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19 February 2008

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Dear Miss AU,

**Fixed Penalty (Smoking Offences) Bill**

We are scrutinising the legal and drafting aspects of the Fixed Penalty (Smoking Offences) Bill. We have the following points for your clarification:-

Clause 3

The provision provides for a fixed penalty notice to be given by a public officer under specified circumstances.

What is the justification for omitting a provision equivalent to section 3(4) of the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570) which provides for the operation of section 3 (equivalent to clause 3) and sections 6 (equivalent to clause 6), 8 (equivalent to clause 8) and 11 (equivalent to clause 11) shall not be affected by a failure to give a fixed penalty notice by the public officer personally on the offender?

#### Clause 4(1)

The provision provides that if a public officer has reason to believe that a person has committed a scheduled offence, he may, for specified purposes, require the person to supply his name, address and contact telephone number (if any) and produce proof of identity for inspection..

"Scheduled offence" now includes section 3(2) of the Smoking (Public Health) Ordinance (Cap. 371) (smoking in areas designated as no smoking areas) and section 4(1) of the Smoking (Public Health) Ordinance (smoking in public transport carriers). Under section 3(3) or 4(2) of the Smoking (Public Health) Ordinance, the enforcement officer may require an offender to give his name and address or to produce proof of identity. Despite the identical nature of the offences covered, in contrast to clause 4(1), the enforcement officer is not empowered to require contact telephone number from the offender.

What is the justification for empowering a public officer to require the offender to supply his contact telephone number under clause 4(1), bearing in mind failure to comply with such requirement without reasonable excuse or knowingly supplying any particular of a contact telephone number which is false or misleading is an offence?

#### Clause 4(1)(a)

The provision provides that if a public officer has reason to believe that a person has committed a scheduled offence, he may, for the purpose of serving any document under the Ordinance, upon enactment of the Bill, on the person, requires the person to supply specified personal particulars.

The provision clearly applies to clause 3(1) which empowers a public officer to give a fixed penalty notice to an offender. Would you give other examples to which clause 4(1)(a) also applies?

#### Clause 5

Under clause 4(2), if an offender fails to comply with a requirement, without reasonable excuse, for supplying personal particulars, he will be liable on conviction to a fine at level 3 (\$10,000).

Under clause 5, if an offender supplies any personal particulars which he knows to be false or misleading, he will be liable on conviction to a fine at level 3 (\$10,000).

It appears that the nature of an offence committed under clause 5 is more serious than that under clause 4(2) (c.f. sections 4(2) and 5 of the Fixed Penalty (Public Cleanliness Offences) Ordinance). What is the justification, from a legal policy point of view, for levelling the penalty for the offences in clauses 4(2) and 5?

Clause 7(1) and (2)

Both provisions provide for withdrawal of notices before the commencement of any proceedings against an offender. Would you confirm whether proceedings have been commenced when a summons has been issued against the offender or served on the offender under clause 11 or at any other point in time of the process?

Clause 7(1)(b) & (2)(b)

Both provisions provide for service of notice. Presumably, the notice is to be served by post on the offender. If the presumption is correct, would it better reflect the policy intent by adding a provision similar to clause 6(4) or 8(4)?

Clause 7(4)

Would you confirm whether the withdrawal of the notice is not a bar to any proceedings under:-

- (a) the Fixed Penalty (Smoking Offences) Ordinance, upon enactment of the Bill; or
- (b) the Smoking (Public Health) Ordinance; or
- (c) both the Fixed Penalty (Smoking Offences) Ordinance and Smoking (Public Health) Ordinance,

in respect of the scheduled offence specified in the notice?

Clause 13

The provision allows an offender, who has notified the Authority in accordance with a notice under clause 6(2) that he wishes to dispute liability for a scheduled offence, to discharge his liability without going through the court proceedings if he pays the fixed penalty, an additional penalty equal to the amount of the fixed penalty and the sum of \$500 by way of costs

Would it be necessary to add provision similar to clause 6(5) or 8(6) to make it clear that the offender will not be liable to be prosecuted or convicted for the scheduled offence to which the notice relates?

Clause 14

The provision provides for immunity from personal liability of a public officer in respect of any act done by him exercising any of his powers under the Ordinance, upon enactment of the Bill, and within the scope of his employment, if he did the act in the honest belief that he was entitled to do it. Upon research, it shows that similar immunity in respect of a public officer is drafted in two formulations, namely the formulation of "in the honest belief" is used in such as s.48C(1) of Cap. 282, s.14A(1) of Cap. 59, s.3(1) of Cap. 499, s.15A(1) of Cap. 403, s.29(1) of Cap. 400, s.23(1) of Cap. 476, s.42(2) of Cap. 311, s.45(2) of Cap. 358 and s.15(1) of Cap. 570; whereas the formulation of "in good faith" is used in such as s.75(1) of Cap. 426 and s.6(1) of Cap. 415. Would you clarify whether there is any difference between the two formulations? If no, would it be desirable to achieve consistency in drafting by using either formulation. If one formulation is used, which one is preferable and why?

Clause 17(1)(b)

The provision provides that the Secretary may, in relation to a scheduled offence, by notice specify a public officer or a class of public officers. By contrast, the Fixed Penalty (Public Cleanliness Offences) Ordinance provides for a list of public officers in a schedule to the Ordinance. Would you explain why is it considered appropriate to empower the Secretary to specify the public officers in a subsidiary legislation under the Bill instead of setting out the public officers in a schedule to the Bill?

Distress in case of default

Section 14 of the Fixed Penalty (Public Cleanliness Offences) Ordinance provides for distress in case of default in payment of an order made under the Fixed Penalty (Public Cleanliness Offences) Ordinance. Would you explain the reason for omitting similar provision in the Bill?

We would be grateful for your earliest reply in both languages.

Yours sincerely,

(Stephen LAM)  
Assistant Legal Adviser

Encl

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