

For information

**Bills Committee on
Road Traffic Legislation (Amendment) Bill 2008**

Introduction

At the meeting of the Bills Committee on 22 April 2008, a Member requested the Administration to confirm that the provision of a power for the Police to require drivers to provide a breath specimen during a random breath test without reasonable suspicion would not be in breach of the provisions on human rights under the Basic Law or compromise the protection against self incrimination of the person concerned. The information is set out below.

Right to Privacy

2. In the drafting stage, we have already sought legal advice confirming that the Bill is in conformity with the Basic Law, including the provisions concerning human rights. On the proposal to empower a police officer in uniform to require a person to provide a specimen of breath for a breath test without any reasonable suspicion to ascertain whether the driver is under the influence of alcohol, according to our legal advice, the test on whether such interference is permissible requires a balancing of the circumstances having regard to the principle of proportionality. The relevant circumstances are set out in the ensuing paragraphs.

3. Drink driving can bring about grave consequences not only to the drivers of the vehicles concerned but also to other road users. The average Killed and Serious Injuries (KSI)¹ rate of 22.4% in drink driving accidents was much higher when compared with that of 15% in all traffic accidents. RBT will deter people from driving after drinking alcohol and help prevent accidents and casualties caused by drink driving.

4. With the proposed power, a driver who is not involved in any traffic accident, or has not committed any traffic offence, may still be required

¹ Killed casualties are those died within 30 days after the traffic accidents. Serious injuries are casualties detained in hospital as “in-patients” for over 12 hours after the traffic accidents. KSI rate is the percentage of KSI casualties over total casualties

to take breath tests, be prosecuted and convicted of drink driving if he is found to have alcohol concentration in his body above the legal limit when driving. This would be a strong deterrent against drink driving, and would discourage drivers who would otherwise have taken a chance from driving after drinking.

5. Overseas experiences have shown that RBT is effective in reducing drink driving accidents. It was found that there was 13% to 36% reduction in alcohol related traffic fatalities². RBT is currently practiced in a number of overseas countries and cities, including New Zealand, Australia, France, Belgium, Sweden, the Netherlands etc.

6. Indeed, the proposal is a response to the views of the community. In order to reduce drink driving accidents, and in recognition of the fact that RBT is an effective deterrent against drink driving and that it is adopted in some overseas countries, legislators have repeatedly asked the Administration to raise penalties on drink driving offences, and to provide a power for the Police to require drivers to conduct screening breath tests at random³.

7. In addition, the proposed breath test under the RBT operations will be brief and non-intrusive. In order to speed up the RBT checking process and avoid undue delay or inconvenience to motorists, the Police are actively examining the introduction of quick and simple hand-held pre-screening device, which will take as short as 10 seconds to complete a breath test for the purpose of RBT. Besides, as proposed in the Bill, if the driver has provided a specimen of breath to be tested by an approved pre-screening device, and the test does not indicate that he/she has any alcohol in his/her body, he will not be required to conduct the screening breath test.

8. In the light of the above circumstances, the proposed measure is considered reasonable, non-arbitrary and is proportionate for the protection of public safety. It is not an impermissible interference with the right to privacy protected by the Basic Law and the Hong Kong Bill of Rights.

² Source : Ross HL, McCleary R, Epperlein T. Deterrence of drinking and driving in France: an evaluation of the law of July 12, 1978. *Law Soc Rev* 1981; and Homel R, Carseldine D, Kearns I. Drink-driving counter measures in Australia, 1988.

³ The proposed RBT was discussed in the Panel on Transport of the Legislative Council at its meetings on 23 June 2006 and 15 December 2006; as well as in the Legislative Council sitting on 14 June 2006.

Privilege against self incrimination

9. Regarding whether the requirement for specimen of breath may raise the issue of self incrimination, our legal advice points out that the privilege against self incrimination is not absolute, but rather a qualified right⁴. The need to balance between the general interest of the community and the personal rights of an individual has always been recognised by the courts. Drink driving offences are serious offences that result in deaths and injuries. The need to adopt an effective preventive measure against drink driving in order to protect the general public could not be doubted.

10. Further, the purpose of this privilege is to respect the will of the accused person to remain silent, thereby ensuring that the accused is not compelled to provide proof of his or her guilt. It is not intended to extend to evidence that exists independently of the will of the accused. In *HKSAR v Lee Ming Tee & Anor [2001] 1 HKLRD 599*, at paragraph 113, Ribeiro PJ quoted the court in *Saunders v United Kingdom (1996) 23 EHRR 313* at paragraph 69 :

"The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the (European) Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing."

11. As such, the privilege against self incrimination is not intended to extend to evidence that exists independently of the will of the accused, which evidence, in this case, means the breath samples for breath test.

Transport and Housing Bureau
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⁴ *Brown v Stott [2001] SLT 59*