

# 立法會

## *Legislative Council*

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LC Paper No. CB(2)2442/07-08

### **Report of the Bills Committee on Fixed Penalty (Smoking Offences) Bill**

#### **Purpose**

This paper reports on the deliberations of the Bills Committee on Fixed Penalty (Smoking Offences) Bill (the Bill).

#### **Background**

2. Under section 7(1) of the Smoking (Public Health) Ordinance (Cap. 371), any person who contravenes the statutory smoking ban as stipulated under section 3(2) and section 4(1) of the Ordinance commits an offence and an offender is liable on summary conviction to a maximum fine of \$5,000. Section 3(2) and section 4(1) of the Ordinance provide for the prohibition of smoking or carrying a lighted cigarette, cigar or pipe in specified statutory no-smoking areas (such as restaurants and shopping malls) and in public transport carriers (such as public buses and taxis) respectively. The work involved in the prosecution of an offender is a heavy drain on the limited time and resources of the government and the courts, considering that this is a relatively less serious offence.

3. A number of other offences/contraventions of degree of gravity similar to the offence of smoking or carrying a lighted cigarette, cigar or pipe in a statutory no-smoking area or in a public transport carrier are presently being dealt with by an fixed penalty system (FPS). These include offences/contraventions under the Fixed Penalty (Traffic Contraventions) Ordinance (Cap. 237), the Fixed Penalty (Criminal Proceedings) Ordinance (Cap. 240) and the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570). Introducing an FPS to deal with smoking offences would save time and better utilise the limited resources of government and the courts. Enforcement officers could then take more enforcement actions, which would increase the strength and effectiveness of the whole enforcement strategy. There may be a reduction of court's workload if offenders are ready to pay the fines without fighting the cases.

## **The Bill**

4. The object of the Bill is to provide for a fixed penalty to be payable for the offences in contravention of section 7(1) of the Smoking (Public Health) Ordinance and the recovery of the fixed penalty and related matters. In the Bill, the fixed penalty level for the offence concerned is \$1,500.

5. The Bill contains 3 parts and a Schedule.

6. Part 1 stipulates that the Bill, if enacted, will take effect on a date to be appointed by the Secretary for Food and Health (SFH) by notice published in the Gazette. This Part also sets out the definitions of various terms adopted in the Bill.

7. Part 2 sets out in details the operation mechanism relating to the FPS which includes, among other things -

- (a) the giving and withdrawal of a fixed penalty notice (FPN) and a further FPN;
- (b) the powers of the public officers in implementing the FPS;
- (c) the recovery of the fixed penalty by way of application to court; and
- (d) the imposition of an additional penalty in proceedings on liability.

8. Part 3 provides for miscellaneous matters such as -

- (a) creation of an offence of obstruction of public officers;
- (b) empowering SFH to make regulations and to specify enforcement authority and officers by notice; and
- (c) revision of the fixed penalty by way of resolution of the Legislative Council (LegCo).

## **The Bills Committee**

9. At the House Committee meeting on 22 February 2008, Members formed a Bills Committee to study the Bill. Under the chairmanship of Hon Andrew CHENG Kar-foo, the Bills Committee has held seven meetings, including six meetings with the Administration and one meeting with deputations/individuals. The membership list of the Bills Committee is in **Appendix I**. A list of organisations/individuals which/who have given views to the Bills Committee is at **Appendix II**.

## **Deliberations of the Bills Committee**

### Penalty level

10. Hon Tommy CHEUNG considers that setting the penalty level for smoking offences at \$ 1,500 is too high, having regard to the fact that the fine level handed down by the court for smoking offences at present only averaged about \$700-\$800. It is also possible that offenders would choose to dispute liability in the hope that a lesser penalty would be imposed by the court, hence defeating the purpose of having an FPS.

11. The Administration has pointed out that the penalty level should be set at a level sufficiently high to achieve the desired deterrent effect without being unduly harsh. Hence, the proposal to fix the penalty level at \$1,500. This is on par with the fine level for public cleanliness offences which also have public health implications. The Administration has further pointed out that setting the penalty level at \$1,500 also attracted majority support during public consultation on the proposed FPS for smoking offences. As to whether the \$1,500 penalty level would attract offenders to dispute liability, the Administration has advised that should offenders do so, the court is likely to consider -

- (a) the legislative intent in setting up a FPS and is unlikely to impose penalties of a lower level thereby allowing individuals to, through disputing liability, circumvent the fixed fine level and the FPS and defeat the purpose of minimising the drain on the government and the court's resources;
- (b) the consensus of LegCo and of the public opinions represented by the Council over the penalty level when meting out penalties; and
- (c) a provision in the Bill which provides that if a person choose to dispute liability but offers no defence or a defence which is considered frivolous or vexatious by the magistrate, the magistrate should, in addition to any other penalty and costs the court might impose, impose an additional penalty equal to the amount of the fixed penalty. This should be sufficient deterrent for those who have no defence but simply want to dispute liability in the hope of receiving a lower level penalty.

### Payment of fixed penalty

12. Some members have suggested that persons who do not have the means to pay the fixed penalty for smoking offences should be allowed to undergo smoking cessation counseling in lieu of paying the fixed penalty.

13. The Administration has pointed out that as smoking is a costly habit, it is difficult to argue that one can afford tobacco products but cannot pay the fixed penalty. Furthermore, if the system allows those who claim that they do not have the means to pay the fixed penalty to undergo smoking cessation counseling instead, there would have to be a mechanism in place to verify such claims. This would render the whole FPS complicated and costly to administer.

#### Smoking cessation services

14. Some members have suggested that people who have been fined under the FPS several times should be required to undergo smoking cessation counseling in addition to paying the fixed penalty.

15. The Administration has advised that it would not be appropriate to prescribe smoking cessation counseling service as an additional penalty in the Bill as smoking itself is not an offence under the Smoking (Public Health) Ordinance unless such act is carried out in a designated no-smoking area or in a public transport carrier. Moreover, if smoking cessation is made mandatory for a smoker who has paid fixed penalty several times, the law would have to provide for consequences for those who fail to attend the counseling without reasonable excuse. Enforcement staff would also be deployed to investigate and find out the facts of default cases and, if the penalty for such defaulting is not in the form of another fixed penalty, court time is to be spent on hearing the cases and meting out appropriate penalty. All these would render the otherwise simple FPS much more complicated, and may result less savings in enforcement resources, which could be used on enforcement of the smoking offence, and court time. Besides, there is no available evidence showing that the provision of mandatory smoking cessation counseling service or class can effectively cause those who have no intention to quit smoking to quit smoking. It is also not known that mandatory smoking cessation counseling service has been adopted by any country as a means of penalising offenders or promoting smoking cessation. Nevertheless, the Administration believes that opportunities should be taken to provide smokers who have been dealt with under the FPS with information on smoking cessation services. To that end, actions would be taken to print the Department of Health/Tobacco Control Office (TCO)'s smoking cessation hotline on FPNs, and provide information on smoking cessation services when a notice under clause 6(2) of the Bill is issued.

16. Members opine that to assist as many smokers to quit smoking as possible, information on smoking cessation services should be issued together with the issuing of FPNs for smoking offences by authorised enforcement officers. The Administration has replied that it would positively consider the appropriate administrative arrangements to bring the message across.

17. Hon Andrew CHENG is of the view that to provide more incentive to help smokers to quit smoking, the Bill should allow people who contravened

section 3(2) or section 4(1) of the Smoking (Public Health) Ordinance to choose between paying a fixed penalty or attending a smoking cessation course/class approved by SFH. Mr CHENG has indicated that he would move amendments to that effect.

Enforcement officers

18. At present, Tobacco Control Inspectors (TCIs) of TCO are empowered to enforce section 7(1) of the Smoking (Public Health) Ordinance. Police officers may also take enforcement actions pursuant to their powers under the Police Force Ordinance (Cap. 232). Under the proposed FPS for smoking offences, TCO officers will remain the leading enforcement agency to be empowered to issue FPNs in all statutory no-smoking areas as well as in public transport carriers. Likewise, police officers would continue to be able to take enforcement action by issuing FPNs in all venues where smoking or the carrying of a lighted cigarette, cigar or pipe is prohibited by law, although their work priority would still be the upkeep of law and order. To cater for public venues managed by Government and frequented by members of the public, the Administration proposes that the following Government departments are also to be vested with enforcement power to issue FPNs for smoking offences in respect of those statutory no-smoking areas in public venues under their management -

<b>Enforcement Department</b>	<b>Relevant Statutory No-smoking Areas</b>
Leisure and Cultural Services Department (LCSD)	Public bathing beaches Public pleasure grounds Public swimming pools Stadia Indoor areas of other public facilities under the management of LCSD
Food and Environmental Hygiene Department (FEHD)	Indoor areas of public markets and hawker bazaars under the management of FEHD
Housing Department (HD)	Statutory no-smoking areas within public housing estates under the management and control of the Housing Authority/Housing Department

19. Clause 17 of the Bill provides that specific ranks of officers authorised to enforce the law would be specified by SFH by notice subsequent to the enactment of the Bill and the notice shall be published in the Gazette.

20. Members have requested the Administration to adopt the arrangement in the Fixed Penalty (Public Cleanliness Offences) Ordinance by specifying the

Authority (defined in clause 2(3) of the Bill) and the list of public officers authorised to exercise the powers and perform the duties under the Bill in a schedule to the Bill, to enable scrutiny by LegCo. On review, the Administration will move amendments to clause 17 of the Bill to specify that the notice to be published in the Gazette is a subsidiary legislation, thereby necessitating vetting by LegCo.

21. The Administration has advised that FEHD intends to authorise venue managers of public markets and hawker bazaars, i.e. staff directly involved in the day-to-day management of these venues, to issue fixed penalty notices. At present, there are about 900 such staff members who are either from the Health Inspector, Hawker Control Officer and Foreman grades, or are Market Assistants employed on non-civil service contract terms. The specific ranks and number of officers to be authorised will be subject to the outcome of staff consultation. Regarding HD, it would authorise a total of 2 000 staff, comprising 1 500 Housing Officers, 500 Assistant Housing Managers and Housing Managers, to enforce the smoking ban. As for LCSD, they would authorise about the same number and ranks of officers presently authorised to enforce the Fixed Penalty (Public Cleanliness Offences) Ordinance to enforce the smoking ban. The specific ranks and number of officers to be authorised will be subject to the outcome of staff consultation.

22. Hon Andrew CHENG is of the view that FEHD inspectors should also be empowered to issue FPNs for smoking offences committed or are being committed in the indoor areas of food premises.

23. The Administration has advised that it is not practicable to empower FEHD inspectors to issue FPNs to people smoking in the indoor areas of food premises, as inspections to licensed food premises by FEHD inspectors focus mainly on the food rooms where food is handled and relatively less so on areas for serving patrons. Moreover, FEHD inspectors are not stationed at the licensed food premises, but only carry out inspections on a regular basis in accordance with the track record and risk classification of the premises ranging from once every four to 20 weeks. Hence, a better approach would be to help venue managers build up their capacity in requesting a smoker to extinguish a lighted cigarette, cigar or pipe or where the person fails to do so, requiring him to give his name and address and to produce proof of identity or leave the no-smoking area.

24. Members have asked whether staff of FEHD, LCSD and HD would wear uniform when taking enforcement action against smoking offences by issuing FPNs in statutory no-smoking areas under their management.

25. The Administration has advised that Housing Officers of HD and most public officers of LCSD who would be authorised to issue FPNs in relation to smoking offences would not be wearing uniform during their course of duties. However, Housing Officers of HD would be carrying with them Departmental

Identity Cards for identification purposes and public officers of LCSD would be carrying identification badges or departmental warrant cards when discharging duties. Officers of these two departments authorised to issue FPNs in relation to public cleanliness offences also do not wear uniform but carry with them identification badges or cards when discharging their duties. It is FEHD's intention to authorise officers directly involved in the day-to-day management of public markets and hawker bazaars to issue FPNs for smoking offences committed at those premises. Depending on the outcome of staff consultation, which is on-going, officers to be authorised would all wear uniform when they are on duty.

#### Inspection of proof of identity

26. Clause 4 of the Bill provides that if a public officer has reason to believe that a person is committing or has committed a scheduled offence, he is empowered to require the person to supply his name, address and telephone number and produce proof of identity.

27. Hon Martin LEE has asked whether the Government policy of empowering public officers to require members of the public to produce proof of identification for inspection has been expanded from the original purpose of detecting illegal immigrants to facilitating various enforcement works of the Government such as issuing FPNs for smoking offences.

28. The Administration has advised that there has been no change or expansion of Government policy in empowering public officers to require members of the public to produce proof of identification for inspection. Throughout the years, the legislature has, by the enactment of different legislation, empowered relevant public officers to ask for proof of identity under different circumstances for different purposes. For example, there are provisions under the Immigration Ordinance (Cap. 115), the Police Force Ordinance, the Fixed Penalty (Public Cleanliness Offences) Ordinance, the Smoking (Public Health) Ordinance, as well as many other ordinances that provide legal powers for law enforcement agencies to require members of the public to produce proof of identification for enforcing the concerned ordinances. The purpose of the requirement varies in accordance with the contents of the concerned ordinances and does not originate from any policy change.

29. Members have asked why an offender would be liable on conviction to a fine at level 3 (\$10,000) for failing to supply his name, address and contact telephone number (if any) and produce proof of identity without reasonable excuse under clause 4(2) of the Bill, as opposed to a fine at level 2 (\$5,000) for a similar offence in the Fixed Penalty (Public Cleanliness Offences) Ordinance. The Administration considers that it is more appropriate for the penalty level under this clause to be consistent with that prescribed under section 7(2) of the Smoking (Public Health) Ordinance which deals with identical offences, as the Bill is introduced mainly to facilitate enforcement of the Ordinance.

Further fixed penalty notice served by the Authority

30. Clause 6(2) of the Bill provides that "Where this section applies, the Authority may serve on the person a notice in the prescribed form". Members are of the view that "may" should be replaced with "shall" to ensure consistency in enforcement. After considering members' views, the Administration will move the necessary amendments to effect the change.

Withdrawal of notice of fixed penalty

31. Members are of the view that considerations for withdrawing a notice of fixed penalty under clause 7 of the Bill should be specified to ensure consistency in enforcement and avoid abuse of power. The Administration considers it necessary to retain clause 7 to allow for circumstances under which law enforcers have a practical need to withdraw a notice of fixed penalty. These include cases where the notice becomes defective due to wilful misrepresentation of personal details on the part of the offender or technical errors on the part of the law enforcement agencies. As it is impossible to cover all circumstances that may give rise to the need for withdrawal of a notice of fixed penalty, it is prudent to retain the wordings of clause 7 as it is.

32. Members opine that wilful misrepresentation of personal details on the part of the offender or technical errors on the part of the law enforcement agencies should at least be specified in the Bill as the ground for withdrawal of notice of fixed notice so that proceedings may be commenced. Hon Andrew CHENG has suggested adding repeated contravention of section 3(2) or 4(1) of the Smoking (Public Health) Ordinance as a ground for withdrawal of notice of fixed penalty so that proceedings may be commenced. On review, the Administration considers that while it does not seem necessary to specify in the law the reasons for the withdrawal of a notice of a fixed penalty, it will move an amendment to specify in clause 7(4) of the Bill that where a notice of fixed penalty is withdrawn, proceedings in respect of the offence specified in the notice may only be commenced if the ground, or one of the grounds, on which the notice is withdrawn is that it contains incorrect information supplied by the person to or on whom the notice was given or served.

Other amendments to be moved by the Administration

33. The Administration will also -

- (a) amend the definition of "scheduled offence" in clause 2(1) of the Bill to make the definition more concise;
- (b) make an editorial amendment to clause 8(4) for the sake of attaining consistency with the drafting style of clause 6(4);



- (c) amend clause 9(3)(c) to enhance the clarity of the meaning of this provision in both the English and Chinese texts;
- (d) amend clause 10(2) of the Bill to make it clear that the “reasonable notice” referred to in that clause is to be given to the Authority who has served the notice in respect of which a court order to recover the defaulted payment of the fixed penalty is made, as under clause 8 of the Bill, that court order could be made by any person appointed by the Secretary for Justice;
- (e) replace "的2天前" referred to clause 13(2) of the Chinese text of the Bill by "不少於2天前" to tally accurately with "not less than 2 days" in the English text of the same; and
- (f) amend the Schedule to the Bill by replacing section 3(2) and section 4(1) of the Smoking (Public Health) Ordinance in column 2 of the Schedule with section 7(1) of the Ordinance (as section 7(1) is the provision which creates the offence of a contravention of section 3(2) or section 4(1) of that Ordinance) and to make the necessary consequential changes to that Schedule.

#### Manpower of TCO

34. Members consider that the main reason for the high wastage rate of TCIs, i.e. 16.1% in 2006-2007 and 23.7% in 2007-2008, is due to the shortage of TCIs to cope with the heavy workload. This problem will inevitably become more serious with the expansion of statutory no-smoking areas from 1 July 2009 when establishments, such as nightclubs and mahjong parlours, will be required to implement the smoking ban in their indoor premises under the Smoking (Public Health) Ordinance.

35. The Administration has advised that the main reason for the departure of TCIs is the securing of a new job. To improve retention of TCIs, the Administration is exploring the possibility of absorbing TCI positions into existing civil service grades as far as practicable. Such conversion will take around six months, having regard to the timing required for formulation of proposal and staff consultation. If, however, there is no existing grade appropriate for absorbing TCI positions, creation of a new civil service grade will be considered. This latter process will take three to six months more, mainly because of the need to seek advice of the Standing Commission on Civil Service Salaries and Conditions of Service and the endorsement of the Establishment Subcommittee as well as the approval of the Finance Committee of LegCo.

Workflow of TCO in following up complaints and enquiries

36. The Administration has advised that TCO will follow up all complaints by inspection of the venues concerned. In view of the short duration of the smoking act, it is impracticable for an inspector to arrive at the scene immediately when a complaint is launched. To make the best use of its manpower resources and for strategic considerations, TCO conducts unannounced inspections to statutory no-smoking venues and targeted black-spots that are the subject of repeated complaints. Upon receiving a complaint relating to smoking offences from the Government's Integrated Call Centre (ICC), TCIs will contact the complainant to provide him/her with an interim reply and to gather further details about the complaint if necessary. Investigation will be initiated within three working days. According to the nature of the case, the time required to process complaints varies, ranging from a few days to a few months.

37. The Administration has further advised that the 85 TCIs work in 20 teams for enforcement of the Smoking (Public Health) Ordinance. On weekends, public holidays and after-office hours of weekdays, two to six teams of inspectors would be on duty depending on operational needs.

Operation and staffing of the complaint and enquiries hotline of TCO

38. Members note that ICC began handling calls to the TCO hotline on 1 February 2007. At the initial stage, operator service was available daily from 9 am to 10 pm and incoming calls from 10 pm onwards until 9 am was routed to a voicemail box. Since October 2007, operator service has become available round-the-clock. There are now on average 12 Customer Service Officers (CSOs) manning the TCO hotline from 9 am to 10 pm, and four such officers from 10 pm onwards. The performance target is to answer 80% of the calls within 12 seconds. If a CSO is not immediately available, the call will be put on a queue, or the caller may leave a voice message. ICC will reply to the callers who have left a voice message within three hours. All complaints received are referred to TCIs in charge of the district immediately after the calls. TCO will then arrange unannounced inspections to follow up on the complaints.

39. Hon Andrew CHENG has suggested that TCO should man the hotline itself to enable referral of complaints about smoking in statutory no-smoking venues managed by LCSD, FEHD and HD to be made to these departments immediately, so that prompt action can be taken.

40. The Administration has advised that ICC is able to refer complaints immediately after it has received a call. The Administration is now exploring the feasibility of ICC referring a complaint relating to a venue managed by staff of LCSD, FEHD and HD to the relevant department's venue manager as well as to TCO, instead of referring it to TCO alone, immediately after the complaint call has been received.

41. The Administration has further advised that there are advantages for TCO to continue to use the services of ICC in handling the TCO hotline. ICC has the latest telephone and information technology support system as well as a team of well-trained staff with the know-how to handle telephone complaints effectively. Experience indicates that ICC has handled complaint calls to TCO hotline with greater efficiency and cost effectiveness than TCO itself. Up to April 2008, ICC has received over 28 000 calls to the TCO hotline. About 80% of the enquiries were resolved at the first contact. Complaints were also effectively transferred for follow up action by TCIs. With a dedicated team of CSOs handling the telephone complaints, more TCO officers can be deployed to carry out duties relating to tobacco control, including law enforcement, public education, provision of smoking cessation services and related administrative work. TCO will continue to work closely with ICC to monitor the performance level and explore the option of increasing the number of designated CSOs if the demand so justifies.

42. At the Bills Committee's request, the Administration has agreed to give an undertaking that it will explore the option of increasing the number of designated CSOs if the demand so justifies to be given by SFH when the Second Reading debate on the Bill is resumed.

#### **Undertaking by the Administration**

43. The Administration has undertaken to include in the speech to be given by SFH when the Second Reading debate on the Bill is resumed that the Administration will explore the option of increasing the number of designated CSOs if the demand so justifies (paragraph 42 refers).

#### **Consultation with the House Committee**

44. The Bills Committee consulted the House Committee on 13 June 2008 and obtained its support for the Second Reading debate on the Bill to be resumed at the Council meeting on 2 July 2008.

**Bills Committee on Fixed Penalty (Smoking Offences) Bill**

**Membership list**

**Chairman** Hon Andrew CHENG Kar-foo

**Members** Hon Martin LEE Chu-ming, SC, JP  
Hon Tommy CHEUNG Yu-yan, SBS, JP  
Hon Audrey EU Yuet-mee, SC, JP  
Hon Vincent FANG Kang, JP  
Hon LI Kwok-ying, MH, JP  
Dr Hon Joseph LEE Kok-long, JP  
Hon Alan LEONG Kah-kit, SC  
Hon LEUNG Kwok-hung  
Dr Hon KWOK Ka-ki  
Hon WONG Ting-kwong, BBS

(Total : 11 Members)

**Clerk** Miss Mary SO

**Legal Adviser** Miss Winnie LO

**Date** 11 April 2008

**Bills Committee on Fixed Penalty (Smoking Offences) Bill**

A. Organisations and individuals which/who have given oral representation to the Bills Committee

1. Asian Consultancy on Tobacco Control
2. Beijing Club
3. Catering Entertainment Premises Smoking Ban Regulations Concern Group
4. Clear the Air
5. Club Paris
6. Committee on Youth Smoking Prevention
7. Entertainment Business Rights Concern Group
8. Hong Kong Bars and Karaoke Rights Advocacy
9. Hong Kong Council on Smoking and Health
10. Hong Kong Food and Environmental Hygiene Department Staff Rights Union
11. Hong Kong Mahjong House
12. Hong Kong Public Health Inspectors' Association
13. K C City Billiards
14. School of Public Health, Li Ka Shing Faculty of Medicine, The University of Hong Kong
15. The Association for Hong Kong Catering Services Management Limited
16. The Federation of Hong Kong and Kowloon Ballroom and Night Club Merchants
17. Mr Michael MAK

B. Organisations which have provided written submissions only

1. Government Cultural Services Grades' Alliance
2. Hong Kong College of Physicians
3. Tobacco Association of Hong Kong
4. Tobacco Control Research and Policy Unit, Department of Community Medicine, School of Public Health, The University of Hong Kong
5. Democratic Party