



中華人民共和國香港特別行政區政府總部食物及衛生局
Food and Health Bureau, Government Secretariat
The Government of the Hong Kong Special Administrative Region
The People's Republic of China

Our Ref.: CR 3/52/581/89

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8 Jackson Road
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Dear Mr Lam,

Fixed Penalty (Smoking Offences) Bill

Thank you for your letter of 19 February 2008. Our response to the questions raised is set out as below –

Clause 3

Section 3(4) of the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570) ("Cap. 570") was incorporated into that Ordinance for the purpose of ensuring that the operation of the fixed penalty system will not be affected by a refusal on the part of an offender to receive the fixed penalty notice. For the Fixed Penalty (Smoking Offences) Bill ("the Bill"), such a case will be dealt with by clause 6, in particular clause 6(1)(b) and (4).

Clause 4(1)

From an operational perspective to achieve effective enforcement, we have included the requirement for the offender to give his contact telephone number to enforcement officers. This piece of information would facilitate enforcement officers to verify information about the offender or to seek subsequent clarification from the offender. Cap. 570 has similar provision.

Clause 4(1)(a)

This clause would only apply for service of a fixed penalty ticket under clause 3 and service of all other documents under the Bill e.g. clause 6(2) notice which are actions directly related to the issue of a fixed penalty ticket.

Clause 5

The fee levels under sections 4(2) and 5 respectively of Cap. 570 are also the same. Moreover, the Administration is of the view that it is more logical to align the maximum penalty under clause 5 of the Bill with that under section 7(2) of the Smoking (Public Health) Ordinance (Cap. 371). The Administration considers the relevant offences are of equal gravity in nature in that both are attempts at thwarting enforcement of the law.

Clause 7(1) and (2)

Proceedings in respect of a scheduled offence will commence when a summons in respect of the offence is issued.

Clause 7(1)(b) and 7(2)(b)

We consider the present provisions adequate for their purposes. The presence of clauses 6(4) and 8(4) is to avoid arguments from offenders that the notice concerned shall not be sent to him by post, implicitly suggesting that such notices ought to be handed out in person, which would not be a practicable arrangement. On the other hand, it is highly unlikely that an offender will argue that the notice under clause 3 of the Bill has not been validly withdrawn by reason that the withdrawal notice specified under clause 7 is sent to him by post only. Clause 7 is modelled on section 7 of Cap. 570, and so far no problem has arisen with the withdrawal notice specified under the latter being sent to the offender by post.

Clause 7(4)

The withdrawal of the notice is not a bar to any proceedings under the Smoking (Public Health) Ordinance (Cap. 371) in respect of the scheduled offence specified in the notice provided that the action is not time-barred under section 26 of the Magistrates Ordinance (Cap. 227).

Clause 13

Clause 13 of the Bill is modelled on section 13 of Cap. 570, which provides that the proceedings shall terminate upon payment of the specified sum by the offender. It is

already clear that the offender will not be liable to be prosecuted or convicted for the relevant offence.

Clause 14

Both formulations are commonly used in Hong Kong and overseas jurisdictions to provide immunity to a person discharging statutory functions. There is no standard approach as to which of the 2 formulations should be adopted. The choice can depend on factors such as comparable or related legislation (in this case the "honest belief" is used in the Smoking (Public Health) Ordinance (Cap. 371) and the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570)).

We are not aware of any case law evaluating the difference between the two. However, there seem to be common factors underpinning the two concepts. For instance, in the absence of an honest belief, there is unlikely to be good faith. Both serve the same broad function and seem to be based on the general principle that immunity is conditional upon there being no bad faith. It is believed that if a court is called upon to accord a meaning to either of these expressions it would do so having regard to the context and not in the abstract.

Clause 17(1)(b)

We would like to clarify that the notice is not subsidiary legislation as it does not have legislative effect. It is our policy intent that the Secretary for Food and Health should be given the power to make a notice (which is not subsidiary legislation) specifying the list of public officers or classes of public officers. This arrangement would provide more flexibility for the Administration to decide administratively what ranks of public officers shall be empowered with the enforcement powers according to changing needs and manpower situations.

Distress in case of default

Clause 10(8) of the Bill is a deeming provision which provides that where an offender fails to comply with the order made under subsection (3)(b)(ii), even though he is not convicted with any offence, be deemed to be have failed to pay the sum adjudged to be paid by conviction for the purpose of section 68 of Cap. 227 and shall be liable to be imprisoned under that section.

Section 68 of Cap. 227 sets out a scale of imprisonment for non-payment of money. Meanwhile, section 101A of Cap. 227 vests power in the magistrate to imprison the offender who fails to pay the sum adjudged to be paid by conviction. Under section 101A, the magistrate may first issue a summons to such offender to appear before him or if the offender does not turn up, issue a warrant to apprehend him. On appearance of the offender in court, the magistrate may commit him to prison for the period provided

by section 68. We believe that this would be an effective way for the enforcement of non-payment of penalties.

According to the experience of colleagues who are empowered to enforce provisions under Cap. 570, it is not worthwhile to invoke the use of distress warrants taking into account the costs and human resources required. Moreover, given the nature of the relevant smoking offences, there will not be any company defaulter to be prosecuted under the Bill as enacted. The effectiveness of recovering payment through distress warrant is very doubtful. We believe the present arrangement as proposed in the Bill could already provide an effective mechanism for recovery of payment in case of default.

Finally, we should be grateful if you could provide us with the Chinese version of your letter of 19 February 2008 for our reference please. Thank you very much.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "Christine".

(Miss Christine Au)
for Secretary for Food and Health