THE HONG KONG E&M CONTRACTORS' ASSOCIATION

The Hong Kong E&M Contractors' Association Limited
香港機電工程商協會有限公司

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Ref. EMCA-2019-HS-001/GT/gk

22 March 2019

Legislation Review Team
Occupational Safety and Health Branch
Labour Department
13/F., Harbour Building
38 Pier Road,
Central, Hong Kong.

By fax & post
2157 1245

Dear Sir / Madam

Penalties for Occupational Safety and Health Legislation

We refer to the LC Paper No. CB(2)981/18-19(03) dated March 2019 and LC Paper No. CB(2)981/18-19(04) dated 14 March 2019.

We write to set out our concerns regarding the proposals prepared by the Labour Department ("LD"). The amendments proposed by the LD can be summarized as follows:

1. the maximum fines under the general duty ("GD") provisions for prosecutions taken out as summary offences against employers/proprietors/occupiers of premises will be aligned and then subject to a six-fold increase, i.e. $3 million; while the imprisonment terms will be increased from six months to two years;

2. for extremely serious cases, LD may prosecute the employers/proprietors/ occupiers of premises contravening the law by invoking the GD provisions as indictable offences. The relevant maximum fines will be pitched at 10% of the convicted entities' turnover or HK$6 million whichever is greater, while the maximum imprisonment term will be pitched at three years;

3. having considered the inflationary factor and the need to achieve a material increase, all the maximum fines of the penalties (other than the penalties of GD provisions for employers/proprietors/occupiers of premises) will be subject to an across-the-board three-fold increase; while the imprisonment terms (if applicable) of the relevant provisions will remain unchanged; and

4. for prosecutions taken out as summary offences, the time-bar for issuing summonses will be extended from six months to one year.

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Before we set out our specific comments, we would like to point out that we agree that there should be a fundamental overhaul of health and safety legislation in Hong Kong. We support the recommendations made in the Construction Industry Council ("CIC") Report "Building for a Better Future" published in January 2016 and echoed in the Development Bureau's ("DevB") recent Construction 2.0 paper.

We believe that all stakeholders (employers, consultants, contractors, sub-contractors and workers) have a shared responsibility for safety. In our view, a holistic approach needs to be taken, drawing on best practices from other common law jurisdictions, and addressing all stakeholders fairly with an emphasis on improving safety overall with a combination of incentives and penalties.

Unfortunately, the LD proposals only focus on penalties and therefore cannot provide an overall solution to the issues that exist with the current health and safety legislation in Hong Kong.

We would urge that the industry takes this opportunity to look at all of the issues in a holistic manner, rather than simply adopting non mature proposal. We believe that together our industry has a unique chance to institute a major change to Hong Kong's safety culture and it would be a shame if this opportunity was missed because too much focus was placed on only one issue.

Increase of GD Fines

One of the matters that the LD's recommendations does not address, and which is of critical importance, is that there needs to be a recognition of the existing deterrents that currently are in place in relation to health and safety violations. These include:

- Court fines
- DevB suspensions
- CIC suspensions
- High Employer's Compensation insurance costs
- High common law negligence liability costs

For serious incidents, the combination of all of these impacts will have a significant deterrent effect, well beyond any individual fine. For example, tender suspensions of lengthy durations can have a catastrophic effect on a contracting organisation's business and the high costs of EC insurance are a major incentive to improve safety.

We would urge members to be mindful of the current deterrents that are available, before making drastic changes to only one element of them in isolation.

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While the LD acknowledges that there have been significant improvements in the Accident Incident Rate over the last 20 years, it does not cite similar statistics for fatal cases over this period, which we believe would also demonstrate large improvement in this regard. In no way do we seek to downplay the seriousness of the situation, but we simply ask that things are put into their proper context.

Given the improving safety environment, it seems unfair and inequitable to arbitrarily increase fines for GD. This is disproportionate, when one considers the other deterrent impacts mentioned previously.

In addition, all stakeholders should be treated equally, and the LD's proposals appear to focus predominantly on contracting organisations, without addressing the culpability of employers, consultants and individual workers.

The fact is that the existing penalty system largely does not affect employers. They do not suffer penalties such as suspensions from being able to acquire land, nor do they have any personal legal liability in the event of accidents on their sites. The contracting model in Hong Kong is price driven, with unreasonable programmes and extensive design changes, all of which lead to a poor safety culture that is driven down through the industry. In this regard it is inequitable that employers and consultants are not sharing the burden of penalties, and instead everything is passed down to the contracting organisations.

The fragmentation of the construction industry, as identified in the DevB's Construction 2.0 report, also leads to increased safety risks and it is unfair and inequitable to penalize contracting organisations alone for this industry-wide issue.

In our view the LD should properly analyse an organisation's safety support resources and actual safety performance, rather than simply looking to increase penalties arbitrarily. This all comes back to looking at these issues holistically.

Indictable Offences and Tying Fines to Turnover

The proposal to institute indictable offenses is inconsistent with prosecution practices in other jurisdictions and leaving the LD with the power to decide what amounts to an indictable offence places too much discretion in the hands of the LD and could be open to abuse.

As mentioned above, there are significant deterrent impacts already in place, particularly for serious incidents, and there is no justification for introducing indictable offences.

The proposal to institute fines based on the turnover of individual organisations is inconsistent and out of all proportion with sentencing practices in other jurisdictions. No comparable common law jurisdiction levies fines for health and safety violations based on turnover.

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The UK sentencing guidelines that have been mentioned by the LD do not base fines on turnover, rather they categorise organisations according on their turnover, as being large, medium, small or micro, and then provide for different ranges of fines for each category.

Other than competition and telecommunications laws and financial regulation, there is no other body of law that seeks to levy fines based on turnover. In our view, it is entirely out of all proportion to look at turnover-based fines and to do so demonstrates a wholly inadequate understanding of the nature of health and safety legislation on the part of the LD. For example, to compare safety violations with competition law violations is naïve and does not take into account the vastly greater societal and economic effect of competition law violations.

Further, the proposal to carve out a HK$6 million for small organisations is blatantly biased against sizable contracting organisations, who in many cases devote more effort and resources to driving safety performance.

In addition, turnover-based fines could lead to counter-productive side effects with contracting organisations setting up special purpose companies with limited turnover for individual projects in order to avoid the impact of the law, which can hardly be in the interests of improving safety performance.

It is our opinion that the question of fines should be left to the courts and should be dealt with by way of court sentencing guidelines as is the case in other jurisdictions.

Increase of Fines other than GD Fines

We have made it clear at the outset of this letter that we believe that a holistic review and ultimate overhaul of the health and safety legislation in Hong Kong is long overdue. Whether increase in fines for offences other than GD offences is appropriate should be part of this review, taking into account similar legislation in other jurisdictions.

Increase of Limitation Period for Brining Prosecutions

We note that no basis is put forward for the proposed increase of the limitation period for issuing a summons from 6 months to 12 months. It is suggested that the LD needs more time to conduct investigations. This statement is not supported by any evidence and appears simply to be wishful thinking on the part of the LD, with no consideration given to the need to ensure that justice is delivered efficiently and in a timely manner.

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The extension of the limitation period for issuing summons is inconsistent with the practice in other jurisdictions. The LD should focus its efforts on prosecuting well investigated cases and the existing 6 month limitation period is more than sufficient for the LD to conduct thorough investigations of appropriate cases. We do not believe that any evidence exists of cases not being prosecuted as a result of lack of time.

Conclusion

In conclusion, the proposals put forward by the LD are misconceived, non-mature researched.

We believe that penalties alone cannot address the root causes of poor safety performance. Rather, a fundamental overhaul of the health and safety system needs to be instituted and the initiatives proposed in the DevB's Construction 2.0 report should be implemented. We have the road map, so we should follow it rather than taking this divisive detour.

The Government should encourage the participation of all stakeholders to work towards improved safety standards so that all stakeholders have equal legal liabilities when they do not fulfil their duties. A comprehensive scheme with subsidy and support from the Government should be established to encourage organisations to make long-term investments in building a safety culture that is sustainable and lasting

Thank you for your attention.

Yours faithfully
For and on behalf of
EMCA

Gilbert Tsang
President

cc Mr Jeff Leung, JP - Dep Comr (Occupational Safety and Health)
The Hon Abraham Shek JP - Legco Council Member
Ir Dr Hon Lo Wai Kwok – Legco Council Member
Mr Paul Chong – HKFEMC President