The Administration's response to issues raised at the meeting of the Legco Subcommittee on regulation relating to Occupational Safety and Health on 11 January 1999

1. To review whether a defence clause should also be provided for proposed regulations 38A, 38D, 38E and 38F.

The Administration has considered whether or not a defence clause should also be provided for in the proposed regulations 38A, 38D, 38E and 38F and come to the view that a defence clause is not necessary for the following reasons:

REGULATION 38A (SAFETY OF PLACES OF WORK)

Regulation 38A requires a contractor to ensure that the place of work is, "so far as is reasonably practicable", made and kept safe. As a defence of "reasonably practicable" already exists in this regulation, amendment thereto is not necessary.

REG. 38D (CONSTRUCTION & MAINTENANCE OF SCAFFOLD, ETC.)

This regulation can be considered as an extension and elaboration of regulation 38C as it spells out the specific technical requirements for the scaffolds, ladder or other means of support required to be kept safe under the latter regulation. As regulation 38C already has a defence clause which is embodied in regulation 38H(1), a separate defence clause in regulation 38D is not necessary. Besides, the proviso of "having regard to the work to be done" in regulation 38C also connotes an application of "practicability" test in selecting the most suitable safety means to carry out work at height.

REG. 38E (TRAINED WORKMEN TO ERECT SCAFFOLD UNDER SUPERVISION) AND REG. 38F (INSPECTION OF SCAFFOLDS)

These two regulations require a contractor to engage competent workers and competent persons to take adequate steps to discharge the duty under regulation 38C to ensure that the means of support for workers working at height are safe. Such means of support are typically scaffolds and ladders. It is inappropriate to provide for a defence clause for failing to take the specific steps as required under regulation 38E and 38F to make the scaffold, ladder and other means of support safe,

otherwise regulation 38C will be ineffectual. On the other hand, the duties under regulations 38E and 38F will not arise if the contractor argues that regulation 38C is not appropriate to the situation and raise a defence of "impracticability" under regulation 38H(1). In other words, a defence clause has indirectly been provided for in regulations 38E and F in the context of regulations 38C and H.

2. To amend proposed regulation 38H(1)(c) to the effect that all reasonably practicable steps as far as possible were taken to ensure the proper use of the safety belts by the persons to whom they were provided.

The Administration will amend the proposed regulation 38H(1)(c) according to the above suggestion by members.

3. To consider imposing a fixed penalty for contravening proposed regulation 38I and to provide information as regards the review on the feasibility of a fixed penalty system.

At the Industrial Safety Review in Hong Kong conducted in 1995, the Administration has carefully considered the feasibility of introducing a Fixed Penalty System (FPS), similar to that for minor traffic offences, to deal with contravention by employers and workers of safety regulations of a less serious nature and came to the conclusion that FPS was not viable from a practical and legal point of view. A copy of the extract on FPS in the Review Paper is attached as Appendix. The Administration revisited the issue last year and found that the reasons against implementation of such a system still remained valid. Moreover, the FPS is purely retributive in nature and is out of tune with the approach of safety management and self-regulation currently being promulgated in the industry. Taking into account all the arguments and the recent development of our proposed legislative requirements for mandatory safety training for workers in the construction and container handling industries and a safety management system for designated industries, the Administration considers that it is not appropriate to implement a FPS. As an alternative, the Administration will step up prosecution and issue more Improvement/ Suspension Notices to require poor performers to improve their safety at work.

4. To confirm that clause 2(c) on the amendment to the definition of "working platform" will be deleted.

The Administration confirms that clause 2(c) on the amendment to the definition of "working platform" will be deleted.

5. To provide a copy of the amendments proposed by the Administration as regards para. 2 and 4, and para. 1 above if any.

A copy of the amendments proposed by the Administration in respect of para. 2 and 4 will be provided when it is released by the Law Draftsman.

Fixed penalty system

5.7 A fixed penalty system, similar to that for minor traffic offences, to deal with less serious breaches of the safety regulations by the employers and workers has been examined but not found to be a viable option. Most of the offences committed by proprietors and contractors under the FIUO are serious or very serious and a fixed fine is unlikely to carry enough deterrent effect. Such offences are less simple and straightforward than a minor traffic offence and a fixed fine also cannot take into account previous conviction records of similar offences. For an offence on a construction site, it is difficult to identify or prove proprietorship or contractorship for the purpose of serving a fixed penalty ticket to the right person on the spot.

5.8 Fixed penalties against workers are not necessarily simple and straightforward. There is no effective way to enforce payment of fixed fines particularly when a worker provides a false residential address. The fixed penalty system may also create possible conflict or even confrontation between the Factory Inspector and the site staff and workers. Lastly, some less responsible proprietors or contractors may conveniently evade their duty to supervise and manage their workers and leave the job to the Labour Department.