

**Guidelines for Instituting Prioritized Prosecution
Against Non-complied Statutory Orders**

Background

According to the provisions in the Buildings Ordinance (BO), any person who, without reasonable excuse, fails to comply with a statutory order against unauthorized building works (UBW) or dangerous/defective buildings shall commit an offence and the person if convicted may be fined and imprisoned by the court. With regard to these non-compliant statutory orders, in a bid not only to demonstrate to the public the determination of the BD in enforcing the orders but also to serve a deterring effect, vigorous prosecution should be promptly initiated in all cases to negate the delaying tactics used by some owners. Furthermore, to make the most effective use of the available resources, there is the need for considering priorities in prosecution.

Prosecution

2. The BD issues a large number of statutory orders each year, predominantly removal orders requiring the demolition of UBW, and others are mainly repair/investigation orders requiring the carrying out of repair/remedial works for dangerous/defective buildings. District Sections of EBDs and MBID will normally refer those non-compliant orders to the Legal Services Section for instituting prosecution against the owners who, upon expiry of the orders, pay no heed to the warning letters issued to them. As explained above, the use of available resources of the BD should be strategically planned to ensure full effectiveness. Accordingly priority for instigating prosecution should be given to the following list of cases in descending order:

(A) Sub-divided Flats (SDF) cases warranting Emergency Enforcement Action

To avoid the potential fire risk due to the prolonged existence of UBWs in SDF, the highest priority for prosecution should be given to those SDF cases falling within the categories for the Emergency Enforcement Action [Interim Guideline on Emergency Enforcement

in respect of Certain Types of Building Irregularities in Sub-divided Flats issued on 8.7.2013 refers].

(B) Cases with serious hazard to life and limb under Large Scale Operations (LSO)

Under the various LSO launched by the BD, statutory orders are issued for the removal of UBW as specified in a list of actionable UBW for the LSO. Among the large number of statutory orders served under the LSO, those UBWs posing particular serious hazard to life and limb should be accorded with higher priority for prosecution. Some typical examples are listed below:

- (i) Seriously dilapidated UBW or UBW causing serious environmental nuisance
- (ii) Solid constructions on cantilevered canopies
- (iii) Overloaded cantilevered structures or other structures with imminent structural danger as specified in EBD Manual Part II Section 6 Instruction No.4 on “Guidelines on Structural Danger”
- (iv) Serious or complete blockage of the means of escape/firemen’s access
- (v) Removal of the required staircase
- (vi) SDF other than those warrants Emergency Enforcement Action with structural or fire safety problems

(C) Continuous Offence after Conviction

Second or further rounds of prosecution immediately following the previous conviction will keep the momentum on pressing the offender to comply with the order.

3. Apart from the cases warrant highest priority as mentioned in paragraph 2 above, priority should also be given to the following cases:

(A) Cases Arising from Public Reports

Statutory removal orders issued under this category are normally those arising from the enforcement action against the UBW accorded

with priority for removal according to the policy of the BD against UBW. They are mostly UBW posing imminent dangers, new UBW or UBW found under construction, or UBW causing serious health hazards or environmental nuisance to the public. The informants are normally very concerned about the progress of the enforcement action of the BD. They would like to see swift enforcement action to be taken and many such cases often end up in the Office of the Chief Executive, the Ombudsman, the LegCo or in the limelight of media reports. For those cases subject to repeated reports and/or reports arising from various sources, it may be considered to escalate them to highest priority for the prosecution action.

Although UBW erected on rooftops and podiums, in yards and lanes (TMB) are also the actionable targets arising from reports in the revised enforcement policy effective from 1 April 2011, they are however rated as posing lesser risks, and priority for prosecution against TMB should thus be accorded as higher unless they are found to fall within the highest priority categories laid down in the paragraph 2 above.

(B) Cases having Domino Effect

Cases in which prosecution or conviction of an owner may have an immediate influence on the other owners to remove their similar UBW in the vicinity. An example is the prosecution of the owner of an upper UBW which is structurally connected to a lower UBW. After being convicted and fined for non-compliance with the statutory order, the owner will likely remove the upper UBW after which the owner of the lower UBW can carry out the required removal works.

(C) Long Outstanding Cases

Long outstanding statutory orders which have been expired for more than 10 years. However, if the statutory order is issued to the co-owners or owners' corporation (OC) for building repairs and removal of UBW in connection with the common parts of a building,

prosecution may not be instigated as they may have reasonable excuses. Reference can be made to Building Department Instruction 5.8 on “Prosecution Policy for Prompt and Rigorous Action”.

(D) Cases under Minor Works Control System (MWCS)

With the implementation of MWCS on 31 December 2010, statutory orders may be issued under section 24AA of the BO for demolition or alteration of minor works commenced under the simplified requirements but have been carried out in contravention of any provisions of the BO, any approved or draft plans prepared under the Town Planning Ordinance (TPO) or any relevant master layout plan approved by the Town Planning Board under section 4A(2) of the TPO. Higher priority given to prosecution against the non-complied orders under section 24AA of the BO would be conducive to conveying positive message to the public about BD’s resolution in the implementation of the MWCS.

Concluding Remark

4. The above have set out the guidelines for instituting prioritized prosecution against non-compliant statutory orders. It should be noted, however, that there may be certain circumstances under which activation of GC action should come independently before or in parallel with prosecution as appropriate. Reference can be made to EBD Manual Part II Section 8 Instruction No. 8 on “Guidelines for carrying out of Defaulted Works against Non-complied Statutory Orders”. In case of doubts, advice from the respective Section Chiefs should be obtained.

5. This Instruction should be read in conjunction with EBD Manual Part II Section 8 Instruction No. 3 on “Prosecution under the Buildings Ordinance in relation to Unauthorized Building Works”.

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Prosecution Policy for Prompt and Rigorous Action

Purpose

This is a directive for prompt and rigorous prosecution and related action under the Buildings Ordinance and Regulations, the Fire Safety (Commercial Premises) Ordinance and the Fire Safety (Buildings) Ordinance. Guidelines are also provided to facilitate the making of decision to prosecute.

Introduction

2. The Buildings Ordinance and Regulations, the Fire Safety (Commercial Premises) Ordinance and the Fire Safety (Buildings) Ordinance provide for safety requirements, offences and penalties. Prosecution of offenders is an integral part of our enforcement responsibility. The Director of Buildings is concerned that there should be a clear and consistent prosecution policy for the Buildings Department (BD). The objects are to :

- pursue the cause of justice
- serve the public interest
- create an effective deterrent
- enhance respect for the law and for the department as enforcement agent.

This Instruction sets out a fair, reasonable and practical policy for implementation by staff of BD.

General Considerations

3. Generally speaking, any person who commits an offence under the offence provisions of the above Ordinances or Regulations may be prosecuted. Possible offenders are listed at Appendix A for reference. Care should be taken in identifying the person to be prosecuted.

4. For this purpose, a critical examination should be made of the particular provision which appears to have been contravened. The following specific provisions for offences and penalties should be noted :

- sections 40 and 53B of the Buildings Ordinance, Chapter 123
- regulation 13 of the Building (Demolition Works) Regulations
- regulation 23A of the Building (Planning) Regulations
- section 58 of the Building (Minor Works) Regulation
- regulation 12 of the Building (Oil Storage Installations) Regulations
- sections 5, 6, 9, 10, 16, 17, 18 and 21 of the Fire Safety (Commercial Premises) Ordinance, Chapter 502
- sections 5, 6, 9, 10, 17, 18, 19 and 22 of the Fire Safety (Buildings) Ordinance, Chapter 572

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5. The aim is to prosecute wherever and whenever appropriate. As BD resources are not unlimited, there may be a need for considering priorities in prosecution.

Considerations for Priority

6. Priority should be given to the following cases where necessary:

- (a) a person committing the same offence twice or more;
- (b) a person found to be carrying out unauthorized building works, i.e. UBW in progress;
- (c) where UBW, new or old, are excessive in scale and in blatant disregard for the law or for public safety;
- (d) where an order issued under the Buildings Ordinance and/or Building (Planning) Regulations, a direction/order issued under the Fire Safety (Commercial Premises) Ordinance or a direction/order issued under the Fire Safety (Buildings) Ordinance is not complied with (various types of order/direction are listed at Appendix B for reference);
- (e) where building works carried out deviate materially from plans approved by the Building Authority; and
- (f) where building works have been or are being carried out in such manner that it causes or is likely to cause injury to any person or damage to any property.

7. These considerations for priority should be taken on the following understanding :

- The circumstances are not listed in any order of importance and all cases falling within the circumstances described should be acted on as and when they come to attention;
- The Building Authority's power or duty to prosecute is not limited to cases falling within these circumstances and all cases should be judged on their own merits; and
- Prosecution will proceed in parallel with enforcement of an order or other provisions of the Buildings Ordinance (e.g. remedial works executed in owner's default).

Examination of a Case

8. In considering a case for prosecution, reference could be made to "*The Statement of Prosecution Policy and Practice*" published by the Department of Justice (D of J) in 2009 which is available in its website: www.doj.gov.hk/eng/public/pubsoppaptoc.htm. In general, the first question to address is whether there is **sufficient evidence** to prove the ingredients of an offence. The second question is whether the public interest requires a prosecution to be pursued.

Prospect of Conviction

9. A prosecution should not be started or continued unless it is satisfied that there is admissible, substantial and reliable evidence that an offence known to the law has been committed by an identifiable person. The Secretary for Justice does not support the proposition that a bare prima facie case is enough to justify a decision to prosecute. The proper test is whether there is a reasonable prospect of a conviction. This decision requires an evaluation of how strong the case is likely to be when presented at trial.

10. A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the court, as well as an evaluation of the admissibility of evidence implicating the accused. Any defences which are plainly open to or have been indicated by the accused, and any other factors which could affect the prospect of a conviction should also be considered.

The Public Interest Criteria

11. Once it is satisfied that the evidence itself can justify proceedings in the sense that there is a reasonable prospect of obtaining a conviction, we must then consider whether the public interest requires a prosecution. Regard should be made to the availability or efficacy of any alternatives to prosecution.

12. The factors which can properly lead to a decision not to prosecute will vary from case to case, but, broadly speaking, the graver the offence, the less likelihood will there be that the public interest will allow of a disposal less than prosecution. Where, however, an offence is not so serious as plainly to require prosecution, we should consider whether the public interest requires a prosecution. If the case falls within any of the following categories, this may be an indication that proceedings are not required, subject to the particular circumstances of the case.

- **Old age and infirmity**

The older or more infirm the offender, the more reluctant we may be to prosecute unless there is a real possibility of repetition or the offence is of such gravity that a prosecution is unavoidable. It will also be necessary to consider whether the accused is likely to be fit enough to stand his or her trial.

- **Mental illness**

Where there is evidence to establish that an accused was suffering from a mental disorder, we may conclude that prosecution will not be appropriate in the circumstances unless it is overridden by the wider public interest, including in particular the gravity of the offence.

- **Remorse**

Where a suspect has admitted the offence and shown genuine remorse and a willingness to make amends, we should carefully evaluate this.

- **Mitigation**

Where there are mitigation factors present, we should consider whether these are factors which should be taken into account by sentencing court in the event of a conviction rather than factors which should lead to a decision not to prosecute.

- **Mistake**

If the offence was committed as a result of a genuine mistake or misunderstanding, a prosecution may not be required.

It must be emphasized again that the above categories are not exhaustive and a decision whether to prosecute will eventually depend on what the interests of justice requires.

Reasonable Excuse

13. In a number of provisions of the Buildings Ordinance, "reasonable excuse" provides a defence. The possibility that a defendant may advance such an argument does not constitute a reason for not prosecuting. Usually, the defendant has an evidential burden to prove to the Courts that they have a reasonable excuse for the offending act. It is then for the Courts to determine whether the defence has been made out. Where certain reasonable excuses have been accepted by the Courts and/or the D of J, we have to pay regard to them in prosecution cases with similar circumstances. Some typical situations are listed at Appendix C for reference.

Multiple Ownership Cases

14. It is acknowledged that there are practical difficulties in prosecution in cases of multiple ownership. Where these cases arise from orders served by the Building Authority, BD staff should offer practical assistance and advice to building owners as to how they may best cooperate to meet the requirements of the orders or otherwise comply with the Buildings Ordinance. Evidence of assistance given by BD staff in advising how compliance with the Buildings Ordinance may be achieved may assist in negating any defence of reasonable excuse.

15. That a large number of summonses will have to be issued in cases involving multiple ownership is not a reason for not prosecuting at all. There may well be practical difficulties to BD staff and to the Courts in cases where a large amount of summonses are heard together. The point to note is that each summons against an individual owner in a multiple ownership situation is also a separate case in its own right. Dealing with these separate cases in batches of a manageable number, say 20 at a time, may be practical and permissible under each court session.

Warning or advisory letters

16. A warning or advisory letter should not, and cannot, be treated as an alternative to or substitution for prosecution.

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17. However, if the intention is purely to encourage compliance with the Buildings Ordinance or technical standards or to request improvement in performance, staff may use "advisory letters". These should not contain any suggestion or threat of possible prosecution but highlight questions of law/fact and risk/responsibility for safety.

Related Instructions

18. Information on collection of evidence for investigation and/or prosecution is given in Instruction 5.9 of this Handbook.

19. Procedures for implementation of this prosecution policy by staff of different Divisions are determined by the relevant Assistant Director and contained in Manuals of respective Division.

Review

20. All divisions should keep under review the implementation of the prosecution policy with a view to improving effectiveness and as appropriate revising the policy.

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