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Panel on Manpower

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 19 March 2019**

Penalties of occupational safety and health legislation

Purpose

This paper provides background information on the penalties of occupational safety and health ("OSH") legislation and summarizes the past discussions by the Panel on Manpower ("the Panel") on the subject in the Sixth Legislative Council ("LegCo").

Background

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

3. According to the prevailing OSO, 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 three months to 12 months.

Deliberations of the Panel

Level of penalty

4. Members noted with concern that the construction industry topped all industries in terms of the number of industrial fatalities and accident rate. In the first half of 2018, there were 1 700 industrial accidents, including six fatal cases, in the construction industry. Most members called for the imposition of heavier penalty on convicted cases related to fatal industrial accidents in the construction industry so as to increase the deterrent effect against non-compliance with the OSH legislation. The Panel passed a motion at the special meeting on 12 April 2017 urging the Government to, among others, increase the penalties by forbidding the companies concerned to tender in government contracts for one year after the occurrence of a fatal accident, and to introduce legislative amendments to subject those consultants and contractors who were found to be negligent in their safety performance to criminal liability.

5. The Administration advised that in order to raise the deterrent effect of court penalties, the Labour Department ("LD") had been adopting different approaches to seek heavier penalties for duty holders. In a bid to raise the level of penalty for non-compliance with safety requirements, LD had since 2011 submitted comprehensive information to the court for reference in sentencing. Depending on the circumstances of individual cases, LD would request the Department of Justice ("DoJ") to consider filing reviews or appeals to the court in respect of the conviction and the penalty to increase the deterrent effect. According to the Administration, the fines imposed by the court on convicted cases related to fatal industrial accidents in the construction industry had increased in recent years when compared with the past.

6. Some members remained concerned that although the amount of fines imposed by the court had on the whole increased slightly, the actual penalties were still on the low side. Notably, the average fine for each summons involving fatal industrial accident in the construction industry was only about \$21,000 in 2017, and that no convicted duty holder had so far been sentenced with immediate imprisonment. These members pointed out that the labour sector had all along criticized that the current penalties for violating the OSH legislation remained on the low side and they could hardly reflect the seriousness and consequences of the offences and achieve sufficient deterrent effect.

7. Some members also raised concern about whether, under the subcontracting practice in the construction industry, the principal contractors would easily evade their legal liabilities in the event of industrial fatalities and accidents. According to the Administration, both principal contractors and

subcontractors of construction projects would be liable to prosecution if there was sufficient evidence to substantiate their non-compliance with the OSH legislation and safe work practices. The Administration had successfully initiated prosecution against the principal contractors in the past years. The Administration further advised that in addition to raising the penalties for breaching the OSH legislation, it would step up its efforts in raising the awareness of duty holders/contractors and employees in enhancing the occupational safety performance through publicity and education.

8. Members were further advised that LD would conduct a review of the provisions and penalties of OSH legislation.

Proposed amendment directions

9. The Administration briefed the Panel on the preliminary directions for raising penalties of OSH legislation at its meeting on 17 July 2018. The Administration proposed, amongst others, to raise the fine levels and imprisonment terms of the OSH legislation to appropriate levels. For extremely serious cases which involved extremely high culpability or serious negligence and led to serious consequences, the fine levels would be pegged with the turnover of the convicted companies so as to ensure that penalties imposed on companies of different scales would all have sufficient deterrence effect.

10. Most members welcomed the Administration's plan of bringing in higher penalties under the OSH legislation to increase the deterrent effect. Members enquired about the meaning of "appropriate levels" of the fine and imprisonment terms and how the seriousness of the cases would be determined. Some members expressed concern that some enterprises might go bankrupt if the maximum fines for breaching the OSH legislation would model on the provisions in the Competitive Ordinance (Cap. 619) and the Telecommunications Ordinance (Cap. 106), i.e. pitched at 10% of the convicted companies' turnover. These members called on the Administration to duly consult the stakeholders when working out details of the legislative amendment. Some other members, however, were concerned about the deterrence of the penalty for those convicted companies with a low turnover or new companies with no records of turnover at all. These members considered that the proposed fines should peg with the contract value of the works projects in which the industrial accidents occurred.

11. The Administration advised that the overall objective of conducting a review of the penalty level for non-compliance with the OSH legislation was to raise the deterrence to an appropriate level. In light of the initial observations transpired from the legislative review, LD proposed the amendment directions in order to increase the necessary deterrent effect of OSH penalties. The

penalty review had not yet been finalized. The Administration would make reference to the penalty levels under similar legislation in other jurisdictions and relevant overseas experience on instituting prosecution against offences of similar nature and take into account the actual situation in Hong Kong when working out the legislative amendment details.

12. The Administration further advised that LD also noted that the United Kingdom had developed a set of systematic sentencing guidelines for OSH offences to assist the court in sentencing. The sentencing guidelines not only took 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 Administration was considering to adopt a similar approach in pitching the maximum fines at a specific percentage of the convicted companies' turnover or imposing a specified amount of fines applicable to convicted companies with a low turnover, whichever was higher, so as to ensure that the sentences could have sufficient deterrent effect on companies of different sizes. The Administration added that since the OSH legislation applied to all industries, it might not be appropriate to peg the maximum fines with the contract value of works projects which might not be applicable to other industries. The Administration's intention was thus to peg the level of fines with the size of the convicted companies.

13. Some members were concerned that the court generally imposed a fine at a level below the maximum fine. As such, consideration should be given to setting a minimum fine for contravening the OSH legislation. According to the Administration, it might not be appropriate to set a minimum fine level for OSH legislation, having regard to the principle of fairness and the fact that convicted companies were of different sizes, ranging from sole proprietorship to listed companies.

14. In order to strengthen the deterrence effect of the penalties and facilitate the court to impose sentences which were proportionate to the seriousness and dire consequences of the offences, some members considered that the Administration should study the prosecution threshold in taking forward the legislative amendments. The Administration advised that in the course of the legislative review, LD had made reference to overseas OSH legislation and noted that the prosecution threshold in respect of the OSH legislation in Hong Kong was generally comparable to those of overseas jurisdictions. LD therefore considered that the prevailing prosecution threshold was appropriate.

15. Some members enquired about the rationale for proposing extending the time bar for laying summonses from six months to one year. The Administration advised that the current time bar for laying summonses for OSH offences was six months. LD considered that there was a need to extend the

time limit for issuing summonses so that LD could have sufficient time to conduct more in-depth investigations and evidence collection for serious cases.

Legislative timetable

16. According to the Administration, LD was studying the details of the legislative amendments and would consult relevant stakeholders in the process. Depending on stakeholders' views and the progress of law drafting, the Administration aimed to introduce the amendment bill into LegCo within the 2019-2020 legislative session.

17. The Administration would update the Panel on the proposed amendment directions to raise the penalties of OSH legislation at its meeting on 19 March 2019.

Relevant papers

18. A list of the relevant papers available on the LegCo website is in the **Appendix**.

Council Business Division 2
Legislative Council Secretariat
14 March 2019

Relevant papers on penalties of occupational safety and health legislation

Committee	Date of meeting	Paper
Panel on Manpower	17.10.2017 (Item III)	Agenda Minutes
Panel on Manpower	19.12.2017 (Item V)	Agenda Minutes
Panel on Manpower	17.7.2018 (Item III)	Agenda Minutes
Panel on Manpower	16.10.2018 (Item III)	Agenda Minutes
Panel on Manpower	15.1.2019 (Item III)	Agenda Minutes

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