLIC SERVICE VEHICLES) REGULATIONS (Cap. 374 sub.leg. D), any person who drives or uses any private car in respect of which a hire car permit is issued in contravention of any condition to which the hire car permit is subject under regulation 14(5) commits an offence and is liable to a fine of \$1000 and to imprisonment for 6 months.

- (iii) Under section 6(2) of the NOISE CONTROL ORDINANCE (Cap. 400), any person who at any designated place between hours of 7 p.m. and 7 a.m., or at any time on a general holiday, carries out, or causes or permits to be carried out, any prescribed construction work, in respect of which a construction noise permit is not in force or otherwise than in accordance with the conditions of a construction noise permit in force in respect thereof, commits an offence. Under section 6(5), any person who commits an offence under this section shall be liable on conviction to a fine of \$100000.

- (iv) Under section 8(1) of the WATER POLLUTION CONTROL ORDINANCE (Cap. 358), a person commits an offence who discharges any waste or polluting matter into the waters of Hong Kong in a water control zone, unless as provided in section 12(1)(b) he proves that the discharge in question is made under and in accordance with a licence granted under section 20. Under section 20(4), a licence may be granted subject to conditions. Under section 11(1)(a), a person who commits an offence under section 8(1) is liable to imprisonment for 6 months and a fine of \$200000.

- (v) Under section 9 of the ENVIRONMENTAL IMPACT ASSESSMENT ORDINANCE (Cap. 499), a person shall not construct or operate a designated project without an environmental permit or contrary to the conditions

thereof, and under section 26 a person who contravenes section 9 commits an offence and is liable on summary conviction to a fine at level 6 and to imprisonment for 6 months.

From the above, one can see that the range of penalties in the form of fine can vary from \$1000 to \$200000. There is no fixed pattern.

For section 10Q, we believe the fine of level 5 is too low for the nature and gravity of offence, and the potential offenders. We must take into account of the economic incentive for those who may commit the offence. We must also provide sufficient protection to people who may be affected by the offence. When one compare the gravity of this offence with other offences in the Bill, one can see that this is much more serious. Whereas the other not so serious offence attract a fine of level 5, this one under section 10Q which may endanger lives, should carry a much heavier fine as a penalty, to have a deterrent effect.

We looked into penalties, in particular, fines for offences involving unsafe work place or construction sites, which are somewhat similar to the targets of control under section 10Q(1). There are examples under the CONSTRUCTION SITES (SAFETY) REGULATIONS (Cap. 59; sub.leg I) under the FACTORIES AND INDUSTRIAL UNDERTAKINGS ORDINANCE (Cap 59) with fines ranging up to \$200,000

with or without prison term.

Regulation 68(2)(a) states that, a person guilty of, inter alia, contravening regulation 39(1) - prevention of workmen from being endangered by fall or displacement of earth etc., and regulation 41 - prevention of material falling into an excavation or collapse of edge of excavations, shall be liable to, inter alia, a fine (regulation 68(2)) of \$200,000.

Similarly under regulation 68(2)(g), the penalty for failing to provide a safe work place (regulation 38A(2)) and failing to provide safety barrier (regulation 40(1) and 68(2)(f)) is a fine of \$200,000 .

From the above, it is quite obvious that the trend is, when it is involving construction, and one of safety that endangers life, a fine of \$200,000 should be appropriate in order to maintain the deterrent and punitive effect.

Based on the above, we therefore propose that for Section 10Q(2), we replace it with:

"(2) A permittee and nominated permittee who contravenes subsection(1) shall each be guilty of an offence and shall each be liable on conviction to a fine of \$200000. "

Question (g) To provide information on the circumstances under which section 101E of the Criminal Procedure Ordinance (Cap. 221) would apply, particularly in cases whereby the offence was committed out of the knowledge of the director concerned or because of the director's dereliction of duty.

Answer (g) In order for a director to be liable under s. 101E of the Criminal Procedure Ordinance, Chapter 221, the prosecution has to prove that (1) the company has committed the offence and (2) the offence was committed with the consent or connivance of the director. If the company has not committed the offence, the director will not be liable. In relation to offence under section 10Q, the director must consent to or connive at the company's act of providing inadequate safety measures, and so before the director becomes liable it must be proved that the director had knowledge of the company's act of providing the inadequate safety measure. However, where there is no proof of actual knowledge, constructive knowledge may be proved by evidence that the person concerned wilfully closed his eyes to the obvious or deliberately refrained from making proper enquiry. Unless and until the prosecution has succeeded in proving either gross negligence, criminal negligence or recklessness, there is no case for a defendant, in the absence of actual knowledge, to answer. (*R. v. Sunway Gas and Engineering, Ltd.* [1995] 3 H. K. C. 472).

Question (h) To provide information on whether it was a Government policy to recover costs involved in carrying out inspections and on the practices of Food and Environmental Hygiene Department, Buildings Department, Electrical and Mechanical Services Department and Labour Department, etc. in this respect.

Answer (h) Generally it is a long-established government policy of adopting the user-pays principle for setting government fees and charges to recover the full cost of services provided.

The activities which this \$32 is to cover include monitoring so as to where necessary to provide advice to street excavation promoters and their contractors about how to maintain their work in a law abiding manner. It is not something optional but an integral part of the excavation permits system. This *service* is necessary for the operation of the system so that it can achieve the aim of doing good to the whole community by maintaining good order in the street excavation works, like the *service* provided by Highways Department when vetting application for excavation permits, which requires assessment on the impact of traffic flow and coordination with various departments and parties.

The charge is proposed on a daily basis during the permit period to tally with the pattern of cost incurred in providing the services.

The daily inspections carried out by the Police and surveillance for collecting evidence by Highways Department staff in relation to prosecution work are regarded as part of the law enforcement activities and have been excluded from the cost calculation of the daily charge. This is in line with our general principle of excluding from fee charging the prosecution costs and the costs of inspection for law enforcement purpose. This principle applies to government departments such as Food and Environmental Hygiene Department, Buildings Department, Electrical and Mechanical Services Department and Labour Department, etc.

All government fees and charges are subject to regular review to ensure that user-pays principle is upheld and full cost recovery basis is maintained. If the performance of street excavation is improved in future, resulting in decrease on demand for monitoring and advisory service, the savings will be reflected in the fee review.