

A Review of the Air Pollution Control Ordinance for Legal Professionals

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Introduction.....	2
The control of air pollution under the Air Pollution Control Ordinance	
Anatomy of the Air Pollution Control Ordinance	
Legislative development of air pollution control in Hong Kong and public health	
Is public health one of the overarching interests of the Ordinance?.....	8
1. Does “pollution of the atmosphere” in the Long Title of the Air Pollution Control Ordinance refer to “air pollution” as defined in s 2?	
Is the health objective integrated into the operative parts of the Ordinance?.....	9
2. Why is there no reference to “air pollution” in Part II of the Ordinance (Air Control Zones and Air Quality Objectives)?	
3. Do the Secretary, Authority or any other relevant Government official (such as the Secretary for Health) have any emergency powers in respect of air pollution levels which are prejudicial to health?	
Is the Ordinance’s process adequate for setting air quality objectives?.....	12
4. What external references (international, regional or national standards or authorities in respect of emissions, air quality or health) are used or referred to in establishing the air quality objectives and other standards or codes in the Air Pollution Control Ordinance?	
5. Is the Secretary required to review and update the air quality objectives?	
6. Is the Authority required to achieve the air quality objectives?	
7. Is the Secretary responsible for the achievement of air quality objectives?	
8. Why is the Chief Executive not empowered to give directions to either the Authority or the Secretary under the Air Pollution Control Ordinance?	
9. Has the Secretary ever given directions to the Authority under subs 8(3)?	
Does the Ordinance facilitate the achievement of the air quality objectives?.....	18
10. Do the powers in Part III of the Ordinance (Control of Air Pollution) relate to the attainment and maintenance of air quality objectives?	
11. Other than the licensing regime, are there any specific powers of enforcement in respect of air quality objectives?	
12. Why are the air quality objectives and air pollution not referred to in s 12 (Prevention of discharge of noxious or offensive emissions)?	
13. Can licences and exemptions be revoked for breach of the air quality objectives?	
Does the Ordinance facilitate proper management of air pollution?.....	22
14. Are there any provisions for the abatement of air pollution other than the reference in the Long Title and the air pollution abatement notices in s 10?	
15. Is the Secretary or Authority required to monitor the levels of air pollution in Hong Kong?	
16. Why do the grounds of objection under subs 14(4)(b) not apply to applications for the renewal of licences (s 16), the transfer of licences (s 18A) and the application for a licence upon the cessation of an exemption (s 21)?	
17. Are the penalties and fees under the Air Pollution Control Ordinance reviewed and updated frequently? Have they been set at a sufficiently deterrent standard?	
18. Are there any private rights under the Air Pollution Control Ordinance for damages or other remedies for breaches of the terms and conditions of licences and exemptions, the air quality objectives or Codes?	
19. Why is there a time limit for bringing prosecutions for offences in the Air Pollution Control Ordinance?	
20. Do the provisions of the Air Pollution Control Ordinance take precedence over the provisions of other Ordinances where there are conflicting provisions, particularly in respect of attaining and maintaining air quality objectives or prejudice to health by air pollution?	

INTRODUCTION

In June 2007, the Environmental Protection Department of the Hong Kong Government initiated an 18-month study to review Hong Kong's Air Quality Objectives and develop a long-term air quality management strategy. The scope of the study includes a review of the current state of air quality in Hong Kong, including "legislation in place for controlling air pollution"¹.

Air pollution in Hong Kong is primarily provided for under the Air Pollution Control Ordinance (Chapter 311 of the Laws of Hong Kong), which came into force on 1 October 1983. Other pieces of legislation relevant to the control of air pollution in Hong Kong include the Environmental Impact Assessment Ordinance (Cap 499), the Ozone Layer Protection Ordinance (Cap 403), and various traffic control provisions.

This review is limited to the provisions of the Air Pollution Control Ordinance that deal with outdoor air pollution. A full section-by-section commentary on the Ordinance by the same author will be published by LexisNexis in the Annotated Ordinances of Hong Kong in March 2009. In light of the ongoing study, this review attempts to provide a timely and relevant discussion in respect of the key piece of legislation on air pollution in Hong Kong.

The control of air pollution under the Air Pollution Control Ordinance

Air pollution control in Hong Kong takes place under four distinct regimes under the Air Pollution Control Ordinance that appear to have limited interaction with one another.

The first is the Air Quality Objectives regime², under which certain objectives are set in respect of air pollution levels in Hong Kong. In setting such targets, the Air Quality Objectives regime interacts with other laws, such as the Environmental Impact Assessment Ordinance, and is also to be taken into account in the licensing regime (see below).

Secondly, as mentioned, there is a Licensing regime³ for stationary emitters of air pollution, whereby licenses must be sought for carrying on certain polluting processes. The attainment and maintenance of air quality objectives must be taken into account in the grant of licences. Under the Licensing regime, further provisions specifically for electricity works (power generation) have been enacted as the result of Government findings in respect of the breakdown of local contributors to air pollution⁴.

¹Paragraph (a), "Scope of the Study", Air Quality Objectives, Environmental Protection Department website: http://www.epd.gov.hk/epd/english/environmentinhk/air/air_quality_objectives/air_quality_objectives.html

² Part II, APCO

³ Parts IV and IVB, APCO

⁴ http://www.epd.gov.hk/epd/english/environmentinhk/air/data/emission_inve.html

Thirdly, a more general regime for the control of air pollution also exists⁵ under a broader approach to air pollution⁶. Under this regime, air pollution abatement notices may be issued in respect of air pollution. This general regime and the Licensing regime are mutually exclusive, as abatement notices cannot be issued to any emitters that fall under the Licensing regime⁷. As will be discussed further below, the Air Quality Objectives regime is not directly referred to in the general regime, and certain implications arise from this lack of reference.

Fourthly, there can also be found under the provisions of the Air Pollution Control Ordinance an entirely separate regime for the control of asbestos. In this regard, it should be noted that the distinction between indoor and outdoor air pollution is not made under the Ordinance, and it would thus appear that the provisions of the Ordinance other than the asbestos control regime refer to outdoor air pollution⁸.

The control of emissions from road traffic were previously focused on the fuel of motor vehicles. This regime has since been removed to the regulations under this Ordinance, and further provisions relevant to (though perhaps not directed at) motor vehicle emissions may be found in certain road traffic control laws and regulations⁹.

Anatomy of the Air Pollution Control Ordinance

The Air Pollution Control Ordinance consists of 101 sections, divided over 9 Parts, as well as 6 Schedules and 22 pieces of subsidiary legislation, or regulations.

Part I of the Ordinance consists of ss 1 – 5, and is the Preliminary part, containing the interpretation (s 2) and application provisions, which set out the definitions and scope of the Ordinance, as well as establishing the (Secretary of the Environment as) air pollution control Authority.

Part II consists of ss 6 – 8, and provides for air control zones (s 6) and air quality objectives (s 7). Part II may be described as a sort of catch-all for those aspects of air pollution not dealt with by the licensing regime in Parts IV and IVB, or the asbestos control regime in Parts VIII and IX, and must therefore fall under the general ambit of the air quality objectives regime.

Part III consists of ss 9 and 10, and deals with the control of air pollution by way of technical memoranda (s 9) and air pollution abatement notices (s 10).

Part IV, Specified Processes and the Licensing of Premises Therefor, consists of ss 11 – 26A. Specified processes are set out in Sch 1. The prevention of noxious or offensive emissions is provided for in s 12, and the requirement to be licensed for such

⁵ Part III, APCO

⁶ s 10(2), APCO

⁷ s 10(6), APCO

⁸ Parts VIII and IX, APCO

⁹ See the Air Pollution Control (Motor Vehicle Fuel) Regulations (Cap 311L). See also regulation 44 of the Road Traffic (Traffic Control) Regulations (Cap 374G) in respect of leaving the engine of a motor vehicle running and regulation 45 of the Road Traffic (Public Service Vehicles) Regulations (Cap 374D) in respect of loitering etc as examples of other provisions indirectly linked to motor vehicle emissions.

processes is set out in s 13, failure for which is a criminal offence. The application process is set out in ss 14 and 15, whilst s 16 provides for the renewal of licences and s 17 provides for their cancellation, variation and revocation by the Authority. Exemptions and their removal are provided for under ss 20 - 21, whilst ss 24 – 25 concern compensation for the cancellation or variation of licences and exemptions.

Part IVA, consisting of ss 26B – 26F, previously concerned unleaded petrol and the control of the emission of air pollutants from motor vehicles. This Part has been repealed in its entirety.

Part IVB, Specified Licences, consists of ss 26G – 26N, and concerns licences for electricity works (referred to as specified licences under s 2). For the purposes of such licences, there are allocated a quantity of emission allowances under s 26G, contravention of which gives rise to criminal liability¹⁰, but also for which adjustments can be made such as surplus being carried forward to the following year under s 26J, applications for increases of allocated allowances under s 26K and the acquisition or transfer of such allowances under ss 26L and 26M.

Part V (ss 27 – 30B) contains the powers of enforcement, including the Authority's powers to obtain information, powers of entry and inspection, power to require modification in respect of licensed premises, offence provisions for failing to comply with the Authority's powers and for breach of terms and conditions of a licence or exemption.

Part VI, consisting of ss 31 – 36, concerns appeals against the decisions of the Authority, and sets out the establishment, composition and jurisdiction of the Appeal Board, when appeals may be brought, and certain administrative matters in respect of the Board.

Part VII consists of ss 37 – 50, and provides for miscellaneous matters. These include:

- a. the establishment of the non-binding Codes of Practice under s 37,
- b. certain requirements in respect of the Technical Memoranda,
- c. provision for licensing hearings, a register in respect of the licensing regime,
- d. confidentiality of information,
- e. immunity for those exercising powers under this Ordinance,
- f. the power of the Secretary to create regulations under s 43,
- g. the application of this Ordinance to the Government,
- h. the composition of the Advisory Council,
- i. time limitations for laying information in respect of offences under the Ordinance under s 46,
- j. the prosecution of offences,
- k. the liability of corporate officers,
- l. defences to the offence provisions in respect of emissions,
- m. the supplementary nature of the provisions of the APCO under s 49, and
- n. service of notices.

Parts VIII (Control of Environmental Asbestos, ss 51 – 68) and IX (Asbestos Control Works, ss 69 – 80) contain the asbestos control regime.

¹⁰ under s 30B

Legislative development of air pollution control in Hong Kong and public health

Prior to the Air Pollution Control Ordinance, air pollution was dealt with under the repealed Clean Air Ordinance, which was to “make provision for restricting pollution of the air and for matters connected therewith”¹¹. The provisions of the Clean Air Ordinance primarily concerned smoke emissions from furnaces, ovens, chimneys and industrial plants. Before the enactment of the Clean Air Ordinance, smoke control legislation in Hong Kong was dealt with under the repealed Air Navigation (Abatement of Smoke Nuisances) Ordinance 1955 and s 17(19) of the Public Health (Sanitation) Ordinance 1935¹². The Clean Air Ordinance repealed and replaced those laws when it came into force in 1960, with smoke nuisances and the safety of aircraft using the Kai Tak Airport remaining the primary mischief the Ordinance was directed against. Whilst the Clean Air Ordinance replaced a section concerning public health and sanitation, there was no express provision concerning public health in it.

The provisions of the Air Pollution Control Ordinance are more detailed, but the influence of the Clean Air Ordinance is clear – almost every section of the Clean Air Ordinance finds a counterpart in the Air Pollution Control Ordinance.

Section in Clean Air Ordinance	#	#	Equivalent in Air Pollution Control Ordinance
Interpretation	2	2	Interpretation
Application	3	3	Application
Notice to abate smoke nuisance	4	10	Air pollution abatement notice
Declaration of smoke control areas and scheduled areas	7	6	Air control zones
Special defences in the case of smoke nuisances	9	48	Defences in proceedings relating to emission of air pollutants
Appointment of competent authorities and smoke abatement officers	10	4	Authority and authorised officers
Information about furnaces and fuel consumers	11	27	Authority may obtain information
Powers of entry and inspection	12	28	Powers of entry and inspection, etc
Issue of codes and advice	13	37	Codes of Practice
Power to require modification or replacement or repair, etc. of furnaces, ovens, chimneys and industrial plants	14	30	Power to require modification etc., of chimneys and relevant plant
Power of Governor in Council to make regulations	15	43	Regulations
Protection of public officers	16	42	Protection of Government and public officers

Comparison table of the Clean Air Ordinance and equivalent sections in the Air Pollution Control Ordinance

When the Air Pollution Control Ordinance succeeded the Clean Air Ordinance by repealing and replacing it in 1983, it took the same nuisance-based approach to air pollution. Not until the Air Pollution Control (Amendment) Ordinance 1993 (13 of

¹¹ Long Title, Clean Air Ordinance (previously Cap 311, repealed)

¹² Para 1, ‘Objects and Reasons’, Clean Air Bill, No. B. 17, 1959

1993) was the term 'air pollutant nuisance' replaced by the term currently in use, 'air pollution', which is defined as "an emission of air pollutant which either alone or with another emission of air pollutant –

- (a) is prejudicial to health;
- (b) is a nuisance;
- (c) imperils or is likely to imperil the safety of or otherwise interferes with the normal operation of aircraft; or
- (d) is determined to be air pollution under a technical memorandum".

Hence, prejudice to health as a consideration in the control of air pollution was grafted onto existing legislation which historically was not concerned with and had not made any provision for public health.

The Air Pollution Control Ordinance also marked a divergence from the development of air pollution control in the UK, which by 1983 was dealt with under Part IV of the Control of Pollution Act 1974, a consolidated approach to pollution in all forms. This consolidated approach continues to this day in the UK under the Environment Act 1995, whilst in Hong Kong, the legislative provisions dealing with pollution continue to be split up over a number of disparate pieces of legislation¹³. Whilst the Clean Air Ordinance, a relatively simple piece of legislation, was strongly influenced by the more complex English Clean Air Act 1956, by contrast, the Air Pollution Control Ordinance has no readily identifiable counterpart provisions in Part IV of the Control of Pollution Act 1974 (UK).

The Air Pollution Control Ordinance has undergone a number of amendments, most notably under

- the Air Pollution Control (Amendment) Ordinance 1987 (23 of 1987),
- the Air Pollution Control (Amendment) Ordinance 1991 (2 of 1991),
- the Air Pollution Control (Amendment) Ordinance 1993 (13 of 1993),
- the Air Pollution Control (Amendment) (No. 2) Ordinance 1994 (19 of 1994),
- the Air Pollution Control (Amendment) Ordinance 2008 (31 of 2008).

The amendments in 1987 may be described as minor, making more detailed various provisions in the principal Ordinance.

The amendments in 1991 were made to extend the air pollution controls in the principal Ordinance to motor vehicles, to deal with the supply of unleaded petrol for the purposes of controlling air pollutants emitted from motor vehicles, and to extend the powers of entry and inspection, codes of practice, protection of information and regulatory powers under the principal Ordinance to motor vehicles and premises in which petrol is stored or offered for sale¹⁴.

The amendments in 1993 were the most detailed and complex set of amendments made to the principal Ordinance. They introduced a new regime in respect of asbestos control, as well as the use of technical memoranda for the control of air pollution from stationary sources, and the exemptions under the licensing regime

¹³ Including the Waste Disposal Ordinance (Cap 354), Water Pollution Control Ordinance (Cap 358), Noise Control Ordinance (Cap 400), Ozone Layer Protection Ordinance (Cap 403), and the Environmental Impact Assessment Ordinance (Cap 499)

¹⁴ Para 1, Explanatory Memorandum, Air Pollution Control (Amendment) Bill 1990

were also revised. The 1993 amendments also marked the first major revision to the appeal and penalty provisions of the principal Ordinance¹⁵.

Minor amendments subsequently took place in 1994 for the purposes of revising the notification requirement in respect of specified processes and the control of the supply and sale of motor vehicle fuel (petrol and diesel), in particular, the transfer of ss 26B – 26F of the principal Ordinance to the Air Pollution Control (Motor Vehicle Fuel) Regulations (Cap 311L)¹⁶.

The amendments in 2008 amend the principal Ordinance for the purposes of regulating the emission of sulphur dioxide, nitrogen oxides and respirable suspended particulates from electricity works, removing the right of referring a decision of the Appeal Board to review, prohibiting public officers from being appointed to Appeal Boards, and clarifying the meaning of ‘licence’ in the principal Ordinance and its subsidiary legislation.

The result of this legislative evolution has been a reactionary and fragmented approach to problems as they emerge – Part IVA, which concerned unleaded petrol and the control of the emission of air pollutants from motor vehicles, was added to the primary legislation by the 1991 amendments and then transferred into a set of regulations by the 1994 amendments. Parts VIII and IX of the Ordinance which address asbestos control were added by the 1993 amendments to the tail-end of the primary legislation, whilst the more detailed provisions in respect of the licensing regime for specified licences (concerning electricity works) were inserted into the primary legislation by the 2008 amendments.

The piecemeal fashion in which the amendments are made and the fragmented approach has led to certain weaknesses in the Ordinance, such as inconsistencies and the omission of what appear to be logical extensions to the provisions of the Ordinance. One example of the piecemeal approach is the numerous references to ‘Governor’ and the ‘Governor in Council’ that remain in the Ordinance, instead of referring to ‘Chief Executive’. Under Schedule 8 of the Interpretation and General Clauses Ordinance (Cap 1), any reference to Governor after 1 July 1997 shall be construed as a reference to the Chief Executive of the HKSAR, but the references serve as an apt reminder that many of the provisions have not received much consideration since before 1 July 1997.

¹⁵ Para 1, Explanatory Memorandum, Air Pollution Control (Amendment) Bill 1992

¹⁶ Paras 1 & 3, Explanatory Memorandum, Air Pollution Control (Amendment) (No.2) Bill 1993

IS PUBLIC HEALTH ONE OF THE OVERARCHING INTERESTS OF THE ORDINANCE?

1. Does “pollution of the atmosphere” in the Long Title of the Air Pollution Control Ordinance refer to “air pollution” as defined in s 2?

Long title	Interpretation
<p>To make provision for abating, prohibiting and controlling pollution of the atmosphere and for matters connected therewith.</p> <p>Originally 17 of 1983 1 October 1983</p>	<p>...</p> <p>"air pollution" (空氣污染) means an emission of air pollutant which either alone or with another emission of air pollutant-</p> <ul style="list-style-type: none"> (a) is prejudicial to health; (b) is a nuisance; (c) imperils or is likely to imperil the safety of or otherwise interferes with the normal operation of aircraft; or (d) is determined to be air pollution under a technical memorandum; (Replaced 13 of 1993 s. 2) <p>...</p>

The Long Title of an Ordinance does not impact upon its operative provisions save where there may be ambiguities, in which case the Long Title states the legislative intent behind the Ordinance. The full long title of the Air Pollution Control Ordinance reads: “To make provision for abating, prohibiting and controlling pollution of the atmosphere and for matters connected therewith”.

As referred to above in the Introduction, “air pollution” is defined under s 2 (sub-para (a)) of the Ordinance as emissions of air pollutants which are prejudicial to health. If “pollution of the atmosphere” refers to “air pollution” as defined in the Ordinance, prejudice to health forms part of the objective of the Air Pollution Control Ordinance. This would have significant impact upon the scope and construction of the provisions of the Ordinance (though it should be noted that the definition of “air pollution” in s 2 does not contain emissions from specified processes).

IS THE HEALTH OBJECTIVE INTEGRATED INTO THE OPERATIVE PARTS OF THE ORDINANCE?

2. Why is there no reference to “air pollution” in Part II of the Ordinance (Air Control Zones and Air Quality Objectives)?

PART II

AIR CONTROL ZONES AND AIR QUALITY OBJECTIVES

6. Air control zones

- (1) The Governor in Council may, after consultation with the Advisory Council on the Environment, by order published in the Gazette, declare any part of Hong Kong to be an air control zone for the purposes of this Ordinance. (Amended L.N. 165 of 1984; L.N. 57 of 1994)
- (2) An order under subsection (1) shall, for each air control zone constituted thereby-
 - (a) make reference to a plan or map of that zone deposited in the Land Registry at Victoria; or (Amended 8 of 1993 s. 2)
 - (b) sufficiently describe the zone by other means.

7. Secretary to establish quality objectives

- (1) The Secretary shall, after consultation with the Advisory Council on the Environment, establish for each air control zone air quality objectives or different objectives for different parts of a zone.
(Amended L.N. 165 of 1984; L.N. 57 of 1994)
- (1A) The Secretary may publish air quality objectives for an air control zone by issuing a technical memorandum which may specify different objectives for different parts of the zone.
(Added 13 of 1993 s. 5)
- (2) The air quality objectives for any particular air control zone or part thereof shall be the quality which, in the opinion of the Secretary, should be achieved and maintained in order to promote the conservation and best use of air in the zone in the public interest.
- (3) Any air quality objective may be amended from time to time by the Secretary, after consultation with the Advisory Council on the Environment.
(Amended L.N. 165 of 1984; L.N. 57 of 1994)
- (4)-(5) (Repealed 13 of 1993 s. 5)

8. Authority to seek to achieve quality objectives

- (1) (Repealed 13 of 1993 s. 6)
- (2) The Authority shall aim to achieve the relevant air quality objectives as soon as is reasonably practicable and thereafter to maintain the quality so achieved.
- (3) If in the opinion of the Secretary the achievement or maintenance of any air quality objective would be better served by the exercise by the Authority in a particular manner of any of his powers under section 15(4), 17 or 22, the Secretary may give directions in writing to the Authority as to the manner in which he shall exercise those powers; and, in the case of a direction which relates to section 15(4), any such direction may be of a general nature or relate to a particular case or particular cases.
- (4) The Authority shall comply with any direction given to him under subsection (3) and the discretion conferred on the Authority by section 15(4), 17 or 22 as the case may be, shall not apply to any specified process in respect of which such a direction is in force.

Part II of the Ordinance consists of ss 6 – 8, providing for the establishment of air control zones (s 6), air quality objectives (s 7) and imposing upon the Authority for air pollution the aim of achieving the relevant air quality objectives (s 8). Whilst it is implied by reference to the Long Title that the purpose of establishing air control zones and air quality objectives is for the abatement, prohibition and control of air pollution, no explicit reference is made to the term. Thus, air pollution may be defined with reference to technical memoranda under its definition in s 2 (sub-para (d)), but air control zones and air quality objectives may be established without reference to air pollution or its prejudicial effects to health.

Instead of referring to air pollution or public health, air quality objectives “shall be the quality which, in the opinion of the Secretary for the Environment, should be achieved and maintained in order to promote the conservation and best use of air in the zone in the public interest”. Neither “the best use of air” nor “the public interest” are defined under the Ordinance. Moreover, it is not an objective assessment of what “the best use of air” or “the public interest” may be that applies to the establishment of air quality objectives, but the Secretary’s subjective opinion of what those terms may be that applies. It should be noted that whilst the Secretary establishes the air quality objectives in consultation with the Advisory Council on the Environment, only the opinion of the Secretary is referred to in respect of “the best use of air” and “public interest” under subs 7(2).

The power to issue technical memoranda in respect of the air quality objectives under subs 7(1A) may be contrasted with the power to issue technical memoranda under s 9 in Part III of the Ordinance (Control of Air Pollution) as the power in s 7 may be exercised without reference to the definition of air pollution (and prejudice to health) whereas the power in s 9 explicitly concerns air pollution as defined in s 2. Under s 9, the Secretary may issue technical memoranda setting out principles, procedures, guidelines, standards and limits in respect of air pollution and air pollution abatement notices. It is unclear from the wording of the section whether or not the section merely clarifies the power to issue technical memoranda under s 7 in respect of air quality objectives, or whether it is an additional and supplemental power to issue technical memoranda beyond the scope of the air quality objectives. As mentioned above, the definition of ‘air pollution’ in the Ordinance incorporates a prejudice to health element, and thus prejudice to health receives consideration in technical memoranda under s 9, but not in those issued under s 7 in respect of the air quality objectives.

3. Do the Secretary, Authority or any other relevant Government official (such as the Secretary for Health) have any emergency powers in respect of air pollution levels which are prejudicial to health?

Under s 43, the Secretary may make regulations in consultation with the Advisory Council, and also includes penalties for breach of such regulations. Whilst there is a wide range of regulations that may be made under this section, it does not provide for rules on emergency powers in respect of air pollution and the endangerment of health in situations where the levels of air pollution have risen to dangerous levels, nor are such powers provided for in the primary legislation. No powers are provided to other Government officials or bodies in respect of air pollution under this Ordinance.

IS THE ORDINANCE'S PROCESS ADEQUATE FOR SETTING AIR QUALITY OBJECTIVES?

4. What external references (international, regional or national standards or authorities in respect of emissions, air quality or health) are used or referred to in establishing the air quality objectives and other standards or codes in the Air Pollution Control Ordinance?

10. Air pollution abatement notice

...

(2) In determining whether the emission of air pollutants is causing or contributing to air pollution which exists or which is imminent, the Authority and an authorized officer may take into account-

...

(b) research material results or publications which indicate that the type of emission may have adverse health effects;

(c) the advice of a medical practitioner;

...

Under s 10, in determining whether or not air pollution exists, factors to be taken into account include “research material results or publications which indicate that the type of emission may have adverse health effects”¹⁷ and “the advice of a medical practitioner”¹⁸. These are the only references in this Ordinance to material on air pollution that do not originate from the Secretary, Council, Authority or other Government body or officer – no references are made to any international, regional or national standards, nor even for the provision of international, regional or national level co-operation and exchanges with authorities equivalent to the Secretary or Authority in other jurisdictions.

It should be noted that the United Nations Framework Convention on Climate Change and its Kyoto Protocol was extended to Hong Kong with effect from 5 May 2003¹⁹. The Kyoto Protocol is directed at the reduction of four greenhouse gases (carbon dioxide, methane, nitrous oxide, sulphur hexafluoride) and two groups of gases (hydrofluorocarbons, perfluorocarbons). Carbon dioxide and methane are both explicitly excluded from the definition of “volatile organic compound” under the Air Pollution Control (Volatile Organic Compounds) Regulation (Cap 311W), whilst perfluorocarbons (with no saturations and with sulphur bonds only to carbon and fluorine) are mentioned in the definition of ‘exempt compound’ in the Schedules to those Regulations. Despite the Kyoto Protocol coming into force on 16 February 2005, it does not appear that any reference is made to the Protocol in the primary or subsidiary legislation of the Air Pollution Control Ordinance.

¹⁷ s 10(2)(b) APCO

¹⁸ s 10(2)(c) APCO

¹⁹ Declaration (10)

5. Is the Secretary required to review and update the air quality objectives?

I do not see how it can be prima facie argued that s.7 is itself lacking. The section reads as follows :

- “(1) The Secretary shall, after consultation with the Advisory Council on the Environment, establish for each air control zone air quality objectives or different objectives for different parts of a zone.
- (1A) The Secretary may publish air quality objectives for an air control zone by issuing a technical memorandum which may specify different objectives for different parts of the zone.
- (2) The air quality objectives for any particular air control zone or part thereof shall be the quality which, in the opinion of the Secretary, should be achieved and maintained in order to promote the conservation and best use of air in the zone in the public interest.
- (3) Any air quality objective may be amended from time to time by the Secretary, after consultation with the Advisory Council on the Environment.”

As I read the section, it makes direct provision for the Secretary for the Environment, in consultation with a statutory body, not only to introduce air quality objectives but to update them whenever necessary. The contention must be, therefore, that the Government has failed to use its powers under the section to introduce what the applicants describe as ‘up-to-date’ air quality objectives.

– Hartmann J, *Clean Air Foundation Ltd v The Government of the HKSAR* (unrep. HCAL 35/2007)

Under subs 7(1), the Secretary is required to establish air quality objectives, but on a narrow reading of that subsection, is not required to review and update them, though there is a power in subs 7(3) for the Secretary to amend the objectives “from time to time”.

However, in *Clean Air Foundation Ltd & Anor v The Government of the HKSAR* (unrep. HCAL 35/2007), Hartmann J found that this section makes “direct provision for the Secretary for the Environment, in consultation with a statutory body, not only to introduce air quality objectives but to update them whenever necessary” (para 27). The failure to exercise the power under this section was characterized by Hartmann J as being a matter of policy, which is not the domain of the Courts in judicial review. The tension between “whenever necessary” and the exercise of the power being a matter of policy should be noted – unless it is suggested that it is a matter of policy to determine when it is ‘necessary’ to amend the air quality objectives. Given Hartmann J’s finding that there is a prima facie argument that the right to life under Article 28 of the Basic Law and Article 2 of the Bill of Rights (as well as the progressive achievement of the highest attainable standard of health under Article 12 ICESCR, as referred to in the judgment) imposes a duty on the Government to combat air pollution, ‘necessity’ should be determined by objective reference points or standards for necessity, such as medical necessity, rather than being a matter to be determined under Government policy.

It should also be noted that whilst the Secretary consults with the Advisory Council in establishing the air quality objectives, there is no provision for the Advisory Council to take the initiative to advise the Secretary in respect of the objectives, including their review and renewal. An assessment of the provisions under s 7 must be that the provisions are static with respect to the ease with which standards may be adjusted, in contrast to the reference to abatement in the Long Title.

6. Is the Authority required to achieve the air quality objectives?

Art.28 of the Basic Law and art.2 of the Bill of Rights provide for the right to life in the context of detention, trial and punishment. The question arises, therefore, of whether, on a purposive interpretation, the constitutional protection can be extended to matters of air pollution control. In this respect, Mr John Scott SC, leading counsel for the applicants, has referred to an emerging international jurisprudence to the effect that the right to life may, depending on the circumstances, impose on public authorities an obligation outside of the context of crime and punishment; for example, to provide vaccines in the case of epidemics or to protect against identified environmental hazards such as nuclear waste. I accept therefore that it is at least *prima facie* arguable that the constitutional right to life may apply in the circumstances advocated by the applicants; that is, by imposing some sort of duty on the Government to combat air pollution.

– Hartmann J, *Clean Air Foundation Ltd v The Government of the HKSAR* (unrep. HCAL 35/2007)

Under s 8, the Authority for air pollution control is responsible for the achievement of the air quality objectives established by the Secretary. It should be noted that under subs 8(2), only maintenance of the air quality objectives is mandatory, whilst achievement of the objectives is not a mandatory requirement of the Authority. Nor are any time limits set for the achievement of air quality objectives – instead, subs 8(2) provides for their achievement “as soon as is reasonably practicable”, an undefined period of time.

This reading of the Ordinance, however, must be contrasted with Hartmann J’s judgment in *Clean Air Foundation Ltd & Anor v The Government of the HKSAR* (unrep. HCAL 35/2007), in which he accepted that it is at least *prima facie* arguable (for the purposes of leave for judicial review) that the right to life under Article 28 of the Basic Law and Article 2 of the Bill of Rights imposes a duty on the Government to combat air pollution, a duty reflected “more directly in point” in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) on the progressive achievement of the highest attainable standard of health (para 17). The lack of requirement under s 8, therefore, may not be consistent with Hong Kong’s obligations under the ICESCR.

7. Is the Secretary responsible for the achievement of air quality objectives?

26G Secretary to allocate emission allowances in respect of specified licence

- (1) For the purposes of this Ordinance, the Secretary shall by technical memorandum allocate a quantity of emission allowances for each type of specified pollutant in respect of each specified licence in relation to each emission year commencing on or after 1 January 2010.
- (2) In making an allocation under subsection (1) for a type of specified pollutant, the Secretary shall—
 - (a) have regard to the best practicable means for preventing the emission of that type of pollutant;
 - (b) have as his purpose the attainment and maintenance of any relevant air quality objective;
 - (c) have regard to whether the emission of that type of pollutant would be, or be likely to be, prejudicial to health.

...

Under Part II of the Ordinance, the Chief Executive establishes air control zones (s 6), the Secretary sets the air quality objectives for each zone (s 7) and the Authority is responsible for achieving the objectives (s 8). The Authority's responsibility for achieving the objectives is also reflected in the licensing regime under Part IV, in which under subs 15(3)(b) the Authority shall have as his purpose the attainment and maintenance of objectives in exercising his discretion to grant or refuse an application for a licence.

The Secretary is provided the power under subs 8(3) to give the Authority directions as to how the objectives may be achieved, but does not appear to be responsible for their achievement under s 8.

This, however, may be contrasted with s 26G in Part IVB as pertains to specified licences, where for the purposes of electricity works the Secretary allocates emission allowances. In making such allocation, it is the Secretary, and not the Authority, that is required to have as his purpose the attainment and maintenance of any relevant air quality objective under subs 26G(2)(b). There is no provision under the Ordinance by which the Secretary may delegate his duties to the Authority for air pollution, and thus whilst a general responsibility is placed upon the Authority for the attainment and maintenance of objectives under subs 8(2) and reinforced in other parts of the Ordinance, such as s 15(3)(b), the Secretary is responsible for the attainment and maintenance of objectives in respect of specified licences. It is unclear why the Secretary is empowered to direct how the objectives may be attained and maintained under the general provision but is only responsible for the attainment of objectives under Part IVB.

8. Why is the Chief Executive not empowered to give directions to either the Authority or the Secretary under the Air Pollution Control Ordinance?

As mentioned above, the Secretary is provided the power under subs 8(3) to give the Authority directions as to how the objectives may be achieved, and under subs 8(4), the Authority is obliged to comply with any such direction.

It should also be noted that the Governor's (or Chief Executive's now) power to give directions under s 5 was repealed by the Air Pollution Control (Amendment) Ordinance 1993 (13 of 1993), though the Chief Executive retains the power to:

1. appoint the Authority under s 4,
2. establish air control zones under s 6,
3. must also approve the cancellation or variation of licences and exemptions under ss 17 and 22 in the licensing regime under Part IV,
4. appoint the Chairman and panel members in respect of the appeal boards under s 32 in Part VI, and
5. extend the time allowed for bringing claims for compensation under ss 24 and 25 in Sch 4.

Although the power of the Chief Executive to give directions was repealed on the introduction of the technical memorandum approach under the Air Pollution Control (Amendment) Ordinance 1993 (13 of 1993) (under which the Secretary is empowered to issue technical memoranda), the power of the Chief Executive to give directions may be found in numerous other Ordinances. An apt comparison may be drawn to the Water Pollution Control Ordinance (Cap 358), in which the technical memorandum approach is also in place, and under which both the Secretary and an Authority (the Director of Environmental Protection) have duties in respect of water pollution control. Under s 3 of that Ordinance, the Chief Executive is empowered to give both the Secretary and the Authority directions in respect of the exercise or performance of their powers, functions or duties under that Ordinance.

The power of the Chief Executive to give directions is unique to Hong Kong. It is considered a tool of last resort not to be exercised lightly and without due consideration and in some cases, consultation, and has never been exercised in the past. The provision raises issues of governance and transparency, but also potentially enhances the internal accountability of the Executive branch of government in Hong Kong due to the fact that the Chief Executive has the ultimate say in respect of how powers, functions or duties are exercised or performed by rest of the Executive branch of government under him.

9. Has the Secretary ever given directions to the Authority under subs 8(3)?

Under subs 8(3), the Secretary may give the Authority directions in respect of how the Authority should exercise its powers under the Air Pollution Control Ordinance. This appears to be an absolutely discretionary power on the part of the Secretary, as there is no requirement for the Secretary to consult with the Advisory Council on the Environment before issuing such directions nor is the Secretary required to publish or otherwise notify the public of any such directions.

The lack of a requirement to notify the public in particular may be contrasted with the general requirement in s 4A, whereby the Secretary is required to publish details of methods or standards that he is empowered to approve under the Ordinance.

When the lack of a notification requirement is considered along with the lack of an overriding power on the part of the Chief Executive to direct the Secretary, there appears to be vested in the Secretary a high level of discretion but a low level of accountability under this Ordinance.

DOES THE ORDINANCE FACILITATE THE ACHIEVEMENT OF THE AIR QUALITY OBJECTIVES?

10. Do the powers in Part III of the Ordinance (Control of Air Pollution) relate to the attainment and maintenance of air quality objectives?

**PART III
CONTROL OF AIR POLLUTION**

9 Technical memorandum relating to air pollution
The Secretary may issue a technical memorandum setting out principles, procedures, guidelines, standards and limits for-

- (a) the prediction, measurement, assessment or determination of air pollution caused, or contributed to, by the operation of a polluting process;
- (b) the issue of air pollution abatement notices for such pollution; and
- (c) the determination of whether or not an air pollution abatement notice is being complied with. (Part III replaced 13 of 1993 s. 7)

10 Air pollution abatement notice

- (1) Where the Authority or an authorized officer is satisfied that the emission of air pollutants from a polluting process is causing or contributing to air pollution which exists or which is imminent, the Authority or the authorized officer may give an air pollution abatement notice, either verbally or in writing, to the owner of the premises or to the person carrying out the activity requiring him-
- (a) to cease the emission of air pollutants from the premises or to cease the operation of the polluting process;
- (b) to reduce the emission of air pollutants from the premises or polluting process;
- (c) to take other steps to abate the emission of air pollutants from the premises or polluting process.

...

The power to issue technical memoranda under s 9 makes no reference to the air quality objectives, and instead concerns air pollution generally.

Section 10 creates air pollution abatement notices, for which failing to comply will result in criminal liability. Whilst notices under this section do not apply to the licensing regime in Part IV or that under the Public Health and Municipal Services Ordinance, the power to issue such notices does not concern the attainment or maintenance of air quality objectives. Neither is it exercised with reference to them, and instead concerns air pollution in a general sense – which is further defined by reference to factors under subs 10(2). Amongst the factors to be considered are technical memoranda (subs 10(2)(a) – other than technical memoranda issued under s 26G), but no express reference is made to the air quality objectives, which may be established by technical memoranda under s 7. It should be noted that the reference to technical memoranda appears to refer to those under s 9 – technical memoranda under subs 7(1A) are not explicitly excluded (unlike those under s 26G). However, the Secretary is merely empowered to issue objectives by way of technical memoranda but is not obliged or confined to technical memoranda in issuing objectives.

Without reference to the air quality objectives in Part III, it is unclear what powers the Authority may exercise (other than those in respect of the licensing regime) to achieve the air quality objectives. It is almost as though Parts II and III of the Ordinance are entirely unrelated.

11. Other than the licensing regime, are there any specific powers of enforcement in respect of air quality objectives?

As noted above, there does not appear to be any direct connection between air pollution abatement notices under s 10 and air quality objectives.

Setting aside air pollution abatement notices, Part V of the Ordinance (ss 27 – 30B) contains the powers of enforcement, including the Authority's powers to obtain information, powers of entry and inspection, power to require modification in respect of licensed premises, offence provisions for failing to comply with the Authority's powers and for breach of terms and conditions of a licence or exemption. It should be noted that none of the provisions in respect of enforcement nor the penalty provisions therein directly refer to the attainment or maintenance of the air quality objectives. It should also be noted that the term 'air pollution' is similarly not referred to under the enforcement provisions in Part V.

The power to obtain information under s 27 refers to the Authority's functions and duties under the Ordinance, which may refer to the duty to attain and maintain air quality objectives under s 8. The purposes for the exercise of the powers of entry and inspection under s 28 are listed in subss 28(1)(a) to (g), but the attainment and maintenance of air quality objectives or the abatement, prohibition and control of air pollution are not referred to under these purposes. Nor are they referred to in the offence provisions in s 29 concerning s 28. Sections 30A and 30B concern the contravention of terms and conditions of licences, specified licences and exemptions – neither the air quality objectives nor air pollution are directly referred to therein, but the terms and conditions may potentially so refer.

12. Why are the air quality objectives and air pollution not referred to in s 12 (Prevention of discharge of noxious or offensive emissions)?

12 Prevention of discharge of noxious or offensive emissions

- (1) The owner of any premises used for the conduct of any specified process shall use the best practicable means for preventing the emission of noxious or offensive emissions from such premises, and for preventing the discharge, whether directly or indirectly, of such emissions into the atmosphere, and for rendering such emissions where discharged harmless and inoffensive.

...

Part IV of the Ordinance deals with the specified processes in Sch 1 of the Ordinance and the licensing of premises for such processes. Under Part IV, s 12 contains a general prevention requirement whereby owners of premises used for the conduct of specified processes are required to use the best practicable means to prevent the emission of noxious or offensive emissions from any source use in such process. The prevention requirement does not refer to air pollution or the attainment and maintenance of air quality objectives. It should be noted that the definition of air pollution in s 2 does not contain emissions from specified processes.

This may be contrasted with s 14 in respect of the application for licences, under which an objection may be lodged against an applicant if the specified process would 'tend to inhibit the attainment or maintenance of any relevant air quality objective' or 'the emission . . . would be, or be likely to be, prejudicial to health'. Air quality objectives and prejudice to health are also to be considered under s 15 in granting a licence, illustrating the inconsistency with which air pollution and the air quality objectives are referred to throughout the Ordinance.

13. Can licences and exemptions be revoked for breach of the air quality objectives?

20A Cessation of exemption on conviction under section 19(3)

The owner of any premises who is convicted under section 19(3) of an offence relating to those premises shall cease to be exempt under section 20 from the operation of section 13 in respect of the premises.

(Added 23 of 1987 s. 7)

Under ss 17 and 22, a licence or exemption may be cancelled, varied or revoked by the Authority only with the prior approval of the Chief Executive, unless continuation of the specified process would be or be likely to be prejudicial to health. This may be a disincentive for new terms, such as lower rates of emission, to be introduced to licences and exemptions by the Authority, leading to the terms and conditions of licences and exemptions to be static and thus potentially contradictory with the abatement referred to in the Long Title. No provision is made under this section for variation or cancellation on the basis of failure to attain or maintain relevant air quality objectives, a factor for consideration in granting the licence under s 15(3)(b).

Under s 20A, where an exempted owner of premises is convicted of an offence under s 19(3) in respect of intentionally or recklessly providing information that is incorrect shall no longer be entitled to an exemption under s 20. This is the only provision under the Ordinance in which revocation is the penalty. Under s 30B, specified licence holders may be fined for excessive emissions in respect of electricity works, but excessive emissions are not mentioned under the fining provision in s 30A in respect of other licence holders.

DOES THE ORDINANCE FACILITATE PROPER MANAGEMENT OF AIR POLLUTION?

14. Are there any provisions for the abatement of air pollution other than the reference in the Long Title and the air pollution abatement notices in s 10?

26J Increase in quantity of allocated allowances in case of surplus of allocated allowances in preceding year

- (1) Where the relevant circumstances exist in respect of a specified licence in relation to a type of specified pollutant in an emission year, the quantity of the allocated allowances for that type of pollutant as applicable to the licence in respect of the emission year is to be increased for the purposes of section 26I by the quantity specified in subsection (3).

...

Due to the inflexible way by which standards are set under the Ordinance and the nuisance-based approach to the control of air pollution, few provisions may actually be described as providing for the reduction of air pollution over time. To the contrary, under s 26J in Division 3 of Part IVB in respect of specified processes, up to 2% of allocated emissions may be carried forward from a preceding year where the actual emissions for the preceding year are lower than those allocated. Whilst this may provide incentive for licensees to bring their actual emissions below the allocated amount, this clearly contradicts the abatement provision in the Long Title – incentives may take different forms, such as discounts to the annual charges. Sections 26L and 26M in Division 3 also provide for application for increases of allocated allowances and the acquisition or transfer of such allowances. Again, these provisions appear to contradict the abatement provision.

15. Is the Secretary or Authority required to monitor the levels of air pollution in Hong Kong?

Despite the wide range of powers under the Ordinance to set standards in respect of air pollution, such as:

1. the power to set air quality objectives under s 7,
2. the power to issue technical memoranda for setting out principles, procedures, guidelines, standards and limits under s 9,
3. the power to impose terms and conditions in respect of licences under s 15 and exemptions under s 22,
4. the power to allocate emission allowances under s 26G, and the power to issue non-binding Codes of Practices under s 37, there is no provision in the Ordinance by which either the Secretary or the Authority is required to monitor air pollution in Hong Kong.

It may be assumed that the penalty provisions for breaches of terms and conditions in respect of licences, for example, may imply that such monitoring must occur, but the power of the Secretary to require notification under s 19 in respect of specified processes and the power of the Authority to obtain information under s 27 would appear to be the primary methods by which the Government acquires information under the Ordinance.

The lack of a monitoring requirement is symptomatic of the nuisance-based approach to air pollution that has prevailed since the Clear Air Ordinance 1960. A good example of the approach may be seen in the case of *Teng Fuh Co Ltd v Air Pollution Control Appeal Board & Anor* [2001] 3 HKLRD 304 in which the Court of Appeal upheld Hartmann J's judgment that the storage of shark's fins giving off an odour could be subject to an air pollution abatement notice under s 10. Unfortunately, such an approach may lend itself to the same piecemeal and fragmented results seen in the drafting of this Ordinance.

16. Why do the grounds of objection under subs 14(4)(b) not apply to applications for the renewal of licences (s 16), the transfer of licences (s 18A) and the application for a licence upon the cessation of an exemption (s 21)?

16 Renewal of licences

...

- (3) Except where the Secretary directs otherwise, section 14(3) and (4) shall not apply in relation to an application for renewal of a licence. (Amended 23 of 1987 s. 5)

...

18A Application for transfer of licences

...

- (3) Except where the Secretary directs otherwise, section 14(3) and (4) shall not apply in relation to an application for the transfer of a licence.

...

Under s 14, for licence applications in respect of emissions from specified processes, a notice period is prescribed under subs 14(3)(b). During this period, any person may object to the grant of a licence on the grounds that it would inhibit the attainment or maintenance of any air quality objective or the emissions from such a process would be prejudicial to health.

The notice period and grounds of objection, however, do not apply to applications for:

1. renewal of licences under s 16,
2. applications for the transfer of licences from one party to another under s 18A,
3. the application for licences once an exemption ceases to apply to the conduct of a specified process that no longer conforms to the particulars provided, unless the Secretary expressly directs that the notice period and grounds of objection apply.

The power to object is one that may have significant effect in respect of air pollution and the attainment and maintenance of air quality objectives. It is unclear why the relevant sections do not apply to these applications, particularly when they do apply to:

1. applications for variations of licences under s 18,
2. applications for licences after the removal of an exemption under s 20AA, and
3. applications for variations of an exemption under s 23.

17. Are the penalties and fees under the Air Pollution Control Ordinance reviewed and updated frequently? Have they been set at a sufficiently deterrent standard?

Parts IV (referred to above) and V (in respect of enforcement) contain certain offences for breach of certain provisions. One question that must be raised is whether or not the fines in respect of these offences, which have not been revised since 1993, remain at a sufficiently deterrent level. It should also be noted that the fining provisions do not relate to the upholding of the air quality objectives directly, but to the terms and conditions of licences instead.

In respect of the annual fees under s 15A, under r 7 and Sch 3 of the Air Pollution Control (Specified Processes) Regulations (Cap 311F), the fees therein were last updated in 2000²⁰.

²⁰ Air Pollution Control (Specified Processes) (Amendment) Regulation 2000 (L.N. 306 of 2000)

18. Are there any private rights under the Air Pollution Control Ordinance for damages or other remedies for breaches of the terms and conditions of licences and exemptions, the air quality objectives or Codes?

37 Codes of Practice

...

- (2) Failure on the part of any person to observe the provisions of any such Code or to accept any such advice shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may, in any proceedings whether civil or criminal and including proceedings for an offence under this Ordinance, be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.

Under s 37(2), failure to comply with the Codes does not lead to criminal liability, but such breach may be relied upon in other proceedings as tending to establish liability in question in those proceedings.

However, there is no complementary provision to this subsection providing for a right of action against licensed entities which do not comply with the Codes, nor are there any civil rights to complement the criminal liability provisions for breach of terms and conditions in respect of licences.

It should be noted that the introduction of such a provision in respect of a private right of action, such as that found in s 281 of the Securities and Futures Ordinance (Cap 571)²¹, could potentially enhance the deterrent effect of the Air Pollution Control Ordinance and provide private parties with the tools for enforcement in addition to those of the Authority. Limited research in this area in respect of caselaw in other jurisdictions tend to show private law suits for torts such as nuisance in respect of air pollution are more common than suits or judicial reviews against authorities in respect of damages or abatement of air pollution.

²¹ Section 281 SFO provides for the liability of persons who have committed market misconduct to compensate by way of damages to other persons for pecuniary losses they may have sustained as a result of that market misconduct.

19. Why is there a time limit for bringing prosecutions for offences in the Air Pollution Control Ordinance?

46 Limit of time for laying informations, etc.

- (1) A complaint or information in respect of an offence under this Ordinance shall be made or laid, as the case may be, within- (Amended 13 of 1993 s. 29)
 - (a) 6 months from the time when the matter of such complaint or information respectively first came to the knowledge of the Authority or an authorized officer; or
 - (b) 1 year from the time of the commission of the offence, whichever is the earlier.
- (2) Subsection (1) does not apply to the making of a complaint or laying of an information for an offence which is a continuing offence. (Added 13 of 1993 s. 29)
- (3) Where an offence is of a continuing nature a complaint or information in respect of the offence shall be made or laid, as the case may be, within 6 months after the continuance of the offence first coming to the notice of the Authority or an authorized officer. (Added 13 of 1993 s. 29)

Section 46 sets out the time limits for the laying of information in respect of offences under the Ordinance, limiting the time for making of a complaint or the laying of an information for a continuing offence to 6 months after the continuance of the offence first came to the notice of the Authority or authorized officer. It is unclear why there is a need for limiting the time a prosecution may be brought for the offences in this Ordinance under s 46, which would potentially appear to reduce the deterrent effect of the criminal provisions.

20. Do the provisions of the Air Pollution Control Ordinance take precedence over the provisions of other Ordinances where there are conflicting provisions, particularly in respect of attaining and maintaining air quality objectives or prejudice to health by air pollution?

49 Provisions of Ordinance to be in addition to any other Ordinance

The provisions of this Ordinance shall be in addition to and not in lieu of the provisions of any other Ordinance.

Under s 49, it is explicitly set out that the provisions of the APCO are additional to rather than overriding provisions of other Ordinances. Given the potential overlap between the APCO and certain other Ordinances in respect of the environment, it is unclear which provisions may take precedence in the event of conflict. This lack of clarity under s 49 raises the issue as to whether or not it may be necessary for a consolidated legislative approach to pollution, such as that found in the UK, or at least a consolidated approach to air pollution and related issues such as ozone protection and climate change.

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