The Administration's response to concerns raised on the Factories and Industrial Undertakings (Medical Examinations) Regulation at the meeting of the Subcommittee on Regulations relating to Occupational Safety and Health on 8 March 2000

(a) It is unclear from the new sections 13 and 14 as to which party will have the authority to select an AMP for re-examining the employee as required by the Appeal Board. Members are concerned that there should be an independent mechanism for conducting the re-examination to avoid any possible conflict of interest and to ensure fairness to all parties concerned. Members also suggest improving the drafting of the new sections 13(2) and 14(2) to remove any possible misunderstanding that the proprietor will be responsible for selecting the AMP to conduct the re-examination in an appeal case.

We propose that if the Appeal Board considers it necessary for the employee concerned in an appeal case to be re-examined, the Board, as an independent third party, and appointed specifically to address appeal cases by virtue of the professional expertise of members, should itself have the authority to appoint an AMP to do so. This will avoid any possible conflict of interest and will ensure fairness to all the parties concerned. Members' comments on sections 13(2) and 14(2) have been incorporated in the latest draft of the Regulation.

(b) The Administration to advise on the nature of reasonable excuses for an employee to refuse re-examination under the new sections 13(3) and 14(3) [now 14(4)].

On deciding whether the employee concerned in an appeal case should be medically examined again, the Appeal Board will consider whether the original medical examination had been properly conducted, and whether further medical examination and investigations are necessary for a proper and fair determination of the case. A re-examination decision, therefore, will be made by the Board only if it is considered absolutely necessary in the interest of the safety and health of the employee. In the circumstances, the employee is expected to co-operate unless he has a reasonable excuse. For example, he has undergone a re-examination by another AMP of his own accord.

(c) The Administration to consider whether a penalty clause should be introduced for non-compliance with the Regulation by the employee, for example, refusal to take medical examination or to follow the recommendation of the AMP.

It must be emphasised that the regulation aims to protect the safety and health of an employee through regular medical examinations. To achieve this purpose, sections 7 and 8 of the Regulation impose an obligation on the employee to undergo the required pre-employment and periodic medical examinations. If an employee fails or refuses to undergo the medical examination, a proprietor has little choice other than to cease to employ him. This is because the proprietor commits an offence by virtue of section 3 and 16(1), if he employs that employee in the absence of such medical examination.

It should be noted that an employee who, in relation to his employment, wilfully disobeys a lawful and reasonable order of the proprietor is, by virtue of sections 9 and 11 of the Employment Ordinance (Cap. 57), liable to have his contract of employment terminated by the proprietor or to be suspended from his employment. Dismissal is already a serious penalty for an employee who refuses to take medical examination, thus additional penalty for non-compliance with the regulation by the employee would not be justified.

According to the draft Regulation, the AMP's recommendation is intended for compliance by employer / proprietor. The question of providing a penalty clause for the employee does not arise.