Factories and Industrial Undertakings (Medical Examinations) Regulation
The Administration's response to concerns raised
At the meeting of the Subcommittee on Regulations relating to
Occupational Safety and Health on 24 January 2000
and queries raised by the Legislative Council Assistant Legal Advisor

1. The definition of "sickness" for the purpose of granting paid sickness days under the Employment Ordinance or other employment related legislation. And whether a worker recommended temporary suspension of employment in a particular occupation is entitled to paid sickness days.

The term "sickness" is not defined in the Employment Ordinance (EO). However, the term "sickness day" is defined in section 2 of that Ordinance as "a day on which an employee is absent from his work by reason of his being unfit therefor on account of injury or sickness".

An employee's entitlement to sickness allowance is governed by the EO. He is eligible for the allowance if -

(i) the sick leave taken is not less than four consecutive days;
(ii) the sick leave is supported by an appropriate medical certificate; and
(iii) he has accumulated the number of paid sickness days taken.

Insofar as sickness allowance is concerned, if an eligible employee is temporarily suspended from employment because of incapacity arising from an injury or from an occupational disease covered by the Employees' Compensation Ordinance (ECO), that employee is not eligible for sickness allowance under the EO, since he is already receiving compensation payable under the ECO. An eligible employee who is temporarily suspended from employment because of suffering from an occupational disease covered by an ordinance other than the ECO, e.g. pneumoconiosis, can claim sickness allowance under the EO for the sickness period.

2(a). Since section 2(2)(a) and (b) only refers to the case of construction industry and that of any other industry, what would "proprietor" mean in the case of an industrial undertaking other than an industry, since the latter is not defined in the principal ordinance and appears to be only a class of the industrial undertakings as defined?

The term "proprietor", for the purposes of sections 4 to 6, is as detailed in section 2(2) of the Regulation. If one reads the Regulation in whole, the intent is to recognise an arrangement under which the Construction Industry Training Authority (CITA) will assume, for the purpose of this Regulation, the role of a proprietor for industrial undertakings in the construction industry. As for industrial undertakings in an industry other than the construction industry, the term "proprietor" would be as defined in the principal ordinance. While it is acknowledged that "industry" is not defined in the principal ordinance, the question assumes that there is a type of "industrial undertaking" which is not an "industry". To enable a proper response be given to this point, a specific example of an "industrial undertaking" which cannot be reasonably described to also be an "industry" would be welcomed.

2(b). Does section 2(2) displace the definition of "proprietor" in the principal ordinance and if not, what is the effect on the latter?

As is evident from the plain language of section 2(2), the definition of "proprietor" in that section is "for the purpose of sections 4 to 6 and, only for those purposes."

The definition of "proprietor" in the Ordinance applies -

(a) to all sections in the Regulation, in the case of any industry other than the construction industry to the extent as is provided under section 2(2);

(b) to all sections in the Regulation, except sections 4 to 6, in the case of the construction industry.

The effect of this, in the case of the construction industry, is as follows -

(i) Under section 4, the Construction Industry Training Authority (CITA) is responsible for the appointment of the appointed medical practitioners.

(ii) Under section 5, CITA is responsible for ensuring that person so appointed has first undergone an approved training course.

(iii) Under section 6, CITA must bear the expenses of all medical examinations conducted and arranged under the Regulation.

(iv) By virtue of section 16(2), if CITA contravenes sections 4, 5, or 6, it does not commit an offence.

3. In paragraph (b) of the Administration response on 13 January 2000, it is stated that "the medical examination requirement in section 3(1) should not therefore be confined to pre-employment examination". This seems to be different to the tenor of paragraph II(a) and (b) of the Administration's earlier response on 10 November 1999, which states, among other things, that "[section 3] has no application in the case of workers who are already in employment in a designated occupation ..." and "[section] 3 deals with the protection of the health and safety of a worker before he has commenced employment".

The meeting of the Sub-committee on 10 November 1999 examined a draft version of the Regulation which contained a different presentation for section 3 (i.e. only containing the existing section 3(1)), and the Administration's response was given in that context. On the basis of Members' comments made at that meeting, a revised version of the

Regulation was subsequently produced and presented for the meeting on 15 December 1999, which contains sections 3(1) and 3(2) in their present form. We clarify that the medical examination requirement in section 3(1) should not be confined to pre-employment examination. A worker should have received a pre-employment medical examination or should possess a valid medical certificate in respect of a periodic medical examination before he can be employed by a proprietor in a designated occupation.

4. Section 7 and 8 both provide that an employee may be exempted "from having to comply with the requirements of section 3" but the requirements imposed by section 3 appear to be on the proprietor only, as is also evident from section 14(1) [now section 16(1)], which provides that a proprietor only may contravene section 3.

The provisions are plain: under sections 7 and 8, the requirements to be complied with are respectively that an employee cannot be employed without having been medically examined as provided in section 3; and an employee is periodically medically examined. These requirements need not be complied with if the employee is exempted, in writing, by the Commissioner for Labour. The emphasis in sections 7 and 8 is on the Commissioner's power to exempt.