

For discussion on
17 July 2018

Legislative Council Panel on Manpower

Raising Penalties of Occupational Safety and Health Legislation

Purpose

This paper briefs Members on the broad directions proposed by the Labour Department (“LD”) to raise the penalties of the Occupational Safety and Health (“OSH”) legislation, and invites Members’ views on the proposed broad directions.

Background

2. The current legislations regulating OSH are mainly the Occupational Safety and Health Ordinance (“OSHO”) (Cap. 509), the Factories and Industrial Undertakings Ordinance (“FIUO”) (Cap. 59) and their subsidiary regulations. The FIUO was enacted in 1955 to regulate the industrial safety and health at industrial undertakings (including factories, quarries and construction sites, etc). The Government amended and raised the penalties of the FIUO and its subsidiary regulations in 1994. It enacted the OSHO in 1997, the scope of which also covers OSH at non-industrial workplaces (including workplaces like offices). The penalties of OSHO have remained unchanged since its enactment.

3. The numbers of occupational fatalities have remained at a high level in recent years. Besides, the public generally considers that the sentences for OSH offences are on the low side, and they fail to reflect the seriousness of the contraventions and to pose sufficient deterrent effect on duty holders violating the law. The public therefore has been pressing the Government to review the provisions and penalties of OSH legislation.

Legislative Review

Maximum Penalties

4. According to the prevailing OSHO, FIUO and their subsidiary regulations, duty holders, upon conviction, are liable to a maximum fine from \$2,000 to \$500,000, depending on the seriousness of offences. As for imprisonment, depending on the seriousness of offences, convicted persons are subject to maximum imprisonment terms ranging from 3 months to 12 months.

Actual Sentences

5. In order to strengthen the deterrent effect of the penalties, LD has been making different efforts to assist the court in determining appropriate sentences with a view to increasing the penalties for serious offences. For example, the LD strives to conduct thorough investigations, and also submits sufficient information to the court as reference for sentencing. Depending on the circumstances of individual cases, LD also requests the Department of Justice to seek a review or to appeal against the penalties.

6. Although the amount of fines imposed by the court has on the whole increased slightly in recent years, the actual penalties are still on the low side. Taking 2017 as an example, the average fine for each summons involving OSH offences was only about \$10,500, while that for the construction industry was about \$10,000. For fatal industrial accidents in the construction industry, the average fine for each summons was only about 21,000.

7. As far as imprisonment is concerned, although LD will, depending on circumstances of the case, institute prosecution by invoking from time to time provisions containing imprisonment clauses, there have so far been only three cases of suspended imprisonment and no case of immediate imprisonment of the convicted persons since the commencement of the concerned legislations. The current OSH offences are all summary offences and the time limit for taking out prosecution is 6 months, i.e. the period from the occurrence of a case to the institution of prosecution cannot exceed 6 months. LD considers there is a need to extend the time limit for issuing summonses so that LD can have sufficient time to conduct more in-depth investigations and evidence collection for serious cases, so as to better secure and provide to the court more complete evidence to assist the court in imposing sentences proportionate to the culpability of the convicted duty holders.

Overseas Experience

8. In the course of the legislative review, LD has made reference to the penalties of OSH legislation in a few advanced countries/region, including the United States, Singapore, Australia, New Zealand and Ontario of Canada. The maximum fines for OSH legislation in most of the aforesaid countries/region far exceed those of Hong Kong. For example, the maximum fine in Australia is approximately HK\$22 million. The maximum fines in these countries/region are detailed at Annex. In comparison, the maximum fines in Hong Kong are clearly on the low side.

9. When researching on overseas OSH legislation, LD also notes that the United Kingdom (“the UK”) has developed a set of systematic sentencing guidelines for OSH offences to assist the court in sentencing. The sentencing

guidelines not only take into account the overall seriousness of the offences (including culpability of the convicted companies and the severity of the harm inflicted), but also the turnover of the convicted companies. The guidelines also clearly set out the range of fines applicable to convicted companies of different sizes in order to ensure that the sentences can have sufficient deterrent effect on companies of different sizes.

10. With regard to the actual situation of Hong Kong, the court generally has to impose a fine at a level below the maximum fine. This practice may not be able to ensure that the fines handed down to a larger-scale company can carry sufficient deterrent effect. LD therefore considers that the above-mentioned sentencing system of the UK (i.e. taking into account the turnover of convicted companies or their scale) has its merits. It meets the public expectation for the penalties to be sufficiently deterrent, especially for very serious cases.

11. In respect of imprisonment terms, most of the countries/region mentioned above, as with their maximum fines, have much higher maximum imprisonment terms than those in Hong Kong. Amongst these, Australia and New Zealand adopt a maximum imprisonment term of five years.

Proposed Amendment Directions

12. In light of the initial observations transpired from the afore-mentioned legislative review, LD proposes the following amendment directions in order to increase the necessary deterrent effect of OSH penalties-

- (a) raise the fine levels and imprisonment terms of the OSH legislation to appropriate levels;
- (b) for extremely serious cases which involve extremely high culpability or serious negligence and lead to serious consequences, the fine levels will be pegged with the turnover of the convicted companies, thereby ensuring penalties imposed on companies of different scales will all have sufficient deterrent effect. LD notices that the maximum fines of certain provisions in the Competitive Ordinance (Cap. 619) and the Telecommunications Ordinance (Cap. 106) of Hong Kong are pitched at 10% of the convicted companies' turnover. LD will make reference to this information and relevant experience of other jurisdictions when looking further into details of the legislative amendments;
- (c) for extremely serious cases mentioned under (b), the concerned maximum imprisonment terms will be increased to reflect the seriousness of these cases;

- (d) current OSH offences are all summary offences, and they can only be heard at the Magistrate Court which has its limitation in imposing sentences. To tackle the extremely serious offences mentioned under (b), LD suggests to amend the general duty provisions of OSH legislation to become “dual offences”. In other words, LD can, depending on the seriousness of individual offences, choose to take out prosecution as a summary offence or an indictable offence. LD plans to take out prosecutions against extremely serious offences as indictable offences. Indictable offences can be heard in either District Court or Court of First Instance under the High Court. These courts are vested with the power to impose more severe penalties; and
- (e) extend the time bar for laying summonses from six months to one year to allow LD sufficient investigation time, especially for conducting more in-depth investigations into very serious cases.

13. LD will work out the legislative amendment details in accordance with the above proposed directions, and will consult relevant stakeholders in the process. Depending on stakeholders’ views and the progress of law drafting, we aim to table the amendment bill within the 2019-2020 legislative session.

Advice Sought

14. Members are invited to offer views on the above proposed amendment directions.

Labour and Welfare Bureau
Labour Department
July 2018

**Penalties of Occupational Safety and Health Legislation of
Overseas Countries/ Region**

| Overseas Countries/ Region | Maximum Fines (converted to HK\$) | Maximum Imprisonment Terms (months) |
|-------------------------------|--------------------------------------|---|
| Australia | About 22,000,000 | 60 |
| New Zealand | About 16,000,000 | 60 |
| Canada, Ontario | About 9,000,000 | 12 |
| Singapore | About 6,000,000 | 24 |
| The United States | About 1,000,000 | 12 |