

16 April 2019

Mr Carlson Chan Ka-shun, JP
Commissioner for Labour
Labour Department
16/F Harbour Building
38 Pier Road
Central, Hong Kong

Dear Mr ~~Chan~~ *Carlson*

Consultation Paper by Labour Department of February 2019 “Raising Penalties of Occupational Safety and Health Legislation” (“the CP”)
Response by Hong Kong General Chamber of Commerce (“HKGCC”)

Introduction

1. HKGCC welcomes the policy objective of the CP, namely to reduce the number of accidents at work (fatal or otherwise) in Hong Kong. However, we question whether the main proposal in the consultation paper (“Proposal 1”) - a substantial increase in the maximum statutory level of penalties on businesses whose workers suffer industrial accidents - will achieve this objective. Moreover, we can see significant downsides for Hong Kong in proceeding with this proposal in its current form. In our view, other methods of achieving this objective would be more effective, and avoid these downsides.
2. We also see no reasonable justification for the proposal to double (from six months to one year) the period within which a summons can be issued for an alleged breach of health and safety legislation (“Proposal 2”).
3. We explain our views on Proposals 1 and 2 below.

Proposal 1: Significant Increase in Penalties

4. The CP’s proposal for a substantial increase in the maximum statutory level of penalties appears to be motivated (according to the CP) by two reasons:
 - the fact that the maximum penalties that can be imposed for breach of health and safety legislation in certain other jurisdictions are significantly higher than those available in Hong Kong; and
 - an assumption that a substantial increase in the maximum statutory level of penalties in Hong Kong will motivate Hong Kong businesses to increase health and safety precautions for workers, thereby resulting in a lower number of accidents.

As regards the first reason, regulation that applies in other jurisdictions is not necessarily suitable for Hong Kong, including the maximum level of penalties. Each jurisdiction's circumstances are different, and what may be regarded as a sufficient maximum level of penalties (combined with other measures designed to promote compliance) in one jurisdiction may not be suitable or necessary in another jurisdiction.

Regarding the second reason, the CP provides no evidence (for example, from other jurisdictions) to show that a substantial increase in the maximum statutory level of penalties results in fewer industrial accidents. This appears to be merely an assumption. In fact, the evidence that exists in Hong Kong points in the other direction. The CP itself notes that between 1998 and 2017, under the *current* statutory limits for penalties, the accident rate per thousand workers dropped dramatically: from 64.7 to 17.2. Moreover, the CP itself states that the penalties imposed by the courts for industrial courts on average fall well below the *current* maximum penalty levels. This indicates that the *current* maximum penalty levels are considered by the courts as more than sufficient to accommodate the culpability of offenders.

5. In addition to the absence of a specific definition for extremely serious cases that are of an indictable nature, we are also concerned by the proposal that for some infringements, a penalty of up to 10 per cent of a business's turnover may be imposed. In our view, linking the level of penalty to a business's turnover is inappropriate in the case of health and safety legislation. To seek to justify this, the CP draws an analogy with a similar turnover cap under the Competition and Telecommunications Ordinances. But in our view, this analogy is misplaced. The link with turnover in these Ordinances is designed to ensure that the economic benefit the business gains from engaging in the conduct (such as a price-fixing cartel) is financially outweighed by the level of the penalty (and other consequences such as liability in damages) that may ensue if the infringement is detected. The 10% cap is derived from EU competition law, and the EU has justified it as follows: "*Breaking the competition rules is profitable if it goes unpunished – that is why companies do it...The fine has to take this into account if it is to achieve its objective of prevention on industry as a whole*".¹ (emphasis added). This rationale is irrelevant to health and safety legislation - a business does not set out to cause industrial accidents in order to boost its profits. As we believe is the case in most if not all other jurisdictions listed in the CP, penalties for breach should be set at a fixed sum.

Downsides

6. A significant increase in the maximum level of penalties, including the rise of general duty fines to HKD3million, and especially a maximum set at 10% of turnover, will inevitably result in an increase in insurance premiums that businesses have to pay, thereby increasing business costs that may ultimately have to be passed on to consumers. In some cases, it may even deter new entry by businesses in certain sectors such as construction, something that Hong Kong can ill-afford at the moment with the shortage of labour to meet the large scale public construction projects that are ongoing or in the pipeline. In the absence of any evidence that increasing penalties to the levels suggested will reduce industrial accidents to a level sufficient to offset these costs, we recommend that the Government takes a holistic approach and focuses on other approaches to reducing industrial accidents, rather than simply increasing the maximum level of penalties.

¹ http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf

Proposal 2: Doubling the Time Limit for Issuing Summonses

7. The CP seeks to justify this proposal by arguing that “*it would assist the courts in better understanding the seriousness and culpability of these cases*” by “*allowing sufficient time for LD to conduct more in-depth investigations into the cases and thus providing the courts with sufficient evidence...*”. This argument seems to suggest that LD has been unable to secure convictions because the six-month time limit has been insufficient to accumulate sufficient evidence. If that was the case, it is doubtful whether prosecution should be brought in the first place. Rather, the solution should be to equip LD with sufficient resources so that it is capable of carrying out investigations thoroughly. Extending the time limit would only prolong the suffering of those subject to industrial accidents and their families, as well as legal uncertainty for the businesses in question.

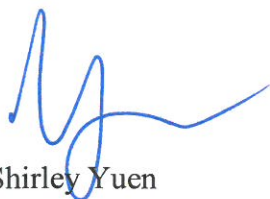
Other Approaches

8. Education and training are key in preventing industrial accidents, because they focus on prevention rather than punishment, and therefore tackle the problem at source. In our view, there is considerable scope for Government and business to work together in achieving this goal, and this would be a more constructive and productive approach than focusing simply on raising the maximum level of penalties. Reference could be made, for example, to the initiatives that the Privacy Commissioner has taken in working with businesses to promote compliance with the Personal Data (Privacy) Ordinance.
9. Maintaining a safe and healthy work environment is a shared responsibility and, as such, the current approach adopted in the CP to place the entire responsibility of observing workplace health and safety on employers is lopsided and unfair. For trades such as construction where self-employed workers predominate or are the norm, ensuring compliance could be problematic despite employers’ best efforts. It is therefore equally important that these contract or task-based workers be held accountable for their actions, which result in industrial accidents despite precautions adopted and safety training provided by employers.

Conclusion

10. Whilst we agree with the Government’s policy objective of reducing the number of industrial accidents, in the absence of any evidence to suggest that increasing the maximum statutory level of penalties would do so, and with the risk of significant downsides in doing so, we are unable to support the Government’s proposal in its current form. We would, however, strongly support more informal joint Government and industry initiatives to improve further health and safety at work.

Yours sincerely



Shirley Yuen
CEO