

立法會 *Legislative Council*

LC Paper No. CB(2)492/20-21(07)

Ref : CB2/PL/MP

Panel on Manpower

**Updated background brief prepared by the Legislative Council Secretariat
for the meeting on 15 December 2020**

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.). OSHO 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 OSHO have remained unchanged since its enactment.

3. 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 three months to 12 months.

Deliberations of the Panel

Current 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 2020, there were 1 102 industrial accidents, including seven 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 Administration to, among others, increase the penalties by forbidding the companies concerned to tender in public works 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 so as to further enhance the deterrence effect.

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 \$27,000 in 2018, 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.

Proposed amendment directions

7. At the Panel meeting on 17 July 2018, members were briefed on the Administration's broad direction to increase the penalties of OSH legislation, so as to raise the deterrence to an appropriate level. At the Panel meeting on 19 March 2019, members were updated on the Administration's preliminary proposed legislative amendments to raise the fine levels and imprisonment terms of OSH legislation. Most members urged the Administration to expedite the introduction of the relevant legislative proposals to increase the deterrent effect.

Increasing the maximum fine

8. Most members welcomed the Administration's proposal to increase the maximum fine of the general duty ("GD") provisions in OSH legislation to \$6 million or 10% of the turnover of the convicted company, whichever was the greater. In their view, to achieve greater deterrence, the court should impose the sentences that were proportionate to the seriousness and dire consequences of OSH offences. Some other members, however, took a strong view that the proposed increase of the maximum fine levels of contravening the GD provisions in OSH legislation was too drastic. They considered that the legislative proposals, if enacted, would seriously affect the operation of small and medium enterprises and the business environment.

9. The Administration advised that comparing to the penalties of OSH legislation in other advanced countries/regions, the penalties of OSH legislation in Hong Kong, which had not been revised for over 20 years, were on the low side. To strengthen the deterrent effect of the penalties, LD had been making efforts to assist the courts to determine appropriate sentences, in particular to impose higher penalties on duty holders for serious cases. Although the amount of fines imposed by the court had on the whole increased slightly in recent years, the actual penalties were still on the low side and did not have sufficient deterrent effect to propel the improvement of OSH performance. While respecting the independence of the Judiciary, the Administration believed that the Judiciary would accordingly impose heavier penalties on OSH offences following the enactment of the relevant legislative proposals. According to the Administration, the proposal of amending the penalty levels for breaching the GD provisions in OSH legislation would only be applicable to extremely serious cases of extremely high culpability or serious negligence which led to serious consequences.

10. Some members were concerned that the court generally imposed a fine at a level far below the maximum fine. As such, consideration should be given to setting a minimum fine for contravening 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.

11. Some members raised concern about the calculation of 10% of the turnover of the convicted company, given that the convicted entity could be a subsidiary company of another holding company. According to the Administration, it was proposed that turnover meant the income arising from a business entity's principal business activities by making reference to the Inland Revenue Ordinance (Cap. 112) and the Hong Kong Accounting Standards. Turnover for sentencing consideration would be confined to that of the convicted company only. The initial thinking was to refer to the turnover information shown in the convicted company's tax return.

12. Some members were concerned that under the subcontracting practice in the construction industry, the principal contractors could easily evade their legal liabilities in industrial fatalities and accidents. Some large enterprises might also intentionally set up a number of subsidiary companies so as to escape their legal liabilities in the event of occurrence of industrial accidents.

13. 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. Separately, business operation in Hong Kong was subject to various regulatory and monitoring regimes. In the Administration's view, splitting a company into smaller ones would incur extra management resources, and companies might be better off positively deploying resources to improve their OSH system.

Re-alignment of seriousness levels of penalty provisions

14. Members noted that OSH offences were grouped into three different categories, namely very serious offences, serious offences and minor offences, according to their seriousness of the breaches and assigned with different maximum fine levels. The seriousness of offences was generally determined by four key factors, i.e. whether the offences directly caused harm to employees; imminence of the harm caused by the offences; seriousness of the harm; and the willfulness of the offenders. According to the Administration, in the course of review for the penalties of OSH legislation in the legislative amendment exercise, it was noted that a certain number of existing provisions did not accurately reflect the seriousness of offences in accordance with the seriousness

categorization. In this connection, the Administration proposed that the seriousness categories of certain offence provisions should be appropriately re-aligned, so as to ensure that the penalties could accurately reflect the seriousness of the offences and avoid inconsistency where offences of similar seriousness were assigned with different maximum fine levels. Some members expressed grave concern that the seriousness levels of 76 penalty provisions would be lowered and that the penalties of 59 provisions would be reduced as a result of the proposed re-alignment exercise.

15. The Administration explained that taking into account the inflationary factor and the need to achieve a material increase, it was proposed that the maximum fines of the 657 offence provisions in FIUO, other than those GD provisions for employers/proprietors/occupiers of premises, would be subject to an across-the-board three-fold increase after the proposed adjustments. The Administration's review also revealed that about 128 penalty provisions carried a maximum fine not accurately reflecting the seriousness of the offences. The Administration therefore considered it necessary to re-align the seriousness categories of these provisions (i.e. the seriousness levels of 52 provisions would be raised and 76 provisions would be reduced). Nonetheless, the Administration would, in light of members' views, review the seriousness categories of the offence provisions, in particular those proposed to be lowered.

Imprisonment terms

16. Many members were gravely concerned that no convicted employer had so far been sentenced with immediate imprisonment term since the commencement of OSH legislation. They called on the Administration to address the difficulties in taking out prosecutions against employers who contravened OSH legislation. Consideration should be given to holding a company director liable for the work of safety management committees formed under various construction projects as well as the occurrence of industrial accidents. To increase deterrence, there was a suggestion of introducing legislative amendments to sections 6A and 6B of FIUO to the effect that imprisonment sentence would be imposed on the duty holder in the event of occurrence of serious or industrial fatality resultant from his/her negligence as a duty holder.

17. The Administration advised that the provisions in OSH legislation for imprisonment terms were comparable to those of various overseas jurisdictions in the respect of the seriousness and threshold for the relevant OSH offences. Individuals as duty holders (including company directors) would be liable to prosecution if there was sufficient evidence substantiating that they were held responsible for committing an OSH offence. Therefore, the Administration

proposed extending the time-bar for issuing summonses from six months to one year in order to facilitate evidence collection by LD for OSH offences and the provision of sufficient evidence for the courts in considering whether to impose immediate imprisonment penalty on convicted defendants.

Legislative timetable

18. Members expressed concern about the slow progress of the Administration in taking forward the legislative proposal to raise penalties of OSH legislation. The Administration advised that LD had consulted key stakeholders, including the Labour Advisory Board as well as various trade associations and labour unions, in particular those in the construction industry. Subject to the stakeholders' views and progress of the law drafting, the Administration would revert to the Panel on the consultation outcomes and the finalized proposed legislative amendments.

19. The Administration would update the Panel on its latest legislative proposal to raise the penalties of OSH legislation at its meeting on 15 December 2020. Members may wish to note that the Occupational Safety and Health Legislation (Amendment) Bill which seeks to amend FIUO, OSHO and their subsidiary legislation to raise the maximum penalty levels so as to enhance their deterrent effect is included in the Government's 2020-2021 Legislative Programme.

Relevant papers

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

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
Panel on Manpower	19.3.2019 (Item III)	Agenda Minutes CB(2)1917/18-19(01) <i>(Annex B)</i>