

**For discussion
on 20 December 1999**

**Legislative Council
Panel on Environmental Affairs**

Proposed Amendments to the Noise Control Ordinance, Cap. 400

INTRODUCTION

Arising from the discussion of the proposed amendments to the Noise Control Ordinance (NCO) at the meetings of the Panel on Environmental Affairs held on 5 and 29 March 1999 to held top management of body corporate accountable for offences under the NCO, this paper provides Members with the following additional information:

- (a) responsible persons under the proposal;
- (b) draft Code of Practice;
- (c) similar provisions in other legislation;
- (d) difficulties encountered in prosecuting the management;
- (e) operation of the provision under a sub-contracting system;
- (f) seriousness of the problem; and
- (g) further consultation with affected parties.

BACKGROUND

2. Under the existing provisions of the NCO, the Environmental Protection Department (EPD) may initiate proceedings against any person who

commits an offence. But in many instances, when the offence is committed by a body corporate, only the body corporate can be held liable. This is because unlike other environmental legislation the NCO doesn't have an explicit provision for prosecuting the top management of a body corporate concerned for offences committed by the body corporate under the NCO.

3. To deter noise offences particularly by body corporate, the Administration has proposed that the NCO be amended to specify explicitly the responsibility of the management of the body corporate under the Ordinance. The proposed amendments will state explicitly that when the offender is a body corporate, the management of that body corporate commits a like offence. In response to Members' comments during the earlier discussions, this paper sets out additional information to help Members to better understand the proposed amendments.

PERSONS TO BE HELD RESPONSIBLE

4. The person to be held responsible will be stipulated clearly in the proposed amendments. It is proposed that any person who at the time of the offence was a director in the management of the body corporate, a director who has delegated his authority for the management of the body corporate, or an officer in the management of the body corporate and acting under the immediate authority of a director of the body corporate shall be guilty of an offence which has been committed by a body corporate. In cases where the directors are holding honorary or non-executive posts (i.e. not concerned in the management of the body corporate), they will not be held responsible. This definition is drawn up after thoroughly considering the views gathered during the consultation and having regard to similar definitions in other legislation in Hong Kong.

DUE DILIGENCE DEFENCE AND DRAFT CODE OF PRACTICE

5. For offences under the NCO (except that related to failure to obtain a construction permit), a statutory due diligence defence is proposed to be made available under the proposed legislative amendment. It is a defence if the management can show that a proper system has been established and has

been in effective operation to prevent the offence. For an offence relating to the carrying out of construction work without a construction noise permit, there would be no explicit statutory defence provision for the management. This is because the permit system for carrying out construction works during restricted hours has been in operation for nearly 10 years, and there should not be any excuse for the management of a body corporate to ignore this basic requirement.

6. The Noise Control Authority will issue Codes of Practice to provide practical guidance on good management practices to prevent a violation of the NCO. Compliance with the Code of Practice can constitute a ground for due diligence. A draft Code of Practice is at Annex A. It intends to help the management to prevent, in a proactive manner, the operations and activities of a body corporate from violating the NCO and is in line with guidelines and practices adopted in many developed countries.

SIMILAR PROVISIONS IN OTHER LEGISLATION

7. Other legislation having similar provisions to hold the management of a body corporate liable for offence committed by the body corporate are listed in Annex B. Examples of the management described in these provisions as being liable are listed in Annex C.

8. Authorities under these legislation generally considered that such provisions have deterrent effect on the management of body corporate. Two examples where the management of body corporate have been prosecuted for an offence committed by the body corporate are listed in Annex D. Directors of the body corporate were prosecuted in these two cases.

DIFFICULTIES ENCOUNTERED IN PROSECUTING THE MANAGEMENT

9. If the provisions are not strict liability, the difficulties in prosecuting the management of a body corporate relate to the collection of evidence to establish responsibility of the management in relation to an offence committed by the body corporate. Very often, it is extremely difficult if not impossible to collect the necessary evidence to establish the responsibility of

directors of a body corporate regarding an offence committed by the body corporate. There is therefore a lack of deterrence under the existing provisions to cause the management of body corporate to adopt, on a proactive basis, good management practices to prevent a violation of the NCO.

OPERATION OF THE PROVISION UNDER A SUB-CONTRACTING SYSTEM

10. The current proposal does not change the existing legislative control on the main contractor and the subcontractors of construction works. Under the existing NCO provisions, the Environmental Protection Department (EPD) may institute proceedings against any person who commits an offence. EPD will initiate action against the main contractor and/or the subcontractors depending on the evidence collected, when there is violation of the NCO. The proposed legislative amendment is to explicitly specify the responsibility of the management of a body corporate for an offence committed by the body corporate.

SERIOUSNESS OF THE PROBLEM

11. Noise complaints have become very serious over the past few years. The number of noise complaints lodged by the public and other members of the community including members of Provisional District Boards and Legislative Council amounted to more than 40% of the total number of pollution complaints. In 1996, 1997 and 1998, there were about 2,000, 1,900 and 2,200 complaints respectively against noise from construction activities, and 2,100, 2,400 and 2,400 respectively against noise from commercial/industrial activities. Over the same period, the number of convictions on construction noise offences were 117, 364 and 299 respectively while the number of convictions on other noise offences were 135, 81 and 111 respectively.

12. Violation of the NCO by body corporate are particularly serious. Among the 410 conviction cases in 1998, close to 80% (323) of the conviction cases were by body corporates. The situation is highly unsatisfactory and there appears to be a need to strengthen existing provisions of NCO to prevent noise offences in particular by body corporates.

FURTHER CONSULTATION WITH AFFECTED PARTIES

13. Consultation with parties affected by the noise pollution problem were made during the past few months. Representatives of labour unions of trades involved in noisy activities such as ship building, steel and construction consulted generally welcome the idea of making the management responsible. They considered the proposal would bring improvement to the noise environment.

14. Briefing sessions were held to obtain views from members of the Provisional District Boards (PDBs). Some PDBs also invited the Administration to attend their meetings to discuss the issue. A summary of the views gathered from PDB members is in Annex E. In general, they supported the proposal and suggested that persons to be held responsible be clarified.

15. The Administration also consulted the Advisory Council on the Environment and the Council supported the proposed legislative amendment. Environmental groups were advised of the proposed legislative amendment and they also supported the proposal and urged the Administration to proceed with the amendment as soon as possible.

ADVICE SOUGHT

16. Members are requested to give their advice and comments on the proposal to amend the Noise Control Ordinance, Cap. 400, as described above. Subject to Members' comments and approval from the Executive Council, the Administration intends to introduce the proposed legislation to the Legislative Council in the first quarter of 2000.

**Planning, Environment and Lands Bureau
December 1999**

DRAFT

**Code of Practice
on
Good Management Practice
to
Prevent Violation
of the
Noise Control Ordinance
(Chapter 400)**

PREFACE

[Section XX] of the Noise Control Ordinance, Chapter 400 specifies explicitly the liability of certain persons in a body corporate for an offence committed by the body corporate. A statutory defence is available to such persons who have established a proper system to prevent violations of the ordinance.

This Code of Practice is prepared to provide practical guidance on good management practices to ensure operations and activities of a body corporate comply with provisions of the Noise Control Ordinance. It is issued by the Noise Control Authority under [section YY] of the Noise Control Ordinance.

1. Introduction

1.1 This Code of Practice (COP) provides guidance on good management practices to prevent infringement of the Noise Control Ordinance, Chapter 400 (NCO). It lists out key principles that the management of companies should consider and adopt to ensure the integrity and proper operation of their environmental management systems. It also gives examples of proper measures and practices that industries can apply under their management systems.

2. Background

2.1 [Section XX] of the NCO provides for the liability of certain persons in a body corporate. It stipulates that:

[Details of the proposed legislative amendments to be approved by the Executive Council and enacted by the Legislative Council]

2.2 Notwithstanding differences in nature and the size of various companies and the differences in the environmental management systems adopted, the following are the key principles of good practice to ensure compliance with the NCO.

3. Key Principles of Good Management

Persons described in [Section XX] of the NCO (collectively called the management) should apply the following key principles in managing the operation or activity of the body corporate:

- 3.1 Understand and discharge their responsibilities to ensure full compliance with the relevant provisions of the NCO.
- 3.2 Understand how and to what extent the operation or activity of the body corporate may directly or indirectly emit noise to the surrounding areas.
- 3.3 Understand the legal requirements and noise limits described in the NCO and any

relevant technical memorandum issued under the NCO.

- 3.4 Establish an environmental management system and ensure its effective operation to prevent any infringement of the NCO, with effective action plans to prevent or promptly rectify any incident of non-compliance.
- 3.5 Define and assign clearly the responsibilities, duties and authorities of the line management and individuals concerned such that effective and prompt actions can be taken under the environmental management system to achieve the required environmental performance and ensure regulatory compliance.
- 3.6 Ensure that the line management and individuals concerned are fully aware of their responsibilities, duties and authorities and establish effective means of communication on environmental issues and information such that any environmental problem can be promptly addressed and resolved.
- 3.7 Require effective and prompt actions to be taken to avoid the commitment of any offence under the NCO or to rectify any non-compliance immediately.
- 3.8 Require prompt reporting, to the management of any incident of non-compliance with the NCO, any sign of potential non-compliance, any preventive measures to avoid any offence under the NCO, any corrective measures taken to rectify the non-compliance.
- 3.9 Intervene immediately to correct any non-compliance if the non-compliance is not forthwith satisfactorily rectified or effectively prevented from recurrence.
- 3.10 Review the effectiveness of the environmental management system regularly and correct any deficiencies identified to ensure its effective operation.

4. Compliance-based Management Practice

4.1 Defining an Environmental Noise Policy for the company

The Environmental Noise Policy should include, among others, a firm commitment to comply with the NCO and its subsidiary regulations, and to monitor the noise situations and prevent any contravention of NCO. Such a policy should be documented, maintained and publicized within the company so that every staff shall be aware of and are instructed to follow.

[Example

A construction firm shall commit not to violate legislative restrictions on the time period for conducting construction activities and a food catering company shall commit not to exceed statutory noise limits from their operations. Properly documented resolutions at directors' meeting are considered appropriate commitment at the management level while circulars being re-circulated periodically to all staff including those at the construction sites are considered suitable means to disseminate the environmental noise policy. Such policy should be posted at all site offices and at places noticeable to all site staff.]

4.2. **Knowing how and to what extent the operation of the company may emit noise to the surrounding**

The management should arrange audits to be carried out at least once every 6 months to identify any noisy equipment or any noisy operation of the company.

[Example

A branch manager of a food catering chain store should be directed to make a thorough examination of his store to identify the equipment or specific activity which emits noise. A manager of a construction site should be directed to identify the equipment or activities which are restricted or prohibited for use under the NCO and its subsidiary regulations.]

4.3 **Knowing the statutory requirements and noise limits**

The management should ensure that the line management and individuals involved in the environmental management system are fully aware of the current statutory restrictions and requirements on noise.

[Example

The site agent of a construction site would need to know the legislative restrictions and requirements regarding activities at a construction site for him to determine what and when construction activities would require a valid Construction Noise Permit. The manager of a food catering store would need to know the statutory limits on noise from their building services equipment for him to plan and arrange maintenance and noise abatement of the equipment as appropriate.]

4.4 **Establishing pollution prevention system specific to his company's operation**

The management should establish pollution prevention procedures to avoid any violation of the NCO. The procedures should be specific to the company's operation. All relevant staff should be instructed that pollution prevention procedures are required to ensure compliance with the NCO.

4.5 **Identifying possible infringement of the statutory requirements**

The management should identify areas in the company's operations or activities that may or are likely to violate the statutory requirements or noise limits. This may be done through collating inputs from staff members and the management should personally check the result of audits carried out by the line management.

[Example

Every construction site staff should be made aware that any construction work carried out during the restricted hours without a valid Construction Noise Permit or failure to comply with the permit conditions will constitute an offence. For a food catering company, the manager should be made aware that non-compliance of any Noise Abatement Notice issued by the Noise Control Authority (i.e. failure to rectify the noise exceedence within a specified time period) will constitute an offence.]

4.6 **Preventing possible infringement of the statutory requirements**

The management should ensure that action plans are put into place to prevent any

possible infringement of the statutory requirements, to trigger immediate remedial actions on any incident of non-compliance, and to forbid recurrence of similar incident. The action plans should include pro-active preventive measures to be observed by all levels of staff. The action plans should also include monitoring and auditing by different levels of staff to ensure full regulatory compliance. The management should also take effective steps to check.

[Example

The management of a construction site company should formulate and implement an effective action plan to ensure adequate supervision so that only construction equipment or activities specifically listed in a valid Construction Noise Permit for the site could be carried out during the restricted hours and the permit conditions are strictly adhered to. The management must ensure that the line management, such as managers, engineers and foremen, have properly implemented the action plan. The management of a food catering company should ensure that the line management, such as manager and the operators have put all machines under regular inspection and maintenance and carried out repair works for any abnormal performance of the machines without delay.]

4.7 Identifying and defining the environmental responsibilities

The management should describe, how the environmental management system is implemented and maintained within the overall organisation. The responsibilities, duties and authorities of the specific office holders or individuals concerned in environmental management should be clearly defined and made known to all relevant staff directly, or indirectly involved in managing the potentially noisy operations and activities. This could include, among others, the environmental performance expected of the relevant staff concerned in managing specific operations or those staff with responsibilities for certain environmental programs and regulatory compliance. The management should set up channels of communication both horizontally and vertically and means of receiving report on environmental issues and environmental actions to allow effective prevention or rectification of any noise problem identified. The communication channels should be effective and tailored to the needs of individual circumstances.

[Example

The management of a construction company should identify site staff to take overall responsibilities to ensure there is a valid Construction Noise Permit prior to giving approval of works (including works sub-letted) during the restricted hours. The staff member concerned should be assigned the duties and authorities to stop works which are not in accordance with permit conditions. He should be given the authority to refuse access to the site, step up surveillance and temporary suspension of power (other than for general lighting) during restricted hours to prevent violations. The management of a food catering company should appoint suitable staff to monitor the noise performance of equipment, especially outdoor equipment and arrange prompt maintenance should any abnormal or excessive noise be detected.]

4.8 Demanding prompt reports on non-compliance or on any sign of non-compliance

The management must instruct staff at every level to promptly report any non-

compliance or any sign of possible non-compliance. Regular reports should also be provided on compliance with the environmental management system. The reporting must finally reach the management for their personal attention. The management must ensure corrective measures are taken to rectify the problem without delay. Preventive measures should also be devised and implemented to avoid recurrence of non-compliance. The management should ensure that reports are reviewed for accuracy and reliability.

[Example

This can be done by means of a hotline with recording function or hot-fax directly linked to the management personnel, in addition to conventional or normal reporting via the line management or internal memos.]

4.9 Reviewing the performance of the environmental management system

The management must ensure that there are staff at different levels, responsible for auditing, and that the operation of the environmental management system is effective with regard to the NCO compliance. The management should review the audit reports and ensure that the environmental management system is carefully monitored and reviewed regularly (at least once every 6 months). When the system fails, the management must immediately and personally react to the problem with the system.

[Example

The management should either by themselves or by appointing staff to audit and conduct surprise checks to ensure proper operation of the environmental management system. Any non-compliance should be rectified in accordance with the action plans formulated and prevented from recurring.]

Note : The examples in brackets are for reference only and do not form part of this Code of Practice.

**List of legislation with explicit provisions
for holding the management liable**

(A) Legislation with Strict Liability Provisions

Chapter 60	IMPORT AND EXPORT ORDINANCE
Section 36A	Offences by directors, etc. of corporations
Chapter 137	ANTIBIOTICS ORDINANCE
Section 10	Offences and penalties
Chapter 173	CIVIL AVIATION (BIRTHS, DEATHS AND MISSING PERSONS)
Section 2(2)	Power for the Chief Executive to make regulations for recording and registration of births and deaths, etc
Chapter 211	AERIAL ROPEWAYS (SAFETY) ORDINANCE
Section 27B	Liability for offences by body corporate
Chapter 262	CHIT-FUND BUSINESSES (PROHIBITION) ORDINANCE
Section 9	Liability of directors, managers, etc., under sections 3 and 4
Chapter 295	DANGEROUS GOODS ORDINANCE
Section 16	Liability of directors, etc. where offence committed by company
Chapter 303	RADIATION ORDINANCE
Section 23	Liability of directors, etc., where offence committed by company
Chapter 327	LIFTS AND ESCALATORS (SAFETY) ORDINANCE
Section 31	Liability of directors, etc. where company convicted of offence
Chapter 355	PYRAMID SELLING PROHIBITION ORDINANCE
Section 4	Liability of directors, partners etc.
Chapter 384	DANGEROUS GOODS (CONSIGNMENT BY AIR) (SAFETY) ORDINANCE
Section 5	Liability of directors, etc. where offence committed by company
Chapter 406	ELECTRICITY ORDINANCE
Section 56	Major offences
Chapter 449	AMUSEMENT RIDES (SAFETY) ORDINANCE
Section 36	Liability for offences by body corporate

(B) Legislation with Non Strict Liability Provisions

Chapter 24	SECURITIES AND FUTURES COMMISSION ORDINANCE
Section 57	Liability of directors, etc.
Chapter 32	COMPANIES ORDINANCE
Section 109(4)	General provisions as to annual returns
Chapter 32	COMPANIES ORDINANCE
Section 168N	Offences by body corporate
Chapter 57	EMPLOYMENT ORDINANCE
Section 64B	Liability of directors, partners, etc.
Chapter 59	FACTORIES AND INDUSTRIAL UNDERTAKINGS ORDINANCE
Section 14	Liability of directors, partners, etc.
Chapter 106	TELECOMMUNICATION ORDINANCE
Section 32	Liability of directors, etc., where offence committed by corporation
Chapter 155	BANKING ORDINANCE
Section 123	Offences by directors, managers, trustees, employees and agents
Chapter 221	CRIMINAL PROCEDURE ORDINANCE
Section 101E	Liability of directors, etc.
Chapter 311	AIR POLLUTION CONTROL ORDINANCE
Section 47A	Directors of body corporate liable in certain circumstances
Chapter 333	SECURITIES ORDINANCE
Section 147	Liability of directors, etc.
Chapter 335	PROTECTION OF INVESTORS ORDINANCE
Section 7	Liability of directors, etc.
Chapter 354	WASTE DISPOSAL ORDINANCE
Section 39	Liability of directors, etc.
Chapter 358	WATER POLLUTION CONTROL ORDINANCE
Section 10A	Liability of directors, etc.
Chapter 426	OCCUPATIONAL RETIREMENT SCHEMES ORDINANCE
Section 82	Liability of directors, etc.
Chapter 485	MANDATORY PROVIDENT FUND SCHEMES ORDINANCE
Section 44	Liability of officers, managers and partners

Chapter 493	NON-LOCAL HIGHER AND PROFESSIONAL EDUCATION (REGULATION) ORD.
Section 39	Liability of directors, etc.
Chapter 494	AVIATION SECURITY ORDINANCE
Section 62	Liability of directors, etc.
Chapter 499	ENVIRONMENTAL IMPACT ASSESSMENT ORDINANCE
Section 29	Directors of body corporate liable in certain circumstances
Chapter 509	OCCUPATIONAL SAFETY AND HEALTH ORDINANCE
Section 33	Liability of directors, partners, etc.
Chapter 511	ESTATE AGENTS ORDINANCE
Section 42	Liability of directors, etc

**Examples of provisions holding management liable of
offence committed by a body corporate**

Chapter 32 Section 109(4)	<p>COMPANIES ORDINANCE General provisions as to annual returns</p> <p>If a company fails to comply with this section or section 107, the company and every officer of the company who is in default shall be liable to a fine and, for continued default, to a daily default fine.</p>
Chapter 60 Section 36A	<p>IMPORT AND EXPORT ORDINANCE Offences by directors, etc. of corporations</p> <p>Where an offence under section 36 is committed by a body corporate, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, shall be guilty of the like offence unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence.</p>
Chapter 303 Section 23	<p>RADIATION ORDINANCE Liability of directors, etc., where offence committed by company</p> <p>Where a person by whom an offence under this Ordinance has been committed is a company, every director and every officer concerned in the management of the company shall be guilty of the like offence unless he proves that the act constituting the offence took place without his knowledge or consent.</p>
Chapter 311 Section 47A	<p>AIR POLLUTION CONTROL ORDINANCE Directors of body corporate liable in certain circumstances</p> <p>(1) Where a person convicted of an offence under this Ordinance is a body corporate and it is proved that the offence was committed with the consent or connivance of, or was attributable to any neglect or omission on the part of, a director, manager, secretary or other person concerned in the management of the body corporate, the director, manager, secretary or other person also commits the offence.</p> <p>(2) Where a person convicted of an offence under this Ordinance is a partner in a partnership and it is proved that the offence was committed with the consent or connivance of, or was attributable to any neglect or omission on the part of, any other partner or any person concerned in the management of the partnership, the partner or the person concerned in the management also commits the offence.</p>

**Two typical prosecution cases related to
the management of body corporate**

(a) Customs & Excise Department (C&E) :

Under the Import and Export Ordinance the import and export of textiles products must be under and in accordance with valid licences. A garment manufacturing company was prosecuted for making false declaration that some textiles products were of Hong Kong origin. The textiles products were in fact entirely manufactured by a factory in China as arranged by the company. One of the directors of that garment manufacturing company, who assisted C&E in the investigation admitted that the misrepresentation on the licence applications was made in order to obtain licences for the export, was prosecuted under the section 36A of the Ordinance.

(b) Companies Registry (CR) :

Under the Companies Ordinance if a company fails to comply with section 107, i.e. prepare and file annual returns contained required information, the company and every officer who is in default are liable to prosecution. CR sent reminder letters and warning letters by registered post to a trading company and all their directors for their annual returns. As the required information was still outstanding after a period CR issued summonses to the trading company and all their directors under section 109(4) of the Ordinance.

A Summary of the views gathered from PDB members

(A) Legislation aspects

- Support the amendment and should make the legislation more tight and free from loophole.
- Whether the proposal tallies with the legislative structure in HK in respect of holding the directors liable as a limited company is of limited liability.
- Since there is only a limited number of repeated offences the new requirement should not applied to all companies.
- EPD may consider other means.

(B) Penalty aspects

- Support the amendment and should increase the penalty, e.g. suspension of licence after a certain number of repeated offences for more deterrent effect.
- The present fines or penalty provision may being too light.

(C) Targets to be held liable

- Definition of top management too broad.
- May consider targeting the authorized signatory for the site.
- The top management cannot control every aspects of the company.

(D) Other suggestions

- The top management of Owners' Incorporation should be exempted.
- The new provision should also be applied to other environmental Ordinances.
- The estate management companies should be responsible for any fines imposed and should not pass it to the residents.