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**Paper for the House Committee meeting
on 7 June 2002**

**Report of the Bills Committee on
Noise Control (Amendment) Bill 2001**

Purpose

This paper reports on the deliberations of the Bills Committee on Noise Control (Amendment) Bill 2001 (the Bill).

Background

2. Under the existing Noise Control Ordinance (Cap. 400) ("NCO"), a person who commits noise offences is liable to a maximum fine of \$100,000 for the first conviction, and \$200,000 for the second or subsequent conviction. According to the Administration's records, violations of the NCO by bodies corporate are considerably more serious than individual proprietors. In the three years between 1999 and 2001, over 85% of the conviction cases related to construction and commercial/industrial activities involved bodies corporate. Despite the imposition of heavy fines between \$150,000 and \$200,000 on some of the second or subsequent convictions, this had not been able to deter bodies corporate from recurrent offences. A total of 51 companies had been convicted five times or more and among them, 18 had more than 10 convictions.

3. With a view to deterring bodies corporate from recurrent noise offences, the Administration introduced the Noise Control (Amendment) Bill 2000 in February 2000 to provide that directors and officers concerned in the management of a body corporate would be held liable for offences committed by the body corporate. The aforesaid Bill lapsed upon expiry of the last term. In June 2001, the Administration introduced the current Noise Control (Amendment) Bill 2001 which is of substantially similar content, but with an additional provision to provide for a warning system before prosecution is

taken out against the responsible persons of the management of the body corporate.

The Bill

4. The principal objects of the Bill are -
 - (a) to provide that where an offence under the NCO has been committed by a body corporate, certain directors and officers of the body corporate shall be guilty of the like offence where the body corporate commits a further offence at the same site; and
 - (b) to empower the Noise Control Authority (the Authority) to issue codes of practice to provide industries with practical guidance of good management practice.

The Bills Committee

5. Members agreed at the House Committee meeting on 29 June 2001 to form a Bills Committee to study the Bill. Hon IP Kwok-him was elected chairman of the Bills Committee and the membership list of the Committee is at **Appendix I**.

6. The Bills Committee has held four meetings. Apart from discussion with the Administration, the Bills Committee has also met with deputations to receive their views. A list of organizations which have submitted views to the Bills Committee is at **Appendix II**.

Deliberations of the Bills Committee

7. Hon LAW Chi-kwong and Hon Emily LAU have stated that they support the Bill in general. Some other members of the Bills Committee however have queried the appropriateness of imposing personal criminal liability on the corporate management. The Bills Committee has also examined the effectiveness of the warning system provided under the Bill which is intended to address the concerns of the industry.

8. Regarding public consultation, the Bills Committee notes that the Advisory Council on the Environment, on which a number of green groups are represented, fully supports the Bill. Members have also examined the views

submitted by various organizations, including industry/trade associations, utilities, law firms and concern groups, and note that some of them have expressed grave concern or objection to the major proposed amendments.

Liability of directors and persons concerned in the management of the body corporate

Enforcement and safeguards

9. Subject to certain conditions, proposed section 28A of the Bill explicitly provides that where a body corporate commits an offence under NCO, the directors and officers concerned in the management of the body corporate shall be guilty of a like offence. Thus, both the body corporate and the responsible persons can be prosecuted and fined for the same noise offence.

10. The Bills Committee has pursued with the Administration the justification for imposing criminal liability on the responsible officers and whether enforcement of the proposed amendments will give rise to problems. In response, the Administration has stressed that owing to the more serious violation of NCO by bodies corporate than individual proprietors, the imposition of criminal liability on the corporate management is necessary so as to make the latter give more serious regard to compliance with the NCO.

11. Some members of the Bills Committee are gravely concerned about the possible unfairness and abuse caused by the proposed provision. In particular, they share the strong views put forward by the Hong Kong Construction Association Ltd. (HKCA) about the practical difficulty of the management in exercising absolute control over on-site compliance of the legal requirements under a multi-tier subcontracting system. HKCA further cautions about deliberate violations by dissenting workers which may result in the management, instead of the actual offenders, being held liable.

12. As a safeguard against abuse, the Administration explains that a due diligence defence can be raised under proposed section 28A if the corporate management concerned can prove that a proper system has been established and has been in effective operation to prevent the offences. Moreover, the responsible officers of the management will each be served a written notice under proposed section 28B. Members note that although guidance would be given in the Code of Practice, what constitutes reasonable precaution or due diligence will be a matter for the court to decide having regard to the facts of the case. The Administration points out that the proposed amendment has not changed the existing legislative control whereby the Environmental Protection Department (EPD) may institute proceedings against any person who commits an offence. It only seeks to specify the responsibility of the corporate management of bodies corporate.

Imposing personal liability on directors and officers

13. On whether it is acceptable practice to impose liability on the directors and officers for offences committed by the body corporate, the Administration has advised that provisions imposing personal liability on management is found in a number of environmental legislation and in other ordinances dealing with import and export, antibiotics, electricity and safety of lifts and escalators, aerial ropeways and amusement rides etc. Certain environmental legislation in Australia, Canada and the United Kingdom also contains provisions imposing personal liability on the corporate management.

14. Members of the Bills Committee are concerned about some deputations' submission that the proposed amendments may have human rights implications. The Hong Kong Environmental Law Association (HKELA), for example, points out that under proposed section 28A, the prosecution will no longer need to prove the consent, connivance, negligence or omission of a director as in the case of other environmental legislation on water and air pollution control. HKELA considers such power excessive. The Bills Committee has examined the implications of imposing strict liability on individuals and placing the onus of proof on them to raise the due diligence defence. In this connection, members also note that there are similar provisions in other ordinances.

15. As offences relating to noise control are matters of social concern and violation of the NCO is much more serious than water and air pollution offences, the Administration reiterates that the imposition of personal liability on the corporate management is an effective way to encourage greater vigilance to deter bodies corporate from repeating noise offences. The Administration also submits that the due diligence defence would be a sufficient safeguard for the persons charged, and the proposed provision is consistent with human rights requirements.

Categories of persons liable

16. Noting that the management of a body corporate may become personally liable for offences committed by the body corporate, members and some deputations consider that the capacities of such persons should be clearly specified in law. Given the wide scope of persons designated as "concerned in the management of the body corporate", they caution that this may give rise to problems in identifying the right person(s) to be liable.

17. In response, the Administration clarifies that the intent is to impose liability on those senior officers who have management responsibility and who are in a position to make decisions or influence the operation of the body corporate. They may include directors, managers, and company secretaries. However, it may not be possible to provide an exhaustive list of

post titles as they vary between organizations. Nevertheless, the Administration confirms that the general category of "officers concerned in the management of the body corporate" also appears in the offence provisions of other ordinances such as the Criminal Procedures Ordinance (Cap. 221), Air Pollution Control Ordinance (Cap. 311) and Waste Disposal Ordinance (Cap. 354).

The warning system

18. Members note that the Administration has modified the original legislative proposal put forward in 2000 by including a warning system under proposed section 28B of the Bill. In short, after proceedings have been instituted against a body corporate, the Authority may issue a written notice to the directors/officers concerned to warn them of their personal liability under the NCO. These persons will only be liable to prosecution if the body corporate commits a further like offence at the same site. The purpose of the warning system is to enable the corporate management to take all reasonable steps to prevent further offences. The Bill does not provide for an expiry period of the warning notice as the Administration believes that the management of the body corporate should comply with the NCO at all times.

19. A member of the Bills Committee supports the Administration's proposal while some other members urge the Administration to seriously consider imposing a reasonable time limit on the written warning. A number of deputations also call for a time limit such that a fresh warning should be issued by the Authority after a specified period. They consider it unfair to hold the directors/officers liable for an indefinite period of time, particularly in case of construction projects with long duration.

20. Having considered the views expressed, the Administration maintains that strictly from the point of view of protecting the public at large from excessive noise, imposing a validity period on the warning would be inappropriate. However, to strike a balance between the interests of the trade and the community at large, the Administration is prepared to introduce a validity period of two years on the warning. A 24-month period is considered reasonable in deterring repeated offences in projects of average duration and in providing the contractors a chance to be "rehabilitated" in projects with a longer construction period. For some of the existing legislation which contain "rehabilitation" provisions, the validity period is generally set at two years or longer. The Bills Committee has no objection to the proposed validity period and notes that the construction trade has been consulted on the proposal and is agreeable to it. The Administration will move the necessary Committee Stage Amendments (CSAs) to the Bill.

21. Some members remain concerned that the deterrence of the legislation might be undermined as a result of a validity period on the warning. To address the concerns, the Administration has agreed to give an undertaking

during the Second Reading debate on the Bill that it will monitor the regulatory environment and the implementation of the legislation. The 24-month validity period will be reviewed if necessary.

Code of Practice

22. 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 Administration has advised that the Code of Practice will be in line with guidelines and practices adopted in many developed countries.

23. In response to concerns about the practicability of the Code of Practice and how far it can be of assistance to the industry, the Administration has assured members that the trade and professional organizations concerned, as well as the Panel on Environment Affairs, will be consulted on the Code of Practice before its finalization.

Related policy issues

24. In the course of deliberation, members have raised a number of concerns which are outside the scope of the Bill but which merit further study.

Contraventions by public officers

25. Both the Bills Committee and the deputations have urged the Administration to critically review the existing section 38 of NCO and similar provisions in other related ordinances which in practice exempt public officers from criminal liability arising from their contravention of legislative provisions while performing official duties. Members are gravely concerned about the absence of any explicit sanction such as disciplinary action under section 38 of NCO on the offenders. HKCA also considers it unfair that Government departments operating as Trading Funds also enjoy the exemption from prosecutions even though they are competing with the private sector for business.

26. In response, the Administration confirms that the Government has to comply with the NCO. Under the current mechanism, if any contravention is not terminated to the satisfaction of the Authority, the latter will report the matter to the Chief Secretary for Administration who shall ensure that the best practicable steps are taken to terminate the contravention or avoid the recurrence. At present, the Drainage Services Department and Water Supplies Department are the only Government departments which carry out works on their own. So far, there has not been any case of breaches of the

NCO by Government departments. Upon members' call for greater transparency, the Administration has agreed to notify the relevant Panel(s) in the event of any breaches which require EPD to make a report to the Chief Secretary for Administration in future.

27. As the mechanism for dealing with contraventions by public officers is not specific to the NCO but is also found in other environmental legislation, the Bills Committee has agreed that the Panel on Environmental Affairs should be invited to consider the matter in greater detail. Members' concern will also be drawn to the attention of the Bills Committee on Land (Miscellaneous Provisions) (Amendment) Bill 2002 since the said Bill contains a provision similar to the existing section 38 of NCO.

Deterrent effect of other environmental legislation

28. When deliberating on the strict liability imposed on the management of a body corporate under proposed section 28A of the Bill, the Bills Committee notices that a different approach is adopted in the Air Pollution Control Ordinance (Cap. 311), the Waste Disposal Ordinance (Cap. 354) and the Water Pollution Control Ordinance (Cap.358) whereby the prosecution is required to prove the consent or connivance of the directors/officers before the latter can be held liable for the offences committed by the body corporate. On the difference in requirements, the Administration has advised that as the problem of repeated noise offences is much more serious, the proposed amendment is needed in order to achieve greater deterrence. While the Administration has agreed to keep the existing relevant provisions under review, members consider that the deterrent effect and compliance of existing environmental legislation should be further examined at the Panel on Environmental Affairs to ensure that they can meet current needs.

Regulatory regime

29. The Bills Committee is aware that the Bill does not apply to the construction industry only but to all business and industrial sectors. However, members have noted with concern the difficulties faced by the construction trade as reflected by some of the deputations. HKCA and HKELA have urged the Government to give effect to the recommendations of the Construction Industry Review Committee (CIRC) to provide a conducive regulatory environment to enable the construction industry to thrive. HKCA considers that a non-punitive approach should be adopted to help the industry establish good noise control practices.

30. The Administration has confirmed that the Works Bureau is co-ordinating the implementation of the recommendations of the CIRC. Ongoing measures to assist the construction industry to comply with the NCO include "one-stop shop" services for applying for construction noise permits,

publication of guidelines and organization of seminars. EPD has also proposed in late 2001 a three-pronged partnership programme in collaboration with HKCA to raise environmental awareness. Members of the Bills Committee urge the Administration to continue to enhance cooperation with the industry.

Committee Stage Amendments

31. The Administration will propose a CSA (at **Appendix III**) to proposed section 28B and the Schedule to the Bill to provide for a two-year validity period for the warning notice.

32. 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, the Administration has advised that it 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 Council on 19 June 2002.

33. The Bills Committee has no objection to the aforesaid CSAs proposed by the Administration. It will not move any CSA in its name.

Recommendation

34. The Bills Committee supports the resumption of Second Reading debate on the Bill on 26 June 2002.

Advice sought

35. Members are invited to note the recommendation of the Bills Committee in paragraph 34 above.

Legislative Council Secretariat
5 June 2002

Bills Committee on Noise Control (Amendment) Bill 2001

Membership list

Chairman	Hon IP Kwok-him, JP
Members	Hon David CHU Yu-lin, JP Ir Dr Hon Raymond HO Chung-tai, JP Hon HUI Cheung-ching, JP Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP Hon YEUNG Yiu-chung, BBS Hon Emily LAU Wai-hing, JP Hon CHOY So-yuk Hon LAW Chi-kwong, JP Hon Abraham SHEK Lai-him, JP Hon LI Fung-ying, JP Hon Michael MAK Kwok-fung Hon LAU Ping-cheung (Total : 13 Members)
Clerk	Miss Polly YEUNG
Legal Adviser	Mr LEE Yu-sung
Date	6 March 2002

Bills Committee on Noise Control (Amendment) Bill 2001

List of organizations which have submitted views to the Bills Committee

1. The Hong Kong Construction Association Limited
2. MTR Corporation Limited
3. The Chinese Manufacturers' Association of Hong Kong
4. Hong Kong Cable Television Limited
5. The Hongkong Electric Company Limited
6. Masons International Law Firm
7. Hong Kong Environmental Law Association
8. Hong Kong Institute of Acoustics
9. Tai Po Environmental Association
10. Federation of Hong Kong Industries

NOISE CONTROL (AMENDMENT) BILL 2001

COMMITTEE STAGE

Amendments to be moved by the Secretary
for the 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 proposed Schedule, in section 1(c)(i), by adding "but before the 2nd anniversary of that date" after "you".