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

Purpose

This paper reports on the deliberations of the Bills Committee on Road Traffic Legislation (Amendment) Bill 2008 (the Bill).

Background

2. Road safety is an extremely important issue that affects everyone. In February 2005 and December 2006, the Administration sought the views of the Panel on Transport (the Panel) on a package of proposals to combat and deter drink driving and other inappropriate driving behaviour to enhance road safety. Apart from proposing an increase in the penalties for the traffic offences of drink driving and dangerous driving causing death, the Administration has also proposed to impose mandatory attendance of driving improvement courses (DICs) on certain traffic offenders, and to extend the Probationary Driving Licence scheme (PDL scheme) to cover novice drivers of private cars and light goods vehicles so as to further enhance road safety.

3. With the support of the Panel and the Transport Advisory Committee, the Administration conducted further consultation, which included the Road Safety Research Committee of the Road Safety Council, motoring associations, and all relevant transport trades, on the proposed measures to enhance road safety. On 20 February 2008, the Administration introduced the Bill into the Council.

The Bill

4. The main purposes of the Bill are to –
- (a) increase the penalties for the traffic offences of causing death by dangerous driving and drink driving;
 - (b) give police officers a general power to conduct random breath tests (RBTs)

and to introduce a pre-screening device to facilitate the tests;

- (c) require repeated traffic offenders or persons convicted of serious traffic offences (including drink driving) to attend and complete DICs;
- (d) extend the PDL scheme to novice drivers of private cars and light goods vehicles; and
- (e) provide for the review by a Transport Tribunal of certain decisions of the Commissioner for Transport.

The Bills Committee

5. The House Committee agreed at its meeting on 22 February 2008 to form a Bills Committee to study the Bill. Chaired by Hon Miriam LAU Kin-ye, the Bills Committee held eight meetings with the Administration to discuss the Bill. The membership list of the Bills Committee is in **Appendix I**. Apart from examining the Bill with the Administration, the Bills Committee has also invited public views. Five groups have made written and/or oral representation to the Bills Committee. A list of these groups is in **Appendix II**.

Deliberations of the Bills Committee

6. Members generally support the policy intent of the Bill to further combat drink driving and inappropriate driving behaviour to enhance road safety. In the course of deliberation, they have raised questions on the appropriateness of the proposed penalties for the offences of drink driving and dangerous driving causing death, and compared the proposed penalties in the Bill with those in overseas countries. They have also reviewed the proposed arrangements to be adopted by the Police for conducting RBTs and examined whether the proposed provisions of a power for the Police to require drivers to provide a breath specimen during a RBT without reasonable suspicion would be in breach of the human rights provisions under the Basic Law or compromise the protection against self incrimination of the person concerned.

Drink driving offences

7. Under the Road Traffic Ordinance (Cap. 374) (RTO), drink driving offenders are liable to a maximum fine of \$25,000 and three years of imprisonment. They are also liable to be disqualified from driving for not less than two years for a second or subsequent conviction. Depending on the driving behaviour and other related circumstances and if a traffic accident is caused by drink driving and causes the death of another person, the driver can be charged with dangerous driving or causing death by dangerous driving.

8. At present, the Police can only require a person to conduct a Screening Breath Test (SBT) if there is a reasonable cause to suspect that he has alcohol in his body when driving or attempting to drive a vehicle on a road, or if he has been involved in a traffic accident, or has committed a traffic offence while the vehicle is in motion.

9. The Administration proposes a package of additional measures in the Bill to deter drink driving. These include -

- (a) disqualify a drink driving offender from driving for not less than three months on first conviction, and require him to attend a DIC on a mandatory basis;
- (b) provide the Police with a general power so that police officers in uniform can require a person who is driving or attempting to drive a vehicle on a road to conduct a breath test without the need for reasonable suspicion; and
- (c) introduce a pre-screening device to facilitate RBT operations.

10. The Bills Committee has examined the appropriateness of the proposed penalties on drink driving offences and compared them with the penalty levels in other jurisdictions, including Australia (New South Wales), Singapore, Canada (Quebec), the United Kingdom, New Zealand, the United States (Arizona) and Japan. The Bills Committee notes that whilst the level of fines and imprisonment terms for drink driving offences in Hong Kong are generally comparable with those in other overseas jurisdictions, offenders on first convictions in Hong Kong would not be disqualified from driving, as opposed to overseas practice where drink driving offenders would normally be disqualified from driving upon first convictions. The Bills Committee therefore supports the idea of disqualifying a drink driving offender from driving on first conviction, and requiring him to attend a DIC on a mandatory basis so as to enhance road safety.

11. The Bills Committee however notes Mr Andrew CHENG Kar-foo's view that given the seriousness of drink driving offences, the disqualification period upon first conviction of drink driving should be lengthened so as to achieve the desired deterrent effect.

12. The Administration advises the Bills Committee that the proposed three-month disqualification period is a minimum rather than a maximum penalty. The court may, if it sees fit having considered all the relevant circumstances of a case, hand down a sentence of disqualification of any duration longer than three months. Judgments on drink driving offences indicate that the court considers many factors when handing down a sentence. These include, for example, level of alcohol concentration, whether there was a traffic accident, whether there were and if so the number of persons injured, the circumstances behind a guilty plea, etc. In *HKSAR v Tse Wai*

Lun [HCMA 401/2004], the Court comments that the extent to which the prescribed limit was exceeded is a relevant matter to the sentence. In *HKSAR v Wong Man [HCMA 1088/2006]*, the Court recommends that if the alcohol level exceeds the prescribed limit by only a small margin, a relatively short period of disqualification could be imposed, perhaps significantly less than 12 months. Where the excess is substantial, then 12 months would be proper. In cases where the excess doubles the limit or above, longer periods of disqualification would be appropriate. Where the excess approaches four times the prescribed limit, a disqualification period of over 18 months should be considered. In both cases, other relevant factors, such as the driving record of the offender, have been taken into account.

13. In the light that the proposed disqualification for not less than three months on first conviction is but one deterrent out of a proposed package of other additional measures to deter drink driving, and having regard to the decisions of the appellate courts on the relevance of alcohol concentration in addition to other relevant factors in determining the appropriate sentence, the Administration suggests that the proposed package of deterrent measures should first be introduced. It will closely monitor the effectiveness of the new legislation upon its enactment, including the trends on the hit rate of RBT, and accident and prosecution statistics, and consider introducing heavier penalties on drink driving offences as necessary.

14. On the appropriateness of introducing different levels of penalties for different alcohol concentration levels into the Bill, the Administration advises that there are many factors affecting the level of impairment to a person. A driver with lower alcohol concentration in his blood may not necessarily be impaired to a lesser extent than another driver with a higher alcohol concentration. A graded level of penalties may also send a wrong message that slightly exceeding the prescribed limit is not a serious offence. Further, as court cases are already available to provide reference for imposing different levels of penalties for different BAC levels above the prescribed limit, the Administration considers that it may be more appropriate to leave it to the court to decide on the sentence depending on the circumstances of each case..

15. Having considered the explanations given by the Administration, the majority of the members of the Bills Committee consider that the proposed penalties for drink driving are appropriate. Mr Andrew CHENG Kar-foo however maintains his view and indicates that he will move Committee Stage amendments (CSAs) to lengthen the disqualification period on first conviction of the offence of drink driving or failure to provide samples of blood, urine or breath for testing under specified circumstances from not less than three months to not less than six months.

Random Breath Tests

16. The Bills Committee agrees that drink driving has increasingly been regarded as a serious offence that can bring about grave consequences not only to the drivers of the vehicle concerned but also to other road users. As such, the Bills Committee agrees that the proposal to empower the Police to require drivers to conduct RBTs

without the need for reasonable suspicion would be a strong deterrent. To give more confidence to the public that the police will discharge the added power in the most responsible manner, the Bills Committee has examined in detail the arrangements for conducting RBTs. In this regard, the Administration has advised that:

- (a) RBT will initially be restricted to traffic officers already trained in handling drink-driving cases in considering that they have the requisite knowledge and experience to conduct such checks whilst ensuring both their own and the public's safety;
- (b) RBT will not normally be targeted against vehicles in motion. For the safety of the officers concerned, and to ensure that the check can be carried out with the minimum of inconvenience to the driver and other motorists, RBT will normally be conducted during roadblock operations or as part of other traffic enforcement checks;
- (c) limitations on RBT checks by time or location will not be applied as this would defeat the 'random' nature of the checks; and
- (d) no rank restrictions will be placed on the use of RBT power as currently, all police officers are vested with considerable powers which they exercise in a responsible manner.

17. In order to allay the concerns raised by the transport trade that the Police may target certain drivers during RBT operations, the Bills Committee is assured by the Police that a full record of all RBTs conducted would be kept including details such as driving licence numbers, vehicle registration numbers, times and locations of the tests conducted, etc. This will facilitate the Police to look into complaints raised by aggrieved parties through the present police complaints mechanism.

Breath test by a pre-screening device

18. With a view to reducing delay and inconvenience to motorists during RBT operations, the Bills Committee notes that the Police are actively examining the use of a quick and simple hand-held pre-screening device to speed up the RBT checking process. This pre-screening breath test can take as short as 10 seconds or so to complete, compared with the existing SBT process which normally takes about four minutes to complete. For the purpose of introducing the pre-screening device, the Administration originally proposes that if a person has provided a specimen of breath to be tested by an approved pre-screening device, and the test does not indicate that the person has any alcohol in his body, the person will not be required to provide a specimen of breath for a SBT.

19. Whilst the Bills Committee supports the introduction of the pre-screening device to reduce inconvenience to motorists during RBT operations, it considers that a

driver should not be required to conduct a SBT simply because he is found to have any alcohol in his body irrespective of the level of alcohol concentration in his breath specimen detected by the pre-screening device.

20. Taking into account members' views, the Administration proposes that the pre-screening device be calibrated to activate a signal if 20 or more micrograms (mg) of alcohol in 100 milliliters (ml) of breath is detected. The reasons for setting the calibration at this level is that it is close to the prescribed limit¹ and does form a basis for the Police to establish reasonable suspicion that the person's alcohol concentration in his body is likely to exceed the prescribed limit, and the driver should then be required to conduct a SBT.

21. The Administration advises that the pre-screening device would be calibrated such that two distinct signals would be produced as follows –

- (a) a signal (a green light) to indicate less than 20 mg of alcohol in 100 ml of breath; and
- (b) another signal (a red light) to indicate 20 or more mg of alcohol in 100 ml of breath.

If a red signal shows after a test, the driver will be required to conduct a SBT. If a green signal shows, he will not be required to conduct a SBT. If he refuses to conduct a pre-screening breath test, the Police may require the driver to conduct a SBT. Likewise, if a driver is showing obvious signs that the alcohol concentration in his body is likely to exceed the prescribed limit when he is stopped for RBT operation, he will be required to undergo a SBT right away. This is in line with the present practice under the powers provided in the existing law.

22. The Bills Committee is also concerned about the accuracy and reliability of the pre-screening device used for RBT operations and the procedures to be adopted before gazettal of the approved type of pre-screening device. The Administration advises that the Police are now exploring with different manufacturers for types of devices that may be able to meet the proposed specifications for trial and testing purposes. When the suitable devices are available, the Police will arrange tests to be conducted on their accuracy and reliability by the Government Laboratory or an independent laboratory. The ultimate choice of the device to be used will be subject to test results and the outcome of a tender exercise.

23. The Bills Committee has also examined the procedures for approving the type of pre-screening device and is assured by the Administration that each piece of the equipment will be subject to regular service and maintenance checks in accordance

¹ The existing "prescribed limit" is 22 micrograms of alcohol in 100 millilitres of breath, as defined in section 2 of RTO. It is an offence for a person to drive or attempting to drive a motor vehicle on a road with the proportion of alcohol in his breath exceeding the prescribed limit.

with the manufacturer's recommendations. Periodic checks will also be conducted by an independent organization to ensure accuracy and reliability.

24. The Administration also assures the Bills Committee that the Police will keep in view the implementation experience of RBT operations. The Administration will consult the Panel if it proposes to make any changes to the proposed arrangements for RBT operations as well as the calibration level for the pre-screening device for the purpose of requiring a driver to conduct a RBT. The Secretary for Transport and Housing has been requested to include in her speech the above undertakings at the resumption of the Second Reading debate on the Bill

Human Rights Consideration

25. The Bills Committee has examined whether the provision of a power for the Police to require drivers to provide a breath specimen during a RBT without reasonable suspicion would be in breach of the human rights provisions under the Basic Law or compromise the protection against self incrimination of the person concerned.

26. The Administration advises 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, the Administration's view is that the test on whether such interference is permissible requires a balancing of the circumstances having regard to the principle of proportionality. The relevant circumstances to be considered are set out below.

27. The Administration advises that 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 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 reduce the number of casualties caused by drink driving.

28. 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 to take breath tests, be prosecuted and convicted of drink driving if he is found to have alcohol concentration in his body above the prescribed 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.

29. The Administration points out that overseas experiences have shown that RBT is effective in reducing drink driving accidents². RBT is currently practiced in a

² According to studies in France and Australia, there was 13% to 36% reduction in alcohol related traffic fatalities.

number of overseas countries and cities, including New Zealand, Australia, France, Belgium, Sweden, the Netherlands etc. The proposal is also 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 RBTs.

30. 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.

31. In the light of the above circumstances, the Administration's view is that 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 human rights protected by the Basic Law and the Hong Kong Bill of Rights.

32. The Bills Committee notes Mr James TO's view that in order to ascertain that RBT is not an impermissible interference with the human rights protected by the Basic Law and the Hong Kong Bill of Rights, the Administration should conduct further research on case law in other areas which are analogous to RBTs so as to prepare themselves for possible legal challenge in future, rather than simply relying on the premise that RBT is considered reasonable, non-arbitrary and is proportionate for the protection of public safety.

33. The Bills Committee also notes the concerns raised by Mr James TO about the Magistrate's verdict that the requirement under section 63 of RTO of a vehicle owner to give the identity of the driver alleged to be guilty of failing to comply with traffic signals has infringed the human rights provisions regarding the protection against self-incrimination under the Basic Law, and whether there would be any implications on the proposal to empower a police officer to conduct RBT without any reasonable suspicion. In this respect, the Bills Committee has obtained a copy each of the verdict of the magistracy case from the Administration and the Prosecution's Skeleton Argument and List of Authorities filed for the purpose of an application for review of the Magistrate's decision.

34. Having reviewed all the relevant materials provided by the Administration, Mr James TO is not totally convinced of the Administration's explanation that RBT is not an impermissible interference with the right to privacy protected by the Basic Law and the Hong Kong Bill of Rights.

Privilege against self incrimination

35. Regarding whether the requirement for specimen of breath may raise the issue of self incrimination, the Administration's view is that the privilege against self incrimination is not absolute, but rather a qualified right. The Privy Council and European Court of Human Rights have recognized that limited qualification of certain rights, including the privilege against incriminate oneself, are acceptable if the qualification is reasonably directed by the authorities towards a clear and proper public objective and represented no greater qualification than what was called for by the situation. 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.

Evidence of the proportion of Alcohol in the Breath Used by the Court

36. The Bills Committee notes that as far as breath specimens are concerned, the existing section 39D(1) of RTO provides that the court shall use the specimens taken under section 39C(3)(a) for evidence of the proportion of alcohol concentration in the breath, i.e. specimens taken for analysis, which is commonly referred to as evidential breath test (EBT). However, the Bills Committee is concerned that the breath specimen taken by the pre-screening device during RBT alone may be submitted as evidence to the court.

37. To address this concern, the Administration proposes to move CSAs to amend Clauses 3, 9(1) and (11) of the Bill to make it clear that the purpose of the approved pre-screening device is to provide an indication as to whether or not the proportion of alcohol in a person's breath reaches such a level that it is reasonable to suspect such proportion is likely to exceed the prescribed limit, and therefore should be required to conduct the SBT. The proposed CSAs, together with the fact that the pre-screening device will be calibrated below the prescribed limit (at 20 mcg of alcohol per 100 ml of breath) and will not provide a numerical reading or statement as to the proportion of alcohol in the breath, puts it beyond doubt that the result of the pre-screening test cannot be used as evidence to show that the proportion of alcohol in the breath specimen of a driver has exceeded the prescribed limit.

Penalties on causing death by dangerous driving

38. Under section 36 of RTO, a person who causes the death of another person by driving a motor vehicle on a road dangerously can be charged with the offence of causing death by dangerous driving. A person convicted of this offence is liable to a maximum fine of \$50,000 and five years of imprisonment. He is also liable to be disqualified from driving for not less than two years for first conviction and for not less than three years for second or subsequent conviction.

39. The Bills Committee agrees that the maximum imprisonment term for the offence is not commensurate with the severity of the offence. As such, heavier penalties should be imposed not only for punitive purposes, but also for a stronger deterrent effect to reduce fatal traffic accidents. It therefore accepts the Administration's proposal to raise the maximum imprisonment term for causing death by dangerous driving from five to 10 years.

40. In the course of deliberation, the Bills Committee has expressed concern about the level of penalties imposed by the court in the past on the offences of dangerous driving causing death. It has examined the sentencing statistics on the convicted cases of causing death by dangerous driving from 2003 to 2007. The Bills Committee notes that among the 81 convicted drivers, 63 (78%) were sentenced to imprisonment with periods ranging from 20 days to 5 years. The period of disqualification from driving ranged from 3 months to 12 years. 93% of the cases involved a disqualified period of two years or more.

41. The Administration also advises that judges usually take into account the maximum penalty and all relevant circumstances before imposing a sentence. Hence, if the maximum penalty for a certain offence is raised, it would demonstrate the view of the legislature and the community on the seriousness of the offence. This will be drawn upon as reference by the court in handing down a sentence. By doubling the maximum sentence of dangerous driving causing death from 5 years to 10 years, cases of this kind will more likely be tried in the High Court and the District Courts, instead of the magistrate courts, and heavier penalties will more likely be imposed. The Administration therefore expects to see the revised maximum imprisonment term to be reflected in future sentences.

Probationary Driving Licence scheme

42. The Bills Committee notes the various forms of restrictions applicable to novice drivers in overseas countries and is in support of the Administration's proposal to extend the PDL scheme to cover novice drivers of private cars and light goods vehicles.

Mandatory Driving Improvement Course scheme

43. The Bills Committee also agrees that mandatory attendance of educational courses should be imposed on certain traffic offenders as suggested by the Administration.

Committee Stage Amendments

CSAs to be moved by Mr Andrew CHENG Kar-foo

44. The Bills Committee notes that Mr Andrew CHENG Kar-foo will move CSAs to lengthen the disqualification period on first conviction of the offences of drink driving or failure to provide samples of blood, urine or breath for testing under specified circumstances from not less than three months to not less than six months.

45. The Bills Committee notes that Mr Abraham SHEK and Mr KWONG Chi-kin have reservation on Mr CHENG's proposed CSAs. They consider that the penalty levels proposed by the Administration are appropriate.

CSAs to be moved by the Administration

46. Other than the divergent views expressed by members in respect of the proposed penalty levels for the offence of drink driving, the Bills Committee generally supports the Administration's proposed CSAs to the Bill. The Administration's CSAs are set out below.

Breath test by an approved pre-screening device

47. The Bills Committee supports the introduction of a pre-screening device to reduce inconvenience to motorists during RBT operations, but considers that a driver should not be required to conduct a SBT just because he is found to have any alcohol in his body irrespective of the level of alcohol concentration in his breath specimen as detected by the pre-screening device. Having regard to the views of the Bills Committee, the Administration agrees to introduce CSAs to the effect that –

- (a) an approved pre-screening device is clearly defined to mean a device for indicating whether or not the proportion of alcohol in a person's breath reaches such a level that it would be reasonable to suspect that such proportion is likely to exceed the prescribed limit, both at sections 2 and 39F(1) of RTO; and
- (b) if a person has provided a specimen of breath to be tested by an approved pre-screening device, only when the test indicates that the proportion of alcohol in the person's breath reaches such a level that it would be reasonable to suspect that such proportion is likely to exceed the prescribed limit then the driver should be required to conduct SBT.

Reference to "court or magistrate" at section 72A of RTO

48. The Administration has suggested to insert "or magistrate" after the reference to "court" in a number of provisions in RTO in the Bill but has not suggested similar amendments to section 72A. Having regard to the Bills Committee's views that a

consistent approach should be taken, CSAs are proposed to amend section 72A to achieve consistency by removing the definition of "court", and adding "or magistrate" after each reference to "court" in this section

49. The Road Traffic (Driving Licences) (Amendment) Regulation 2008 (L.N. 3 and 55 of 2008) ("Amendment Regulation"), which amends the Road Traffic (Driving Licences) Regulations (Cap. 374B), has come into effect in March 2008, after the introduction of the Bill. Certain references in clause 28 of the Bill (which seek to amend regulation 11 of Cap. 374B) are now inconsistent with regulation 11 of Cap. 374B as amended by the Amendment Regulation. CSAs are therefore proposed to rectify these inconsistencies, mostly by renumbering the paragraphs in regulation 11.

Alterations to Chinese Text

50. The Road Traffic (Driving-offence Points) Ordinance (Cap. 375) provides the statutory framework for the operation of a driving-offence point system. In the English version of Cap. 375, "incurring of points" refers to the accumulation of appropriate number of driving-offence points if a person is convicted, or becomes liable to a fixed penalty, of a scheduled offence. In the Chinese text of Cap. 375, the term "扣分" is used. To enhance the clarity of the Chinese text and to make it consistent with the title of Cap. 375, the Administration proposes to –

- (a) substitute the term "記分" for "扣分" in the Chinese text wherever it appears in Cap. 375 and in Regulations 12I and 12L of Cap. 374B; and
- (b) substitute "扣減" for "補回" to better reflect the meaning of the terms "deducted" or "deduction" used in the English version of Cap. 375.

Recommendation

51. The Bills Committee supports the resumption of the Second Reading debate on the Bill on 25 June 2008.

Consultation with the House Committee

52. The House Committee was consulted on 13 June 2008 and supported the recommendation of the Bills Committee in paragraph 51.

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

Membership list

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| Chairman | Hon Miriam LAU Kin-yee, GBS, JP |
| Members | Hon James TIEN Pei-chun, GBS, JP Hon James TO Kun-sun Hon LAU Kong-wah, JP Hon Andrew CHENG Kar-foo Hon Abraham SHEK Lai-him, SBS, JP Dr Hon Fernando CHEUNG Chiu-hung Hon CHEUNG Hok-ming, SBS, JP Prof Hon Patrick LAU Sau-shing, SBS, JP Hon KWONG Chi-kin Hon TAM Heung-man (Total: 11 Members) |
| Clerk | Mr Andy LAU |
| Legal Adviser | Mr Kelvin LEE |
| Date | 12 March 2008 |

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

List of parties which have submitted views to the Bills Committee

1. Taxi & PLB Concern Group
2. Lok Ma Chau China-Hong Kong Freight Association
3. 香港交通運輸業職工聯合會
4. A Mr CHENG
5. A member of the public

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Legislative Council Secretariat
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