

**Bills Committee on
Aviation Security (Amendment) Bill 2005**

**Administration's response to issues raised
at the Bills Committee meeting on 5 May 2005**

Purpose

This paper sets out the Administration's response to the issues raised by the Bills Committee at its meeting on 5 May 2005.

Administration's Response

(a) To provide relevant cases, if any, on the interpretation of "disorderly behaviour".

The disorderly behaviour offence in section 12B(3) of the Bill is modelled in part on the offence in section 17B(2) of the Public Order Ordinance (Cap. 245).¹ That offence has been the subject of judicial interpretation in several cases in the past few years and we believe that these cases will be relevant to the interpretation of the offence in section 12B(3).

The cases focus on two main legal issues:

- (i) the meaning of "disorderly behaviour"; and
- (ii) the facts that must be proven to establish that the conduct of the accused caused or was likely to cause a "breach of the peace".

(i) *"disorderly behaviour"*

Halsbury's Laws of Hong Kong, 2002 reissue, Vol. 9, paragraph 130.251, states that "disorderly behaviour" refers to "any substantial

¹ Section 17B(2) of Cap. 245 reads as follows:

"(2) Any person who in any public place behaves in a noisy or disorderly manner, or uses, or distributes or displays any writing containing, threatening, abusive or insulting words, with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be caused, shall be guilty of an offence and shall be liable on conviction to a fine of \$5000 and to imprisonment for 12 months."

breach of decorum which tends to disturb the peace or to interfere with the comfort of other people who may be in the vicinity”.²

In *HKSAR v. Cheng Siu Wing*,³ Beeson J. of the Court of First Instance held that the word “disorderly” in section 17B(2) of Cap. 245 should be given its ordinary dictionary meaning and that it referred to “unruly or offensive behaviour” or behaviour which “violates public order or morality”. Beeson J. held that disorderly conduct covered behaviour in the hearing or sight of a person which is likely to cause harassment, alarm or distress thereby. There need not be any element of violence, whether present or threatened, on the part of the accused. It covered conduct which was not necessarily threatening, abusive or insulting in itself.

In *HKSAR v. Cheng Siu Wing*, the conduct of an attempt to photograph or photographing under the skirt of a female was categorized as “disorderly conduct”. Similar conduct was found to constitute disorderly conduct in the case of *HKSAR v. Yip Tak Ming*.⁴

It is a question of fact for the court to decide whether the conduct of the accused can be characterized as “disorderly”: *HKSAR v. Cheng Siu Wing*. The test as to whether the conduct is disorderly is an objective one: *Halsbury's Laws of Hong Kong*, 2002 reissue, Vol. 9, paragraph 130.251, note 6.

(ii) “breach of the peace”/“jeopardise good order or discipline”

Section 17B(2) of Cap. 245 refers to conduct with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be caused. This is similar to the conduct referred to in section 12B(3) of the Bill, i.e., conduct which jeopardises or is likely to jeopardise the “good order and discipline” on board an aircraft.

On the basis of the cases concerning section 17B(2) of Cap. 245, the following basic principles can be discerned:

² For this proposition *Halsbury's* cites the cases of *Barrington v Austin* [1939] SASR 130, *Rice v Hudson* [1940] SASR 290; *Police v Christie* [1962] NZLR 1109 and *Melzer v Police* [1967] NZLR 437.

³ [2003] HKCFI 1152, [2003] 4 HKC 471; 5 September 2003 (CFI).

⁴ [2004] HKCFI 834, [2004] 3 HKLRD 286; 16 September 2004, Deputy High Court Judge B. W. Fung (CFI).

- (1) to constitute a breach of the peace there must be an “act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done”.⁵
- (2) the behaviour must be such that an act or threat of violence occurs or is likely to occur in response to the conduct of the accused.⁶
- (3) the court must consider the tendency of persons present at the scene to be provoked to violent behaviour in considering whether there is a real likelihood of a breach of the peace being caused.⁷
- (4) a disturbance alone, without anything more, cannot constitute a breach of the peace.⁸

(b) To provide the internal guidelines of airline operators on the provision of alcoholic beverages to passengers on board aircraft.

The two local airline operators, i.e. Cathay Pacific Airways and Dragonair, have drawn up internal guidelines on the provision of alcoholic beverages to passengers on board aircraft. Permission has been obtained from the two airline operators to reproduce the guidelines (available in English only) at Annex for members’ reference.

(c) To advise whether there is any overlap between offences in the Aviation Security (Amendment) Bill 2005 (the Bill) and those in the Air Navigation (Hong Kong) Order 1995 (the Order), apart from

⁵ *Reg. v. Howell* (1982) 1 Q.B. 421 (UK). The case of *Reg. v. Howell* has been quoted with approval in *HKSAR v. Cheng Siu Wing* (see note 3) and *HKSAR v. Yip Tak Ming* (see note 4) and also in *HKSAR v. Morter* [2003] HKCFI 432, [2003] 4 HKC 493, [2003] HKLRD 510; 9 May 2003, Beeson J. (CFI); *HKSAR v. Wong Ying Yu and Others* [1997] HKCFI 527, [1997] 3 HKC 452; 19 September 1997, Pang, J. (CFI); *HKSAR v. Yang You Ching* [1997] HKCFI 423, [1997] 3 HKC 744; 25 July 1997, Pang, J. (CFI) and *R. v. Kam Man Fai* [1983] HKCA 203, [1983] 1 HKC 614; 20 August 1983, Garcia J. (HC).

⁶ *Parkin v. Norman* [1983] 1 QB 92 (UK); *HKSAR v. Yang You Ching* [1997] HKCFI 423, [1997] 3 HKC 744; 25 July 1997, Pang, J. (CFI); *R. v. Kam Man Fai* (see note 5) and *HKSAR v. Morter* (see note 5).

⁷ *HKSAR v. Morter* (see note 5).

⁸ *R. v. Kam Man Fai* and *HKSAR v. Wong Ying Yu and Others* (see note 5).

offences relating to drunkenness and smoking.

Apart from the offences relating to drunkenness and smoking, there is some degree of overlapping between Article 51 of the Order and the proposed new section 12B(2) of the Bill in respect of disobeying the commands given by the aircraft commander. But as in the case of drunkenness and smoking (as explained in the Administration's response of 27 April 2005 to the Bills Committee vide LC Paper No. CB(2)1402/04-05(01)), there are differences between Article 51 of the Order and the proposed new section 12B(2) of the Bill in coverage and applicability.

The provisions of Article 51 and section 12B(2) are reproduced below -

Article 51 of the Order

Every person in an aircraft registered in Hong Kong shall obey all lawful commands which the commander of that aircraft may give for the purpose of securing the safety of the aircraft and of persons or property carried therein, or the safety, efficiency or regularity of air navigation.

Proposed new section 12B(2)

Any person on board an aircraft who, without reasonable excuse, fails to comply with any instruction given to the person by the commander of the aircraft, or on behalf of the commander by a member of the crew, for the purpose of –

- (a) protecting the safety of the aircraft or of persons or property on board the aircraft; or*
- (b) maintaining good order and discipline on board the aircraft,*

commits an offence.

Article 51 is applicable to Hong Kong-registered aircraft wherever they may be by virtue of Article 92(1)(c) of the Order. The proposed new section 12B(2) has a wider scope and is applicable to Hong Kong-controlled aircraft wherever they may be and to non-Hong Kong-controlled aircraft whose next place of landing is in Hong Kong (subject to the restrictive conditions specified in the proposed new section 12C). In addition, Article 51 prohibits the

non-compliance with lawful commands given by the aircraft commander for the purpose of securing the safety of the aircraft and of persons or property carried therein, or the safety, efficiency or regularity of air navigation. The proposed new section 12B(2) prohibits the non-compliance with instructions given by the aircraft commander or on behalf of the commander by a crew member for the purpose of (a) protecting the safety of the aircraft or of persons or property on board the aircraft; or (b) maintaining good order and discipline on board the aircraft. Besides, the offence of the proposed new section 12B(2) is not a strict liability because there is a defence provision of “without reasonable excuse” whereas no such defence is provided in Article 51 of the Order.

(d) To explain the prosecution policy for dealing with the overlap between offences in the Bill and the Order; and

As explained in paragraph e(iv) of the Administration’s response of 27 April 2005 to the Bills Committee vide LC Paper No. CB(2)1402/04-05(01), it is not unusual for there to be more than one offence available in respect of the same course of criminal conduct. As far as the overlapping provisions are concerned, the penalties for the offences in the Bill are heavier than those for the offences under Articles 49, 50 and 51 of the Order. Therefore, it is likely that a suspected person will be prosecuted for an offence under the Bill if the act is caught by both the proposed new provisions and the Order.

However, the decision to prosecute a suspect is ultimately the discretion of the prosecuting authority. Under Article 63 of the Basic Law, the Department of Justice is responsible for all prosecutions, and independent prosecutorial discretion is an important feature of Hong Kong’s criminal justice system.

A charge is only ever appropriate if it is in the public interest. In determining where exactly the public interest may be said to lie the prosecutor must examine all the factors and the circumstances. If the evidence supports a prosecution for any one of two or more offences, then a number of factors would be considered. If the conduct is particularly serious, a prosecution for the more serious offence may be initiated. On the other hand, it may be easier to

prove one offence rather than another, and in those circumstances a prosecution may be initiated in respect of the offence that is easier to prove. It is also possible to initiate a prosecution for alternative offences, but the prosecuting authority would specify that the less serious offence is being prosecuted on the basis that it is alternative to the more serious offence. If, thereafter, there is conviction for the more serious offence, then there is no need for the court to consider the less serious offence. But if the court finds the defendant not guilty of the more serious offence, then the court will have to consider the evidence in respect of the alternative, less serious offence, to determine whether there is sufficient evidence to convict the defendant of that offence.

- (e) *To advise on the Administration's plan and timetable, if any, on the review of the Order.*

The Order contains highly technical details regulating the operation of the civil aviation industry, the review of which requires thorough consultation. The Economic Development and Labour Bureau is now reviewing the Order. They aim at completing the review and formulating necessary amendments, in consultation with the industry, as soon as practicable.

Internal guidelines of airline operators on the provision of alcoholic beverages to passengers on board aircraft

(a) Cathay Pacific Airways

Passengers impaired by alcohol

People, when affected by alcohol, react in different ways. Some go to sleep, however, others can become over-friendly and noisy which can offend other passengers and crew members with unwanted attention. Others (more rarely) can become nasty and aggressive, and perhaps physically abusive. As we can never know how a person will react to over-indulgence in alcohol, Cabin Crew should be alert to the potential problems and take steps to avoid them. Inflight Service Manager (ISM) must keep Cockpit Crew informed of the situation and condition of the passenger.

If a passenger appears to be intoxicated (impaired) by alcohol when boarding the aircraft, flight attendants should be observant the situation. If the passenger's behaviour is objectionable, or if he/she appears to be incapable of moving around without falling and stumbling, the ISM must be advised immediately. He/she will in turn advise the Captain who will decide whether the passenger is fit to travel.

If the passenger appears to be getting intoxicated during the flight, the Cabin Crew should :

- Not serve the passenger anymore alcohol.
- Serve the passenger a non-alcoholic drink, juice, soft drink, water or tea / coffee.
- If he/she insists on having an alcoholic drink, refer the situation to the ISM.

It is against regulations for passengers to consume their own liquor on board and if the passengers are observed doing so, they should be stopped. If a passenger would like a certain brand of liquor, he/she can make a request and to be loaded by our caterers. It must be served

inflight by Cabin Crew. Discourage passengers to take the remaining liquor away from the aircraft as they may be taxed by local customs officers.

(b)Dragonair

Passengers impaired by alcohol

People, when affected by alcohol, react in different ways. Some go to sleep and are no problem. However, others can become over-friendly and noisy and can offend other passengers and crew members with unwanted attention and over familiar comments. Others (more rarely) can become nasty and aggressive, and perhaps physically abusive. As we never know how a person will react to over-indulgence in alcohol, Flight Attendants should be alert to the potential problems and take steps to avoid them.

If a passenger appears to be slightly intoxicated (impaired) by alcohol when boarding the aircraft, Flight Attendants should observe the situation and take steps in flight to keep the situation under control.

If the passenger's behaviour is objectionable, or if he/she appears incapable of moving around without falling or stumbling, the Chief/Senior Purser must be advised immediately. She will in turn advise the Captain who will decide whether or not the passenger is fit to travel.

If a passenger appears to be getting intoxicated during a flight the Flight Attendants should :

- a. Try to get the passenger to have a non-alcoholic drink or tea/coffee.
- b. If he/she insists on having a drink dilute or "water down" the drinks, and be a little slow in fulfilling the order.
- c. If necessary, politely refuse to serve any more alcohol – this is a last resort as it may anger the passenger.

It is against regulations for passengers to consume their own liquor on board and if passengers are observed doing so, they should be stopped. In the case of c. above, if duty free alcohol is requested/purchased, it should be given to the passenger when disembarking, and not in-flight.

Some plausible excuse for the delay in giving it to the passenger should be made e.g. the Flight Attendant in charge of Duty Free is occupied at the moment etc.

Airport Services staff should be advised if a passenger appears to be impaired by alcohol and assistance provided to help the passenger disembark.

The incident must be reported on the Flight Report.

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