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**Paper for the House Committee on
8 January 1999**

**First report of the Subcommittee on
regulations relating to occupational safety and health**

Purpose

This paper reports on the deliberations of the Subcommittee on regulations relating to occupational safety and health on the Factories and Industrial Undertaking (Confined Spaces) Regulation.

Background

The Factories and Industrial Undertakings (Confined Spaces) Regulation

2. The Secretary for Education and Manpower gave notice to move a motion on 30 September 1998 to approve the Factories and Industrial Undertakings (Confined Spaces) Regulation (new Regulation) made by the Commissioner for Labour under section 7 of the Factories and Industrial Undertakings Ordinance (FIUO) on 15 September 1998.

3. The new Regulation will replace the existing Factories and Industrial Undertakings (Confined Spaces) Regulations (existing Regulations). It seeks to overcome enforcement difficulties under the existing Regulations and to provide better protection for workers operating in confined spaces. The Administration proposes a grace period of 12 months upon the enactment of the new Regulation before it takes effect.

The Construction Sites (Safety) (Amendment) Regulation 1998

4. The Secretary for Education and Manpower gave notice on 22 September 1998 to move a motion on 14 October 1998 to approve the Construction Sites (Safety) (Amendment) Regulation 1998 (Amendment Regulation) made by the Commissioner for Labour on 22 September 1998.

5. At the request of the House Committee, the Administration had withdrawn the

notices for the two proposed motions in order to allow more time to study the new Regulation and the Amendment Regulation.

The Subcommittee

6. At the House Committee meeting on 18 September 1998, members decided to form a subcommittee to study the proposed motion on the new Regulation. At the House Committee meeting on 25 September 1998, members decided that the Subcommittee should also be responsible for studying the proposed motion on Amendment Regulation and other regulations relating to occupational safety and health that would be introduced during the 1998-99 legislative session. A membership list of the Subcommittee is in **Appendix I**.

7. Under the chairmanship of Hon Andrew CHENG, the Subcommittee has held seven meetings with the Administration up to 4 January 1999. The Subcommittee has concluded its deliberations on the new Regulation on 4 January 1999. It has considered written submissions on the new Regulation from the Hong Kong Workers' Health Centre and the Hong Kong Society of Occupational and Environmental Medicine and the Hong Kong E&M Contractors' Association.

8. The Subcommittee will continue with its scrutiny of the Amendment Regulation.

Deliberations of the Subcommittee on the Factories and Industrial Undertakings (Confined Spaces) Regulation

9. The Subcommittee has identified a number of issues and concerns on the new Regulation and its main deliberations are summarised below.

Exemption of the Government from the new Regulation

10. Noting that the new Regulation would not bind the Government, members have questioned the rationale for the exemption and whether public projects would be subject to the new Regulation.

11. The Administration has explained that the new Regulation is a piece of subsidiary legislation made under FIUO. As FIUO does not apply to the Government, a regulation made thereunder will similarly not apply to the Government as it cannot go beyond the scope of the principal ordinance. Though not bound by FIUO, the Government has put in place a set of internal guidelines which are in line with the requirements stipulated in FIUO. Under the guidelines, Government workplaces and civil servants are required to comply with all provisions of FIUO including the new Regulation, and are subject to inspection by the Labour Department for compliance with the safety measures. Any breach of FIUO or failure to comply with the new Regulation by a civil servant would be subject to disciplinary actions. When the public works projects are contracted out to private contractors, the contractors are

regulated by FIUO.

12. Despite the Administration's explanations, members remain of the view that the new Regulation should bind the Government.

Incorporation of the new Regulation under the Occupational Safety and Health Ordinance (OSHO)

13. As the new Regulation only applies to the industrial undertakings, members has requested the Administration to incorporate the new Regulation into OSHO.

14. The Administration has explained that it is its long term objective to incorporate all occupational safety and health regulations, including those made under FIUO, into OSHO. By grouping all regulations under one single ordinance, this would facilitate enforcement. The Administration would consider making new regulations under OSHO with consideration given to the applicability of the regulations concerned. Regulations which are only applicable to industrial undertakings would more appropriately be made under FIUO while that Ordinance is still in force. The Administration would adopt flexibility in handling the matter. The Administration has further explained that by the time OSHO was enacted in 1997, drafting work on the new Regulation was already at an advanced stage. In order not to delay its introduction, the Administration has decided not to incorporate the new Regulation under OSHO.

15. The Administration has undertaken to keep the Panel on Manpower informed of the time table to incorporate the regulations made under FIUO into OSHO in due course.

Right of employees to refuse to perform dangerous works

16. Members consider that the right of employees to refuse to perform dangerous works should be provided under the new Regulation. The Administration has responded that a proprietor or contractor should not ask a worker to carry out work in a confined space without obtaining a risk assessment report or taking appropriate safety precautions. The safety of workers are safeguarded under the new Regulation. A worker who considers that his personal safety is endangered may refuse to perform the dangerous work if he meets the conditions stipulated in section 10 of the Employment Ordinance (EO), i.e. he can terminate the contract without notice.

17. Members have pointed out that section 10 of the EO is inadequate to protect workers in this regard since most of the workers concerned may not want to terminate their contracts of employment but merely want to refuse to perform a particular type of dangerous work.

18. At the request of members, the Administration has provided information on provisions in overseas legislation regarding workers' right to refuse work on the ground of hazard to their safety and health. According to the Administration, such provisions are not found in Hong Kong's neighbouring countries. While some

provinces in Canada and Australia have such provisions, there exists a mechanism for adjudication by a third party on site to resolve issues relating to work hazards. Members request the Administration to incorporate similar provisions and mechanism for dealing with work hazard issues in occupational safety and health related regulations and OSHO.

19. The Administration has advised that the Safety Management Regulation (SMR) to be made in early 1999 will provide for a safety committee and a legal framework for other elements of a safety management system. A safety committee will comprise representatives of workers and the management. The Administration considers that this is the important first step towards setting up the necessary structure to resolve issues relating to work hazards. As the drafting of SMR is nearly completed, the Administration, upon members' request, has promised to add to the code of practice for SMR a provision on the right of workers to refuse work on the ground of hazard to safety or health and a mechanism for dealing with issues relating to work hazards. The relevant code of practice would be submitted to the LegCo.

Medical examinations for workers operating in confined spaces

20. Members express concern whether certified workers would be required to attend periodic medical examinations so as to ensure that they are physically fit for working in confined spaces.

21. The Administration has advised that the physique requirement of a certified worker would be almost the same, regardless whether or not he is required to work in a confined space, provided that the worker is performing the same type of job, and had complied with the safety precautions before work begins and when work is being undertaken as recommended by a competent person and had used personal protective equipment properly. The mandatory training courses for the confined space work would alert them to any danger, including any symptoms that they are physically unfit to work. The Administration would soon introduce a new regulation under FIUO requiring workers engaged in certain hazardous trades to receive pre-employment medical examinations and periodic post-employment medical examinations.

Definition of "confined space" under clause 2

22. The new Regulation aims to define more clearly what constitutes a confined space. Members have pointed out that the proposed definition of confined space might give rise to ambiguity in enforcing the new Regulation as there is no reference to size or measurements of the workplaces as referred to in paragraph (a) and that the term "risk" in paragraph (b)(ii) is unclear as there is no reference to danger or risk to life or health of workers.

23. Having regard to members' concerns, the Administration proposes to adopt a new definition for confined space which is modelled on the definition in UK's Confined Spaces Regulations 1997, as follows -

"confined space" means any place in which, by virtue of its enclosed nature,

there arises a reasonably foreseeable specified risk, and without limiting the generality of the foregoing, includes any chamber, tank, vat, pit, well, sewer, tunnel, pipe, flue, boiler, pressure receiver, hatch, caisson, shaft or silo in which such risk arises;

The Administration also proposes a new definition for “specified risk” under clause 2.

24. Members accept the Administration’s proposed definitions of “confined space” and “specified risk”.

Application (clause 3)

25. In response to members’ concerns, the Administration has explained that the intention of clause 3(b) is to extend the ambit of the new Regulation to cover work beyond the confined space. This is necessary because many precautionary measures to ensure the safety of working inside a confined space have to be performed outside the confined space. However, this sub-clause applies to certain work only. The work must be required by the new Regulation; it must be in the immediate vicinity of the confined space and it must be associated with the work occurring within the confined space. Therefore, most of the work outside the confined space should not be affected.

Monitoring risk during work (clause 5)

26. As regards continuous monitoring of the working environment within a confined space by equipment, the Administration has advised that the new Regulation already cater for workers’ occupational safety and health. Given proper ventilation in the confined space, there would not be dangerous substances and/or their residues which would jeopardize the safety and health of the workers when they entered or worked in the confined spaces. The relevant risk assessment reports would include recommendations for the workers to wear breathing apparatus as appropriate. Moreover, a fresh assessment would be required whenever there had been a significant change in the condition of a confined space. The Administration, therefore, does not consider it necessary to specify in the new Regulation continuous monitoring of the working environment within the confined spaces by equipment.

27. Members ask what constitutes a significant change in the conditions of a confined space. The Administration has responded that the significant change in the condition of a confined space or in the work activities refers to change in situations or circumstances that may result in a danger or risk to the safety and health of workers working inside a confined space, e.g. a sudden in-rush of substances or dangerous fumes generated during sewer and ditches projects.

28. Members consider that continuous risk assessments should be carried out where a competent person, in his initial assessment on the risk of a confined space, is of the view that there is a likely change in the conditions of the working environment which may result in a risk to the safety and health of workers working therein.

29. On further discussions and having regard to members' concerns, the Administration has agreed to add a provision to the effect that where a competent person, in assessing the risks in a confined space, is of the opinion that there is a substantial likelihood of a change in the condition leading to an increased risk during the course of the work in such confined space, he shall recommend the use of such monitoring equipment as he considers appropriate.

30. On the question of the size of manholes, the Administration has clarified that there is no restriction on the size of manholes under the new Regulation. The measurement of manholes would be dealt with in the relevant code of practice to be made if necessary. Moreover, should there be a need, the recommendation on the size of manholes would be included in the risk assessment report.

Safety precautions when work is being undertaken (clause 8)

31. On clause 8(b), members consider that the person who is stationed outside a confined space to maintain communication with the workers inside should also be a “certified worker”.

32. The Administration has explained that the person referred to in clause 8(b) should maintain communication with the workers in a confined space, administer emergency procedures, e.g. first aid, and be capable of summoning assistance rapidly in emergencies. His role is very different from that of a worker entering a confined space to work. The training he should receive is different from a worker working inside a confined space. The Administration does not consider that such person should also be a “certified worker” as this will not contribute to the safety and health aspects of the work, but may limit the choice of the proprietor in employing such persons and increase the cost of work.

Emergency procedures (clause 10)

33. On clause 10(3), members question whether having only one worker who is knowledgeable in using the safety equipment referred to in subclause (2) is adequate. They consider that the minimum of persons required for the purpose should be spelt out in the new Regulation.

34. The Administration has responded that the factors to be considered as regards the number of persons required include the nature of the work and the hazards inherent in the confined space in relation to the work and to the work methods proposed. These are technical details and would be dealt with in the relevant code of practice. The Administration is of the view that it is not appropriate to provide a set of requirements in the new Regulation as the above factors would have to be assessed by a competent person.

Offences (clause 14)

35. Members query why a proprietor or contractor is not provided with an opportunity to show “reasonable excuse” or “reasonable cause” under clause 14(1) before imposing on him a penalty for contravening the new Regulation.

36. The Administration has explained that a strict liability approach has been adopted for the offences in the existing FIU (Confined Spaces) Regulations. A similar approach should be adopted in the new Regulation. Work safety is an issue of social concern and warrants creation of strict liability for breaching the requirements intended to safeguard such safety. This approach is considered effective in promoting the object of the law, which is the provision of a safe working environment and prevention of work accident, as it will encourage greater vigilance to prevent the commission of the prohibited act. As a matter of legal policy, this is the approach adopted in most provisions dealing with occupational safety in Hong Kong.

37. Members suggest that for offences which are of a more serious nature and are

punishable by imprisonment, a proprietor or contractor should be provided with an opportunity to show “reasonable excuse” or “reasonable cause” before imposing on him the penalty. Where offences are of a less serious nature, a fine would be imposed and a strict liability approach would be adopted. At members’ request, the Administration has agreed to amend clause 14(1) accordingly.

38. Under clause 14(2)(b), a competition person who without reasonable excuse, fails in his assessment report to deal with all matters specified in clause 5(2) commits an offence and is liable on conviction to a fine of \$200,000 and to imprisonment for 12 months. Clause 14(2)(c) provides that a competent person who makes a risk assessment report which is to his knowledge false as to a material particular, commits an offence and is liable on conviction to a fine \$200,000 and to imprisonment for 12 months. Members considers that the penalty for the offences referred to in subclauses 2(b) and (c) should be set at different levels, given that the former offence is of a less serious nature. The Administration has agreed to remove the imprisonment term from the penalty in respect of clause 14(2)(b).

Recommendations

39. The Administration has agreed to incorporate the agreed amendments in the Factories and Industrial Undertaking (Confined Spaces) Regulation. A copy of the agreed amendments is in **Appendix II**. The Subcommittee recommends that the motion to be moved by the Secretary for Education and Manpower on the said Regulation on 20 January 1999 be supported.

Advice sought

40. Members are invited to support the recommendation of the Subcommittee in paragraph 39 above.

Legislative Council Secretariat

6 January 1999

有關職業安全及健康的規例
小組委員會

Subcommittee on
regulations relating to
occupational safety and health

Membership List

鄭家富議員(主席)	Hon Andrew CHENG Kar-foo (Chairman)
何世柱議員	Hon HO Sai-chu, JP
何秀蘭議員	Hon Cyd HO Sau-lan
何敏嘉議員	Hon Michael HO Mun-ka
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夏佳理議員	Hon Ronald ARCULLI, JP
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譚耀宗議員	Hon TAM Yiu-chung, JP
鄧兆棠議員	Dr Hon TANG Siu-tong, JP

合共 : 11 位議員
Total : 11 Members

日期 : 1999 年 1 月 5 日
Date : 5 January 1999

**FACTORIES AND INDUSTRIAL UNDERTAKINGS ORDINANCE
AND
INTERPRETATION AND GENERAL CLAUSES ORDINANCE**

RESOLUTION

(Under section 7 of the Factories and Industrial
Undertakings Ordinance (Cap. 59) and section 35
of the Interpretation and General
Clauses Ordinance (Cap. 1))

**FACTORIES AND INDUSTRIAL UNDERTAKINGS
(CONFINED SPACES) REGULATION**

RESOLVED that the Factories and Industrial Undertakings (Confined Spaces) Regulation, made by the Commissioner for Labour on 15 September 1998, be approved, subject to the following amendments -

(a) in section 2 -

- (i) by deleting the definition of "confined space" and substituting -
"confined space" (密閉空間) means any place in
which, by virtue of its enclosed nature, there
arises a reasonably foreseeable specified risk,
and

without limiting the generality of the foregoing, includes any chamber, tank, vat, pit, well, sewer, tunnel, pipe, flue, boiler, pressure receiver, hatch, caisson, shaft or silo in which such risk arises;"

(ii) by adding -

""specified risk" (指明危險) means a risk of -

- (a) serious injury to any person at work arising from a fire or explosion;
- (b) the loss of consciousness of any person at work arising from an increase in body temperature;
- (c) the loss of consciousness or asphyxiation of any person at work arising

- from gas, fume, vapour or the lack of oxygen;
 - (d) the drowning of any person at work arising from an increase in the level of liquid; or
 - (e) the asphyxiation of any person at work arising from a free flowing solid or the inability to reach a respirable environment due to entrapment by a free flowing solid.";
 - (b) in section 4(2), by deleting "competent persons" and substituting "persons certifying them to be competent to prepare risk assessment reports";
 - (c) in section 5 -
 - (i) in subsection (2)(a)(iii) -
 - (A) in sub-subparagraph (B), by deleting "and" at the end;
 - (B) in sub-subparagraph (C), by deleting "mud or water" and substituting "free flowing solid or liquid";

- (C) by adding -
 - "(D) a fire or explosion in the confined space; and
 - (E) loss of consciousness of a certified worker arising from an increase in body temperature;"
- (ii) by renumbering subsections (4) and (5) as subsections (5) and (6) respectively;
- (iii) by adding -
 - "(4) For the purposes of subsection (2), where a competent person, in evaluating the extent of the risks in a confined space, is of the opinion that there is a substantial likelihood of a change in the environment leading to an increased risk from one of the hazards referred to in subsection (2)(a) during the course of the work in such confined space, he shall recommend the use of such monitoring equipment as he considers appropriate in the

circumstances and shall specify the manner of its use.";

- (d) in section 7(f)(ii), by deleting "mud or water" and substituting "free flowing solid or liquid";
- (e) in section 14 -
 - (i) by deleting subsection (1) and substituting -
 - "(1) A proprietor or contractor who -
 - (a) contravenes section 7, 8, 9, 10(2) or (3) or 11(1) or (2) commits an offence and is liable, on conviction -
 - (i) where the offence was committed without reasonable excuse, to a fine at level 6 and to imprisonment

- for 6 months; and
 - (ii) in any other case, to a fine at level 6;
 - (b) contravenes section 5(1) or (5), 6(1) or 10(1) commits an offence and is liable, on conviction -
 - (i) where the offence was committed without reasonable excuse, to a fine of \$200,000 and to imprisonment for 12 months; and

- (ii) in any other case,
to a fine of
\$200,000;
 - (c) contravenes section 6(2) commits
an offence and is liable, on
conviction, to a fine at level 5.";
 - (ii) in subsection (2) -
 - (A) in paragraph (a), by deleting "5(4)" and
substituting "5(6)";
 - (B) by deleting paragraph (ii) and substituting -
 - "(ii) paragraph (b), to a fine of \$200,000;
 - (iii) paragraph (c), to a fine of \$200,000 and
to imprisonment for 12 months."