

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

28 January, 2021

Dear Sirs,

Consultation Paper for Raising Penalties of Occupational Health and Safety Legislation

We refer to the Labour Department's ("LD") letter dated 10 December 2021 (Ref: (56) in LD LRT/1-10/CS/2/C/I) and to LC Papers No.s CB(2)492/20-21(06) and (07) and the revised proposals for raising penalties for Occupational Safety and Health ("OSH") offences.

Our Chamber has an active Constructive Industry Group ("CIG") which considered and commented on the original proposals and which has now further considered the current revised proposals. The CIG's comments are reflected below. It should be noted that the CIG encompasses a diverse range of professionals including individuals working for leading contractors, subcontractors, engineers, architects and other designers as well as individuals from the legal sphere and academia. Many have extensive experience in other jurisdictions and the CIG counts OSH professionals amongst its active members too.

At the outset, the CIG recognises that the existing framework of OSH penalties has not been reviewed for over twenty years and that every accident and fatality is one too many. However, the CIG notes that both the original and revised proposals focus solely on penalties and believes that these, of themselves, will not deliver the desired changes sought and may well operate unfairly in practice.

Set out below are the CIG's key comments on the revised proposals and their suggestions as to the more holistic approach which could be taken to reduce accidents and fatalities. Many of the points below were made in response to the original proposals and have been made by a variety of stakeholders including CIG and HKCA. No apologies are made for repeating what may have been said before given the importance of what is at stake.

CIG's concerns on the revised proposals

The tenor of the above referenced LC Papers and rationales for increasing the penalties are primarily that it is necessary to increase "deterrent effect" and that there is concern in the wider community that penalties appear low and that there has, to date, been no imprisonment of any convicted employer under the OSH legislation.

Whilst the CIG would endorse the upward adjustment of maximum fine levels to reflect inflation it does not consider that the revised proposals for increasing fines and terms of imprisonment, and the introduction of indictable offences, will make any serious impact on current accident and fatality numbers. Moreover, if implemented, these proposals could operate unfairly and do more harm than good. In particular:

1. By reference to construction industry accident and fatality figures (copy attached) it can be seen that in 2010 the accident rate was 52.1 accidents per 1000 workers with a steady fall through to 2019 with 29 accidents per 1000 workers. The fatality figures are more variable but in the last 5 years have been predominantly below 20 per annum.
2. Although these figures remain far too high the CIG does not see any correlation between the falling accident rate and lack of deterrence in the existing OSH penalties (indeed, accident rates have fallen significantly over time notwithstanding any perceived leniency in the OSH penalties). Also, the CIG is not aware of any evidence at all to link the level of fatalities to the level of penalties or extent of enforcement.
3. The fact that past fine levels have been relatively low and that no employers have been imprisoned is not necessarily evidence of an ineffective framework but probably reflects the fact that Hong Kong does not generally suffer from the worst type of reckless or criminal disregards of health and safety. The reality is that all who work in the industry, from directors to workers, want a safe working environment and to avoid harm to their colleagues. In addition to OSH penalties, Contractors, in particular, already incur significant and sometimes potentially ruinous costs in the event of accidents including:
 - a. Court fines
 - b. LD suspension notices
 - c. DevB suspensions from tendering
 - d. CIC suspensions
 - e. High Employer's Compensation insurance costs
 - f. Common law liability for compensation claims
 - g. Reputational damage
 - h. Disclosure of convictions as part of tendering requirements
4. Due to the very serious and existing implications of the above, the CIG doubts that there would be any real additional incentivisation or deterrent which would benefit

safety arising purely from increased penalties. However, the potentially harsh impacts of the increased penalties could lead to hardship and damage in the industry.

5. Although it is now proposed to cap the maximum penalty amount at HK\$50m it remains something of a blunt instrument:
 - a. The starting point of using 10% of turnover does not reflect the fact that a given company may have a high turnover but low profit and cash reserves or vice versa. We are not aware of any comparable jurisdictions using turnover in this way for similar OSH penalties.
 - b. There may be unfairness between companies as some may contract using subsidiaries with limited turnover, others may be using their main trading entity with high turnovers. Indeed, the increased penalty could lead to restructuring and greater use of subsidiaries precisely to reduce and avoid OSH penalty risk.
 - c. The cap of HK\$50m is more than double the maximum fine amount of any of the comparable jurisdictions which have a cap and are considered in Annex 1 to LC Paper (6).
 - d. There are many companies that would be unable to pay the highest levels of fines and who would face insolvency or extreme financial distress. This would then potentially punish not just the company owners but its employees, subcontractors and suppliers.
6. Whilst the CIG has no objection to the review and recategorization of certain types of offences where appropriate the net result appears to increase burdens for contractors disproportionately. For example, there are many instances where the effect of recategorization and adjustment of fines is to increase potential penalties fifteen-fold. To take just one example – failure to make full and proper use of ear protectors. This has been re-aligned and increased from “minor” at HK\$10,000 to “serious” at HK\$150,000. Without wishing to diminish in any way the importance of proper protection of worker hearing it seems to the CIG that compliance is as much down to individual workers as it is to their management and some non-compliance is occasionally likely, even where good systems and culture exist. Particularly for smaller contractors the fine level would be significant and, it is suggested, disproportionate.
7. With regard to maximum terms of imprisonment and the proposed creation of indictable offences it is again doubted whether any meaningful deterrence or incentive is created. The current 6-month period for pursuing cases is beneficial as it encourages prompt investigation and action and avoids matters being left ‘hanging over’ suspected parties. If there is a case to answer, and by implication lessons to be learned, it is considered better if this is identified and actioned promptly. Finally, the CIG does have some reservations (shared in the wider industry) that there may be a temptation to use the proposed increased powers of prosecution and sentencing to make examples of directors and to show action is being taken, rather than them being used only in the most deserving cases. The CIG believes these increased powers are unnecessary but were they to be adopted should only be available in cases of clear criminal negligence and reckless disregard.

8. Finally, and linking to the further points below, the current proposals remain focussed predominantly, and the CIG feels unfairly, on contractors whereas ultimately safety depends on the contributions and interactions of a wider range of stakeholders including employers, subcontractors, consultants and workers.

In light of the above, insofar as OSH penalties are to be reviewed and revised, the CIG suggests the most appropriate course of action is to adjust the existing fine levels to reflect inflation and review the categorisation of offences but with a check to ensure there will be no dis-proportionate results. The proposed turnover based tariff and increases to terms of imprisonment and times for bringing charges are not supported.

The CIGs Alternative Suggestions

The CIG believes that the only effective way to address safety and reduce accidents and fatalities is to adopt a holistic approach which recognises the complexities and multiple stakeholders involved in the construction process. Although accidents typically occur on site during construction operations the conditions and culture leading to an accident can often be attributed to factors arising much earlier.

In particular, the following all play a crucial part:

1. Design, both permanent and temporary, is fundamental to the ease and safety of construction and also to future maintenance and alteration works.
2. If safety is to be given its proper focus then it is essential the designers and other consultants are appointed on the basis that full consideration of health and safety forms part of their brief and they are remunerated properly for the same.
3. Where sub-contracting chains are too long, communications and systems of supervision become more complex potentially raising the risk of accidents. Reducing the length of subcontracting chains makes supervision and management of safety easier and more efficient.
4. The commercial aspects of a project can also have a bearing on safety. If prices are too keen and / or programme periods are too tight then unhelpful pressure can build on both contractors, subcontractors and consultants which may increase risk. For example, projects subject to significant acceleration, night working and disruption to planned programmes may inevitably see increased risks of accidents. Also, where cash flow is poor, it is often the lowest tiers of the supply chain that suffer most and are perhaps most vulnerable to the temptation to cut corners.
5. Although it is accepted that leadership should come from employers, contractors and consultants the role of individual workers cannot be under-estimated. Any effective safety system ultimately relies in large part on individuals taking responsibility for themselves and those immediately around them. Individuals need to understand and embrace the importance of taking care of themselves and those around them and the dire human consequences of not doing so.
6. The level of skill and experience of individuals is also critical to how well and safely they can perform their roles.

7. In terms of culture, it is vital that health and safety is not just seen in terms of roles, duties and liabilities but that it should be seen as the primary objective, more important than time, cost and quality. Furthermore, that it is seen in these terms not just by contractors who may be liable for penalties but also by employers and consultants who are ultimately the parties responsible for procuring and designing the buildings or infrastructure in question.

In light of the above, the CIG firmly believes that the required holistic approach should encompass the following elements:

- a) The focus should be on incentivising all stakeholders in the industry and not primarily on prosecution and imposition of penalties.
- b) Reflecting the shared stakeholder responsibility for safety and the vital role of design, Construction and Design Management (“**CDM**”) regulations should be introduced. There are international precedents for such an approach which can be adopted and adapted to reflect the local situation to ensure they have the necessary local characteristics. CDM regulations can be developed to ensure safety is properly addressed in design at all stages, that safe working methods and adequate supervision are always in place and that workers undertake their duties professionally and with safety to the fore.
- c) Development of a suitable regulatory framework for CDM should involve all stakeholders including training institutes and universities. Such an initiative will inevitably generate much useful debate, focus, training and capacity building in best practise for safe design and working which would in itself be of immense value to the industry. We note that government issued CDM guidance notes in 2006 although these were not, unfortunately, developed further into regulations. As Government is aware of the potential for CDM to bring lasting benefits and change, the CIG urges that it is acted on.
- d) Government should take the lead in further developing fair procurement and commercial practises with the aim of ensuring that all projects are awarded with fair and adequate pricing and programme periods. Furthermore, that commercial claims and issues are dealt with promptly and reasonably. It unfortunately remains the case that much procurement in Hong Kong ultimately turns on lowest price tendering with commercial and contract management thereafter often becoming somewhat adversarial. To address this, consideration might be given to increasing the weight given to safety in tender assessments and perhaps excluding consideration of the very lowest priced tender – something which is done in some other jurisdictions.
- e) In order to reduce the risks arising from many conventional construction operations the current initiatives to encourage off site manufacture, whether in relation to reinforcement bars, through use of Design for Manufacture and Assembly or Modular Integrated Construction, should be further supported and promoted. In the same vein, it is suggested that safety can also be driven through greater use of early contractor involvement during procurement and the encouragement and tolerance of innovative design solutions with demonstrable benefits for health and safety.

- f) Those elements of construction carrying greatest risk should be identified and tackled directly. For example, the risks associated with bamboo scaffolding are well known and yet its use remains widespread, largely on cost grounds, notwithstanding that steel scaffolding is the default option in many jurisdictions and where there are increasingly options (utilising DfMA / MiC technologies for example) to reduce or eradicate the need for scaffolding.
- g) The training of workers and those who immediately supervise them would benefit from greater focus on safety with emphasis on 'mindset' and 'culture' as well as technical skill sets. Appreciating the consequences of poor practices, even if they may seem to have served well in the past is key. The CIG also believes that training on safety and design for safety should more regularly form part of undergraduate and professional training provided in Hong Kong.

Much of the above can be achieved, the CIG believes, through the implementation of the Development Bureau's Construction 2.0 report which rightly emphasises the importance of further developing the professionalisation of the industry with emphasis placed on safety, designing for buildability and adopting collaborative and fair procurement practices.

The CIG therefore advocates and fully supports Construction 2.0 which, with due emphasis on safety and the points raised above, can bring about lasting change. For the reasons already given in this letter the CIG does not see the proposed dramatic increase in penalties as the right solution.

We thank you for your consideration of our comments and would be happy to meet to discuss our ideas further with you.

Yours sincerely,



David Graham
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British Chamber of Commerce in Hong Kong