

LCQ3: Raising the penalties under occupational safety and health legislation

Following is a question by the Hon Shiu Ka-fai and a written reply by the Secretary for Labour and Welfare, Dr Law Chi-kwong, in the Legislative Council (LegCo) today (April 17):

Question:

Last month, the Government submitted to the Panel on Manpower of this Council preliminary proposals to amend the occupational safety and health (OSH) legislation for raising the penalties for employers/ proprietors/occupiers of premises who have breached the legislation (proposed legislative amendments). In this connection, will the Government inform this Council:

(1) as the Government considers that the actual sentences imposed by the courts on persons breaching OSH legislation are on the low side (e.g. regarding the fatal industrial accidents in the construction industry in 2018, the average fine for each summons was only about \$27,000), whether it has examined the reasons for the court to impose sentences that were on the low side, and whether the relevant sentences reflected the level of the legal liability which the employers had to bear;

(2) regarding those cases in which the sentences were on the low side, whether it has sought a review of the sentence by the court or appealed against the sentence; if so, of the details; if not, the reasons for that;

(3) of the respective numbers of prosecutions and convictions in each of the past five years which involved employees' breaches of OSH legislation, with a breakdown by nature of offence; whether it has assessed if the sentences imposed by the court on the convicted employees were on the low side; if it has, of the details; if it has not, the reasons for that;

(4) given that the industrial accident rate in Hong Kong dropped from 64.7 in every 1 000 workers in 1998 to 17.2 in every 1 000 workers in 2017, whether it knows how such accident rates compared with the corresponding rates in other advanced economies (including the United States, Singapore, Australia, New Zealand and Ontario Province of Canada) in the same period;

(5) given that for prosecutions taken out as "summary offences", the Government has proposed to extend the time-bar for issuing summonses from six months to one year, whether it has assessed the impacts of extending the time-bar for taking out prosecutions on the retention of evidence as well as on the legal rights and interests of the defendants; if so, of the details; if not, the reasons for that;

(6) given that the Government has proposed to raise the maximum fines for extremely serious cases to 10 per cent of the convicted entities' turnover or \$6 million (whichever is the greater), whether the Government has assessed the impacts of the proposal, once implemented, on the operation and business environment of small and medium enterprises, as well as whether the proposed penalty level is proportionate to the severity of the offence; if it has assessed, of the details; if it has not, the reasons for that;

(7) as the Government has indicated that it had consulted six major chambers of commerce on the proposed legislative amendments, of the names of those six major chambers of commerce and their respective stances on such proposals, together with a list of other organisations and individuals that were consulted; and

(8) given that the proposed legislative amendments, once implemented, will affect the business environment of a number of industries (including construction, food and beverage services, storage, ports, transportation, cleansing, etc.), why the Government has not comprehensively consulted the public prior to putting forward the proposals; whether it will comprehensively consult the stakeholders of various industries prior to taking forward such proposals; if so, of the details; if not, the reasons for that?

Reply:

President,

The numbers of fatal occupational accidents in recent years have remained high. Among them, there were a small number of cases involving very high culpability or serious negligence. There are views in the community that a major reason is that the sentences for cases of contravention of occupational safety and health (OSH) legislation have been on the low side. Taking 2018 as an example, the average fine for each summons in relation to fatal industrial accidents in the construction industry was only \$27, 000. The deterrent effect is clearly inadequate.

In fact, the penalties of OSH legislation in Hong Kong have not been revised for over 20 years. The current maximum fine of the legislation (i.e. \$500,000) is far lower than those of other advanced common law countries. Therefore, the Government considers it necessary to review the maximum penalty of the OSH legislation. With reference to the laws and experiences of other countries/regions, and taking into consideration the Hong Kong situation, the Labour Department (LD) has proposed preliminary recommendations for enhancing the deterrent effect of OSH legislation, and conducted a consultation in the past two months or so.

My reply to the question raised by the Member is as follows:

(1) and (2) LD has been making efforts to assist the courts to determine appropriate sentences, particularly in providing investigation reports or

case materials for the courts' reference in deciding the cases and determining sentences. Although the amounts of fines imposed by the courts have slightly increased in recent years, they are still not high enough to effect the expected deterrence of OSH legislation. As far as LD understands, the courts take into account a basket of factors when determining sentences, which include the maximum fines of relevant offences, actual sentences of previous cases of similar nature, etc. LD considers that the current sentences do not appropriately reflect the seriousness of the offences committed by duty holders, particularly convicted cases with very serious consequences and very high culpability. The current sentences do not achieve adequate deterrent effect to protect the safety of workers.

Depending on the circumstances of individual cases, LD will request the Department of Justice (DoJ) where necessary to consider applying to the courts for reviews or appeals with regard to the sentences. During the period from 2014 to 2018, LD proposed to DoJ to apply for review of fines for 40 cases, and among them, DoJ agreed to make applications to the courts in respect of three cases, and the sentence of one case was eventually raised by the court.

(3) From 2014 to 2018, the numbers of employees prosecuted and convicted for OSH offences are set out in Appendix I. As explained above, LD considers the current level of penalties are generally on the low side, and one main reason is that the maximum fines of relevant penalty provisions have not been revised for a number of years.

(4) Different countries or regions have different statutory requirements for reporting work accidents, and the economic sectors covered and definitions of working population vary. Their criteria and methodologies for compiling statistics of workplace accidents are also not the same. In view of these differences, it is not appropriate to directly compare the statistics of occupational accidents in different countries or regions.

(5) Since the commencement of OSH legislation, there have only been three cases of suspended imprisonment, with no case of immediate imprisonment for the convicted persons. LD noted there are views in the community that those people involved in the most serious OSH offences should be sentenced to imprisonment so as to generate sufficient deterrent effect. To facilitate the courts to better understand the seriousness and culpability of the cases, LD considers it necessary to enhance the evidence collection work for such offences, and therefore proposed to extend the time-bar for issuing summonses from the current six months to one year. This would give LD more time to conduct more comprehensive and in-depth investigations into cases, with a view to providing sufficient evidence to facilitate the courts to consider whether it is necessary to sentence the convicted to immediate imprisonment.

According to LD's past experiences, there were only limited number of cases involving severe culpability of individuals. To deal with these limited number of cases, LD needs longer time to collect evidence. As for the remaining majority of cases, LD should be able to complete their investigation and prosecution within six months. LD notices that there are

currently other pieces of legislation in Hong Kong that include provisions with time-bars of one year or above. Such time-bar for taking out prosecutions should not result in unacceptable impacts on the retention of evidence as well as the legal rights and interests of the defendants.

(6) LD noticed there were individual occupational accidents that involved extremely serious offences, extremely high culpability or serious negligence, and resulted in serious consequences. The companies involved in these extremely serious cases are of different sizes. In order to ensure the penalty level to have sufficient deterrent effect to different companies, LD has preliminarily proposed pegging the maximum fines for such cases with the convicted companies' turnover, so that the maximum fines can suitably reflect the seriousness of the offences and pose sufficient deterrent effect. The number of these extremely serious cases is small. Notwithstanding that, we noted during the consultation that the business sector is generally concerned that this proposed penalty may seriously affect the operation of small and medium enterprises and the business environment. LD is carefully analysing and studying the views received with a view to refining the legislative amendment proposals.

(7) and (8) LD started to conduct consultation on the preliminary proposals on raising penalties of OSH legislation in February this year. Apart from consulting the Labour Advisory Board, LD has also consulted the LegCo Panel on Manpower. In addition, LD has taken the initiative to meet with a number of major chambers of commerce with broad representation, explaining to them the preliminary proposals in detail, and listening to their views in full. Besides, as the construction sector may have greater concern about raising penalties given the higher number of accidents in the industry, LD has made special effort to visit a number of trade associations and unions of the construction industry to tap their views. The list of organisations that LD has proactively approached for consultation is at Appendix II.

Since LD has not informed the consulted organisations that their views will be made public, it is not appropriate to provide the relevant information. Nevertheless, generally speaking, both the business sector and the labour organisations agree that the OSH penalties should be raised to enhance their deterrent effect. However, the employer organisations have reservation over the proposal to peg the maximum fines for extremely serious offences with the convicted companies' turnover, which in their views would negatively impact on Hong Kong's business environment. LD would continue to listen to the views of different sectors of the community as appropriate in the course of refining the legislative amendment proposals.