



22 March 2019

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

Our Ref.: 0200031371

By fax and post

2157 1245

Dear Sir,

**Re: Raising Penalties of Occupational Safety and Health Legislation
Comments from the Hong Kong Construction Association, Ltd.**

We write on behalf of our 300 Members to object to your proposal to increase the maximum fines and the maximum imprisonment terms under the Occupational Safety and Health Legislation applicable to construction.

Our objection is not that we do not care about construction safety, on the contrary, the whole industry had poured in lots of resources over the past decade to improve site safety, some in join hands with your department.

We object because we do not believe raising penalties on main contractors alone could reduce accidents nor is it a key factor positively contributing to better construction site safety. Raising the penalties misled public with the wrong impression that main contractors are the main contributor of safety incidents and the obvious party liable.

Construction site accidents were caused by a wide varieties of mishaps and reasons. To improve construction site safety, all stakeholders along the supply chain, including property owners, designers and consultants, main contractors, subcontractors, site supervisors, workers and authority must own and take up their fair share of site safety responsibility. For example, the design and detailing needed to consider construction methods, contract periods need to

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be reasonable and achievable. Design and construction period are two major contributors to construction risks. Others included ageing of skilled workforces, shortage of suitably skilled workers and workers' attitudes.

Hong Kong construction industry contributed 5.2% of GDP in 2017, and employing 8% of the working population. Main contractors are sizeable local employers. Over 481,000 construction workers are registered, qualified for green cards and working to Designated Workers for Designated Trades in new work projects while another 8,400+ are registered minor works workers working in RMAA. They are all registered and own personally duty to practice safe site working not only to care for themselves but also to their peers. It is current good practice norm that main contractors of new projects make it compulsory for workers to attend induction safety trainings and regular safety trainings on sites they attended to. Nonetheless, accidents still happen.

If we look at the accident rate for the past 10 years. The accident rate per 1000 workers dropped from 61.4 in 2008 to 28.7 in the first half of 2018. The total number of industrial accidents has not dropped in parallel only because the base figure (numbers of construction workers) has increased significantly. Fatality number per year ranged from the low 9 (2010) to a high 24(2012) averaged 19 over the ten years period and it was 15 in 2018. The facts are the accident rates are trending down and the yearly fatal cases relatively steady.

In addition to the OSHL penalties, **there are other very significant losses** (not obvious to the public) that main contractors had to suffer, in a case of serious accident, **both under contract and government contractors management procedures**, from poor rating in the Contractors' Performance Reports to total suspension from tendering public projects. These financial losses usually far outweigh the penalties applicable under the law and all main contractors, irrespective of the ordinance penalties, have absolutely no reason not to take reasonable care nor provide PPE for our valuable workforce.

The Labour Department shall not simply compared fine levels of other countries without considering prevailing circumstances and operation details of those countries such as import labours, quality of the workforce, trade splits and work practices, construction periods, complexity of design, concentration of workforce, roles of labour unions in managing work safety practices, and/or imposed responsibilities on design, safety precautions against property owners and design consultants, etc..

If the Department care to study the UK Construction (Design and Management) Regulations 2015 that, to our view, is a better approach to improve health and safety of the industry through:

1. sensibly plan the work so the risks involved are managed from start to finish
2. have the right people for the right job at the right time
3. cooperate and coordinate own work with others
4. have the right information about the risks and how they are being managed
5. communicate this information effectively to those who need to know
6. consult and engage with workers about the risks and how they are being managed

The Association take note that substantial numbers of past poor safety performance cases were related to improper workers' behaviours. Changing workers unsafe behaviours cannot solely rely on raising the penalties to punish the main contractors. We were very disappointed that Labour Department had been reluctant to prosecute those workers acting with unsafe behaviour. The judgements for attributable penalties clearly show how the court viewed the severity and relative contributions by main contractors. **Labour Department ought to always prosecute any worker who behaved unsafely, and such commitment would be a game changer to improve workers' safe working attitude.**

The Association members take great exception to the proposed linking of maximum fines for Indictable Offences with company turnover. This totally new "concept" – "the maximum fine levels be pegged to the turnover of convicted entities" will change the regulatory regime and change the business environment. ***How can the Labour Department justifiably propose penalties equivalent to calculating parking fines based on the value of the offending vehicle?*** This is **simply unfair and discriminating to the size of the business.**

Any main contractor being prosecuted for serious accident (who shall have its right to defend its case) would immediately result in their creditability status being weakened by the huge potential fines that threaten normal bank credits. The result would be detrimental to that main contractor and could lead to bankruptcy, redundancy and uncontrollable knock on potentially serious implications that affect the whole supply chain, workers and public at large. **Members had expressed that this level of penalty will result in many main contractors considering to withdraw business from Hong Kong.**

We noted LD drew reference to the UK laws as the basis of the proposal and wish to have your detailed explanation on how the UK penalties are calculated and said to be turnover linked without limit.

The proposed increase in imprisonment period together with the raise of penalties are totally disproportionate to the business return. Since the commencement of the legislation there has not been any case of immediate imprisonment for workers who breached the ordinance and offences concerning workers are seldom invoked by the Labour Department. We have yet to see any analysis regarding the effect of an increase in fine level on the accident rates in those overseas countries.

Hong Kong is already topping the world in its construction cost and the current

proposals by the government shall no doubt drive up costs. Our construction workers are already being paid high wages and they owe a duty to work in a safe manner.

In conclusion, we believe your proposal is only finding the easy way out to shovel responsibilities and public attentions to main contractors, for which we utterly reject. **We see the need to properly segregate responsibilities amongst industry stakeholders (as stated above) and develop enforcement mechanisms to ensure that each responsible parties carry their in-dischargeable responsibilities.** Not until stakeholders own their share of responsibilities, raising penalties to main contractors without changing the other factors only serve to damage the industry.

Yours sincerely,



Thomas Tse
Chief Executive
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c.c. *Secretary for Labour and Welfare*

Secretary for Development

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香港建造商會就提高職業安全及健康法例罰則之意見

商會代表 300 名會員來信，反對處方建議提高職業安全及健康法例中就建築業相關之最高罰款及最高監禁條款之建議。

我們反對並不代表我們漠視安全，相反，整個行業在過去十年已投入大量資源改善建造業安全，當中亦不少與貴處合作。我們反對，是因為我們認為單獨對總承建商提高罰則並不能減少事故發生，也不是可改善工地安全的方法。提高罰則只會誤導公眾，錯誤理解工地事故是由總承建商負責任的錯覺。

所有事故之發生，是由各種各樣錯誤及原因引起的。要提高施工現場之安全性，供應鏈中的所有利益相關者，包括業主、設計、顧問、總承建商、分包商、現場監督員、工人和相關機構等，都必須公平分擔不可推卸的安全責任。例如，設計及安裝等細節需考慮到施工方式，訂立合約工期亦需要考慮其合理和可行性，而設計和合約工期，均是施工風險的主要成因。其次，也需考慮到勞動人口之老化，技工短缺及工人態度。

香港建築業在 2017 年之本地生產總值佔了 5.2%，僱用了 8% 本地工作人口，總承建商同時擔當相當重要之本地雇主。超過 481,000 名獲已註冊並擁有綠卡資格之建造業工人，在專工專責條例的規管下，在新工程項目工作，另有 8,400 多名已註冊為 RMAA 小型工程工人。他們全是合資格及已註冊之工人，應有個人責任實踐安全施工，工作不只為自己，也要照顧同袍。目前，所有新項目的總承建商一般都指定工人必須參加入職安全培訓以及定期參加在職安全培訓。儘管如此，事故仍然發生。

回顧過去 10 年工地千人事故率，由 2008 年的 61.4% 下降至 2018 年上半年的 28.7%，但事故總數並沒有同時下降，這是因為建築工人數量在這 10 年間顯著

增加。而每年事故死亡人數：最低 9 人 (2010 年)，最高 24 人 (2012 年)，平均為 19 人，在 2018 年則為 15 人。事實證明事故率呈下降趨勢而年度致命數字則相對穩定。

若有嚴重事故發生，主要承建商除了受到職業安全及健康條例處罰外，還要承受 (對公眾來說並不明顯) 其他非常重大的損失，例如根據合同的逾期罰款和政府承包商管理程序中，總承建商的評級在績效報告中被列為「不佳」，甚至完全不能參與項目投標。這些實際經濟損失，通常遠遠超過法律規定的罰則，所以所有總承建商，無論法例罰則如何，亦絕對沒有理由不採取合理且謹慎之措施，也絕不會忽視我們寶貴之勞動人口，而不去提供足夠之個人防護設備。

勞工處不能只單純地將香港與其他國家之處罰水平作比較，應要考慮這些國家之普遍情況和營運細節，如勞動人口之輸入、勞動人口之素質、分工和工作慣例、建設週期、設計的複雜性、勞動人口集中度、相關工會在管理工作安全實行的責任和角式，及/或對設計，對業主和設計顧問的安全事故責任等。

若 貴處願意研究 2015 年英國建築 (設計和管理) 條例，我們認為透過以下方法去改善建造行業健康和較佳：

1. 明智地規劃工作，以便從頭到尾管理所涉及的風險
2. 在適時找合適人選
3. 與他人合作和協調自己工作
4. 掌握有關風險及其管理方式之正確信息
5. 有效地將這些信息傳達至需要知道的人
6. 諮詢並與工人討論風險及其管理方式

商會注意到過去有實在數字顯示不安全工作案例與工人不正當行為有關。改變工人的不正當行為，不可能單靠提高對總承包商罰則來解決。對於勞工處一直不願起訴那些有不安全施工行為的工人，我們感到非常失望。法庭的判決，也清楚地表明法院對總承包商應在案內負責任的比重。勞工處也應該起訴所有不安全施工的工人，而這做法將必改變工人對安全工作之態度。

商會成員對相關違法行為的最高罰款與公司營業額掛鈎的建議表示反對。這個全新的「概念」 - 「最高罰款額與被定罪的實體營業額掛鈎」將改變整個監管制度及營商環境。請問勞工處怎能根據違規車輛的價值去計算違例停車之罰款？這

顯然是不公平且有歧視業務規模之嫌。

任何因嚴重事故而被起訴的總承建商（雖然有權為其案件辯護），立即會因潛在巨額罰款威脅正常銀行信貸，而導致他們的財政狀況被削弱。結果只對總承建商產生不利影響，嚴重更可能導致破產、裁員和一些無法控制的連鎖反應，到最後影響整個供應鏈，工人以至公眾。有商會會員曾表示，這個程度之罰則只會導致總承建商考慮撤出香港的業務。

我們知悉香港勞工處以英國法律作為提案基礎，希望 貴處能詳細解釋英國的罰則如何計算，尤其無上限與營業額掛鈎。

建議的增加監禁期以及增加處罰與業務回報完全不相稱。自本條例生效以來，從沒有任何違反該條例的工人被監禁的案例，勞工處絕少援引檢控工人。我們亦未能看到任何因增加罰則在此等海外國家能有效減低事故率之分析。

香港目前建築成本已世界水平最高，政府提出的建議無疑會增加營運成本。本地建築工人已經獲得高工資，他們亦應有責任安全施工。

總而言之，貴處建議只要求主要總承建商履行職責和引起公眾關注的方法，我們絕對拒絕苟同。我們認為有必要在行業持分者之間適當地分攤責任（如上所述）並制定執行機制，以確保每個責任方履行其職責。在所有持分者承擔他們的自身責任前，沒有改變其他因素的情況下處罰總承建商只會損害整個行業。