

HPLB/BAB Paper/04/04

**Bills Committee on
Buildings (Amendment) Bill 2003**

Fines (Part II)

Purpose

This paper sets out the Administration's response to the views and comments raised by various organizations and Members of the Bills Committee at previous meetings on the level of fines for offences proposed in the Buildings (Amendment) Bill 2003 (the Bill). It also outlines our revised proposals on the level of penalty for the offences concerned.

Background

2. We have proposed in Clause 39 of the Bill to increase the fines for offences under the Buildings Ordinance (BO) concerning unauthorized building works (UBW), substandard building works and construction danger, and to create new offences in connection with minor works. Various organizations and Members of the Bills Committee have expressed views on these proposals and requested the Administration to :

- (a) ascertain the reference to which the level of fines had been made when the provisions relating to fines in the BO were enacted;
- (b) review whether it is appropriate to link the level of fines with the Building Cost Index. It has been suggested that reference may be made to the Consumer Price Index;
- (c) review the proposed increase of maximum fines for selected offences which some Members and organizations considered to be too high;
- (d) review whether it is appropriate that conviction of offences in relation to minor works and of offences of a serious nature under the BO attracts the same levels of fines and

imprisonment terms;

- (e) advise on the feasibility of providing for separate penalties relating to minor works. A Member suggested that a tier-penalty system might be considered to differentiate summary conviction and conviction on indictment;
- (f) review the proposal to increase the maximum fine from \$250,000 to \$1.5 million and the appropriateness of the existing three years' imprisonment under section 40(2AA) for failure to notify the Building Authority (BA) of any contravention of the regulations resulting from the carrying out of building works according to approved plans.

Reference made when the level of fines was first set

3. The last revision of the penalty level of the offences under section 40 concerning UBWs, substandard buildings works and construction danger is set out in the table below -

Section	Change of custodial sentence and fines			
	From		To (existing provisions)	
	Year	Penalty	Year	Penalty
s.40(1)	1955 (when the current edition of the BO was first enacted)	\$2,000	1979	\$100,000
		6 months		2 years
s.40(1B)		\$2,000		\$50,000
		6 months		1 years
s.40(2A)(c)		\$2,000		\$250,000
		6 months		3 years
s.40(2A)(a) &(b), (2AA), (2B) & (2C)		\$50,000		\$250,000
		2 years		3 years
s.40(2AB)	N/A	N/A	1981 (newly introduced)	\$50,000
				1 year
s.40(2AC)	N/A	N/A	1981 (newly introduced)	\$250,000
				3 years

Except for sections 40(2AB) and (2AC) which were newly introduced in

1981, the other offences were last reviewed in 1979 when the then existing level of penalty was considered inadequate to cope with a situation where substantial building works had been deliberately carried out in defiance of the law and which could result in undermining safety to both life and property. There was no specific reference to which the proposed levels of fine were made when the above offences were last reviewed and newly introduced in 1979 and 1981 respectively.

Building Cost Index and Consumer Price Index

4. The Building Cost Index, which is compiled on the basis of Government building projects and consolidated labour and materials index, reflects the change in construction costs. As such, we consider that it is a suitable reference for the proposed increase in fines for offences relating to building works. Nevertheless, we agree that the deterrent effect of the fines may also be reinstated by restoring the value of money. We therefore agree that the fines may be increased with reference to the composite Consumer Price Index (CPI). In its letter dated 27 October 2003 to the Buildings Department, the Hong Kong Institution of Engineers (HKIE) also suggested that fines should be increased according to the composite CPI.

5. According to information provided by the Census and Statistics Department, the composite CPI for 2003 is about 4 times the level of 1979 when the fines for offences under sections 40(1), (1B), (2A), (2B) & (2C) were last revised and about 3 times the level of 1981 when the fines for offences under sections 40(2AB) and (2AC) were first set.

Revised Penalty

6. We have conducted a review of the penalty for offences under sections 40(1BA), (2A), (2AA), (2AB), (2AC), (2B) & (2C) of the BO, the fines for which are proposed to be increased in the Bill. We have also reviewed the level of penalties for the new offences under sections 40(1AA) & (4C) of the BO. Factors like gravity of the offence, frequency of charges, any public concern on the relevant offences and comparable provisions in other legislation were taken into account. We consider that the level of penalty should be commensurate with the seriousness of the offences. Therefore, separate offences relating to minor works with a lower level of penalty should be introduced. Our

revised proposals are set out in paragraphs 7 to 9 below.

(I) Building works excluding minor works (“building works”)

7. Offences under sections 40(2A), (2AC), (2B) and (2C) involving defective “building works”, construction danger or false certification are serious offences and should attract a heavy penalty. The fine of \$250,000 and 3 years imprisonment are the highest among the offences under section 40 of the BO. We consider that such penalty was at the appropriate level when it was last revised or set in 1979 and 1981 respectively. The other offences under section 40(1) for carrying out “building works” without approval and consent (i.e. the new section 40(1AA)), under section 40(1B)(b) for failure to comply with an order requiring removal of UBW (i.e. the new section 40(1BA)) and under section 40(2AB) for contravention of a condition imposed under section 17(1) in respect of “building works” are less serious and should have a relatively lower level of penalty. We consider that the different levels of penalty for these offences as last revised or set in 1979 and 1981 respectively were commensurate with the relative degree of seriousness of the offences and were at the appropriate level.

8. Despite the appropriate level of penalty of the offences described in paragraph 7 above as at 1979 and 1981, the deterrent effect of the fines has greatly reduced with time. We consider that the deterrent effect should be reinstated by restoring the value of money. We therefore propose to increase the fines for these offences, with reference to the composite CPI, to 4 times or 3 times of the existing fines as compared to the year of 1979 or 1981 respectively when the fines were last revised or set.

(II) Minor Works

9. When the offences are committed in relation to minor works and exempted works, the gravity and the consequences are usually less serious than that of building works and should, therefore, attract a comparatively lower level of penalty. With reference to the proposed revised level of fines and the custodial sentence for “building works” as set out in paragraphs 7 and 8 above, we propose the following lower level of penalty for the offences relating to minor works (and exempted works where applicable) :

- (a) Offences under section 40(2A), (2AC), (2B), (2C) and (4C)

The above offences relate to the conduct of false certification or “building works” involving danger to life and limb. The gravity and consequence of such offences in relation to minor works are usually less serious than that in relation to “building works” but the difference should not be large. We therefore propose to set a lower level of penalty at half of that for “building works”. Hence, the proposed penalty for these offences relating to minor works are a fine of \$500,000 and 18 months imprisonment for section 40(2A), (2B), (2C) and (4C), and a fine of \$350,000 and 18 months imprisonment for section 40(2AC).

(b) Offences under section 40(1AA), (1BA) and (2AB)

The above offences in relation to minor works are much less serious than when they are committed in relation to “building works”. We therefore propose to set a lower level of penalty at about a quarter of that for the same offences in relation to “building works”. Hence, the proposed level of penalty for offences relating to minor works under section 40(1AA) is a fine of \$100,000 with a daily fine of \$5,000 and an imprisonment term of 6 months, that under section 40(1BA) are a fine of \$50,000 with a daily fine of \$5,000 and imprisonment term of 3 months, whilst that under section 40(2AB) are a fine of \$35,000 and an imprisonment term of 3 months. The proposed level of penalty under section 40(1AA) for failure to appoint a registered contractor to carry out minor works is comparable to the offence provision under the Electricity Ordinance (Cap. 406) for failure to employ a registered electrical contractor to carry out electrical work, which is liable to a fine of \$50,000 on first conviction and \$100,000 on subsequent convictions as well as imprisonment for 6 months.

(c) New offence provision

As mentioned in paragraph 23 of LC Paper no. CB(1) 237/03-04(02) on ‘Minor Works Control Regime (Part II)’, if an owner intending to carry out minor works fails to appoint a registered contractor who is qualified to carry out the works, he is liable to committing the offence under section 40(1AA).

On the other hand, a registered contractor has the duty to inform the owner whether he is registered for the type of building works that the owner intends to carry out. We propose that if a registered contractor engages in a type of minor works that he is not registered for, he should be liable to prosecution. As such act may contain some element of dishonesty and as a registered contractor should have a higher responsibility for the minor works and thus a greater liability than the owner, we propose to set a higher level of penalty than that under section 40(1AA) at a fine of \$200,000 with daily fine of \$10,000 and an imprisonment term of one year.

Tier-penalty system

10. In view of the proposed different levels of penalties in relation to building works and minor works which reflect the gravity of the offences appropriately, we consider that it is not necessary to further explore the proposal of a tier-penalty system by way of differentiating between summary conviction and conviction on indictment.

Offence under section 40(2AA)

11. Among the comments from various organizations, there is a specific objection to increasing the fine for the offence under section 40(2AA) for contravention of section 4(3)(b), 9(5)(b) and 9(6)(b) of the BO. These sections specify the responsibilities of an authorized person (AP), registered structural engineer (RSE) or registered contractor (RC) to notify the BA of any contravention of the regulations which results from carrying out building works or street works as shown in the plan approved by the BA. HKIE has commented that a fine of \$1,500,000 and an imprisonment term of 3 years is a severe punishment and it is unreasonable for a simple act of failure to notify the BA of an error in an approved plan to attract such a heavy penalty. In view of these comments, we have carried out a comprehensive review of the provisions concerned.

12. The existing building control system under the BO, which has been implemented for more than 40 years, places the responsibility on the AP, RSE and RC to ensure that the building works or street works under their ambit are in compliance with the BO. The BA only plays a

monitoring role and the approval of plans is one of the monitoring functions. Therefore there are commensurate provisions regarding compliance with the BO for the plans submitted to the BA for approval. These provisions are :

- (a) regulation 18A of the Building (Administration) Regulations (B(A)R) which stipulates that AP and RSE are required to certify that the plans comply in all respects with the BO and the subsidiary regulations.
- (b) section 14(2)(c) of the BO which provides that approval of any plans of any building works or street works does not grant any exemption from or permit any contravention of any of the provisions of the BO.
- (c) section 15(2) of the BO which provides that the grounds set out for any refusal to approve plans shall not be treated as being exhaustive.

As the AP, RSE and RC have the responsibility to supervise the carrying out of the works and to comply with the BO (under sections 4(3)(a) & (c), 9(5)(a) & (c) and 9(6)(a) & (c) of the BO), they should have a continuous duty to keep track of any contravention of the BO even after the plans are approved by the BA and when the works are carried out according to the plans. The duty to notify the BA of any contravention of the regulations which results from carrying out the works shown in approved plans is associated with and supplementary to the supervision responsibility mentioned above. Moreover, an approved plan may not indicate in full detail whether the carrying out of works as shown would result in contravention of the BO or not. Any possible contravention may only become apparent when such works are carried out on site. It is, therefore, important for AP, RSE or RC and their representatives to adequately inspect building works to identify on site any contravention which results from carrying out works as shown on approved plans.

13. In order to ensure that the AP, RSE and RC carry out their duties under sections 4(3)(b), 9(5)(b) and 9(6)(b), there is a need to retain the offence provision in section 40(2AA) of the BO. This offence provision may also act as a deterrent for not supervising the carrying out of the works properly. However, it is agreed that the mere failure to notify the BA of any contravention may not be a serious fault. We therefore consider that the gravity of this offence does not deserve a

penalty of imprisonment. As regards fine levels, we do not propose to increase the level of fine but to retain the existing fine at \$250,000. As there is already a statutory defence to the offence under section 40(2AA) for the AP, RSE or RC to prove to the satisfaction of the Court that he did not know nor could reasonably have discovered the contravention, we consider it appropriate to keep the offence under section 40(2AA) as strict liability. If the offence is committed in relation to minor works, in accordance with the principle mentioned in paragraph 9(b) above, we propose to set a lower level of fine at a quarter of that for the same offence in relation to building works. Hence, the proposed penalty for this offence relating to minor works is a fine of \$50,000 and no imprisonment term.

14. The revised proposals on level of penalties for existing and new offences are detailed in the table at **Annex**.

Conclusion

15. We believe that the above revised proposals on fines have sought to strike a balance between addressing the concerns of the building industry and restoring the deterrent effect against UBWs and irregularities in new building works.

Housing, Planning and Lands Bureau
February 2004

Review of Penalty Levels of Offences under the Buildings Ordinance

Section	Description of offence	Existing Penalty (Year of last revision)	Proposed Penalty under Buildings (Amendment) Bill 2003	Revised Proposals	
				For building works	For minor works and Exempted Works (if applicable)
40(1AA)	Contravenes - BO s4(1) in relation to Category I MW – fails to appoint authorized person - s.9(4A), (4B), (4C) or (4D) – fails to appoint registered contractor for minor works - s.14(1) – carry out building works without approval and consent.	\$100,000 + 2 years Daily fine \$5,000 (1979)	\$600,000 + 2 years Daily fine \$30,000	<u>For contravention of s.14(1)(a)</u> \$400,000 + 2 years Daily fine \$20,000 (increase fine with reference to CPI, i.e. 4 times of existing level)	<u>For contravention of s.4(1) in relation to Cat I MW, s.9(4A), (4B), (4C) & (4D) or s.14(1)</u> \$100,000 + 6 months Daily fine \$5,000
40(1BA)	Fails to comply with an order under BO s24(1) for removal of UBW or (1A) for rectification or removal of minor works	\$50,000 + 1 year Daily fine \$5,000 (1979)	\$300,000 + 1 year Daily fine \$30,000	<u>For failure to comply with an order issued under s.24(1)</u> \$200,000 + 1 year Daily fine \$20,000 (increase fine with reference to CPI, i.e. 4 times of existing level)	<u>Failure to comply with an order issued under s.24(1A) on minor works</u> \$50,000 + 3 months Daily fine \$5,000

Section	Description of offence	Existing Penalty (Year of last revision)	Proposed Penalty under Buildings (Amendment) Bill 2003	Revised Proposals	
				For building works	For minor works and Exempted Works (if applicable)
40(2A)	<ul style="list-style-type: none"> Permits defective building works Material deviation from approved plans Misrepresentation of material facts 	\$250,000 + 3 years (1979)	\$1,500,000 + 3 years	\$1,000,000 + 3 years (increase fine with reference to CPI, i.e. 4 times of existing level)	\$500,000 + 18 months
40(2AA)	<ul style="list-style-type: none"> AP, RSE or RGE contravenes BO s4(3)(b) or (3A)(b) RGBC, RSC or RMWC contravenes BO s9(5)(b), (6)(b) or (6A)(b) for failure to notify BA of any contravention of the regulations which result from carrying out works shown in approved plans or plans of minor works 	\$250,000 + 3 years (1979)	\$1,500,000 + 3 years	<u>For contravention of s.4(3)(b) and s.9(5)(b) and (6)(b)</u> \$250,000	<u>For contraventions of s.4(3)(b), s.4(3A)(b) and s.9(6A)(b)</u> \$50,000
40(2AB)	Contravenes conditions imposed under s.17(1) or fails to comply with the requirement of the order issued under this section in respect of building works other than those listed under s.40(2AC)	\$50,000 + 1 year (1981)	\$200,000 + 1 year	\$150,000 + 1 year (increase fine with reference to CPI, i.e. 3 times of existing level)	\$35,000 + 3 months

Section	Description of offence	Existing Penalty (Year of last revision)	Proposed Penalty under Buildings (Amendment) Bill 2003	Revised Proposals	
				For building works	For minor works and Exempted Works (if applicable)
40(2AC)	Contravenes conditions imposed under item 7 in BO s17(1) – failure to take measures to prevent collapse when carrying out foundation works, etc.	\$250,000 + 3 years (1981)	\$1,500,000 + 3 years	\$750,000 + 3 years (increase fine with reference to CPI, i.e. 3 times of existing level)	\$350,000 + 18 months
40(2B)	Carries out works in a dangerous manner	\$250,000 + 3 years (1979)	\$1,500,000 + 3 years	\$1,000,000 + 3 years (increase fine with reference to CPI, i.e. 4 times of existing level)	\$500,000 + 18 months (Also apply to exempted works)
40(2C)	Fails to comply with an order under s.24A to cease or remedy dangerous works	\$250,000 + 3 years Daily fine \$50,000 (1979)	\$1,500,000 + 3 years Daily fine \$300,000	\$1,000,000 + 3 years Daily fine \$200,000 (increase fine with reference to CPI, i.e. 4 times of existing level)	\$500,000 + 18 months Daily fine \$100,000 (Also apply to exempted works)
40(4C)	Knowingly certifies minor works which have been carried out in contravention of the BO	N.A	\$1,500,000 + 3 years	N.A	\$500,000 + 18 months
New	Carries out the types of minor works which the RSC or RMWC is not registered for.	N.A	N.A	N.A	\$200,000 + 1 year Daily fine \$10,000