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A BILL

To

Provide for a fixed penalty to be payable for certain offences in contravention of the Smoking (Public Health) Ordinance; for the recovery of the fixed penalty; and for related matters.

Enacted by the Legislative Council.

PART 1

PRELIMINARY

1. Short title and commencement

(1) This Ordinance may be cited as the Fixed Penalty (Smoking Offences) Ordinance.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Food and Health by notice published in the Gazette.

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires—
“fixed penalty” (定額罰款), in relation to a scheduled offence, means the fixed penalty set out in column 4 of the Schedule opposite to the offence;

“proceedings” (法律程序) means proceedings before a magistrate in respect of a scheduled offence;

“scheduled offence” (表列罪行) means an offence described in column 3 of the Schedule and prescribed by the provision of the Smoking (Public Health) Ordinance (Cap. 371) specified in column 2 of the Schedule opposite to the description.

(2) A description in column 3 of the Schedule indicates for convenience of reference only the general nature of the offence under the provision specified in column 2 of the Schedule opposite to that description.

(3) In applying a provision of this Ordinance in relation to a scheduled offence—

- (a) a reference to “Authority” in that provision shall be construed as a reference to a person specified by the Secretary for Food and Health as the Authority by notice under section 17(1)(a); and
- (b) a reference to “public officer” in that provision shall be construed as a reference to a public officer or a member of a class of public officers specified by the Secretary for Food and Health by notice under section 17(1)(b).

PART 2

FIXED PENALTY

3. Fixed penalty notice given by public officer

(1) If a public officer has reason to believe that a person is committing or has committed a scheduled offence, he may give the person a notice in the prescribed form offering him an opportunity to discharge his liability to conviction for the offence by payment of the fixed penalty for the offence within 21 days from the date of the giving of the notice.

(2) A notice under subsection (1) shall be given by the public officer personally to the person.

(3) Subject to section 7, where a person has received a notice under subsection (1) and has paid the full amount of the fixed penalty shown in the notice within the period referred to in that subsection, he shall not be liable to be prosecuted or convicted for the scheduled offence specified in the notice.

4. Power of inspecting proof of identity

(1) If a public officer has reason to believe that a person is committing or has committed a scheduled offence, he may, for the purposes of—

- (a) serving any document under this Ordinance on the person; or
- (b) issuing a summons in respect of the offence,

require the person to supply his name, address and contact telephone number (if any) and produce proof of identity for inspection.

(2) A person who, without reasonable excuse, fails to comply with a requirement made under subsection (1) commits an offence and is liable on conviction to a fine at level 3.

(3) A public officer may arrest a person who, without reasonable excuse, fails to comply with a requirement made under subsection (1).

(4) Without prejudice to the generality of section 51 of the Police Force Ordinance (Cap. 232), a public officer who arrests any person under subsection (3) shall forthwith take him to the nearest police station or deliver him into the custody of a police officer.

(5) In this section, “proof of identity” (身分證明文件), in relation to the person as referred to in subsection (1), has the same meaning as in section 17B of the Immigration Ordinance (Cap. 115).

5. Supply of false information

A person who, in purported compliance with a requirement made under section 4(1), supplies any particular of his name, address or contact telephone number which he knows to be false or misleading commits an offence and is liable on conviction to a fine at level 3.

6. Further fixed penalty notice served by Authority

(1) This section applies where a person—

- (a) having been given a notice under section 3(1) has not paid the fixed penalty for the scheduled offence specified in the notice within the period referred to in that section; or
- (b) refuses to accept a notice intended to be given to him under section 3(1) in respect of a scheduled offence.

(2) Where this section applies, the Authority may serve on the person a notice in the prescribed form—

- (a) demanding payment of the fixed penalty for the scheduled offence;
- (b) informing the person that if he wishes to dispute liability for the offence he should notify the Authority in writing; and
- (c) stating that the payment or notification (as the case may be) shall be made within 10 days from the date of the notice so served.

(3) No notice shall be served under subsection (2)—

- (a) where subsection (1)(a) applies, after the expiry of 6 months from the date of the notice given under section 3(1); and
- (b) where subsection (1)(b) applies, after the expiry of 6 months from the date on which the person refuses to accept the notice.

(4) A notice under subsection (2) may be served on the person by sending it by post to his address.

(5) Subject to section 7, where a person has received a notice under subsection (2) and has paid the full amount of the fixed penalty shown in the notice within the period referred to in subsection (2)(c), he shall not be liable to be prosecuted or convicted for the scheduled offence specified in the notice.

7. Withdrawal of notice of fixed penalty

(1) Where a notice under section 3(1) has been given to a person, the Authority may, at any time before the commencement of any proceedings against the person in respect of the scheduled offence specified in the notice—

- (a) withdraw that notice; and
- (b) serve on that person another notice in writing informing him that the notice under section 3(1) has been withdrawn.

(2) Where a notice under section 6(2) has been served on a person, the Authority may, at any time before the commencement of any proceedings against the person in respect of the scheduled offence specified in the notice or, where an order under section 8(1) has been applied for, before such order is made—

- (a) withdraw that notice; and
- (b) serve on that person another notice in writing informing him that the notice under section 6(2) has been withdrawn.

(3) Where a notice under section 3(1) or 6(2) is withdrawn under this section and any sum of money has been paid pursuant to the notice, the Director of Accounting Services shall, on demand by the person to or on whom the notice was given or served, repay him the sum so paid.

(4) The withdrawal of a notice under section 3(1) or 6(2) shall not be a bar to any proceedings in respect of the scheduled offence specified in the notice.

8. Recovery of fixed penalty

(1) If a person served with a notice under section 6(2) has not paid the fixed penalty for the scheduled offence specified in the notice or notified the Authority that he wishes to dispute liability for the offence in accordance with the notice, a magistrate shall, upon an application made in the name of the Secretary for Justice, order him to pay within 14 days from the date of service of notice of the order—

- (a) the fixed penalty;
- (b) an additional penalty equal to the amount of the fixed penalty; and
- (c) the sum of \$300 by way of costs.

(2) An application under subsection (1) may be made in the absence of the person on whom the notice under section 6(2) has been served and the Secretary for Justice may appoint any person or class of persons to make the application.

(3) Where an order is made under subsection (1) against a person, the magistrate shall cause notice of the order to be served on the person.

(4) The notice under subsection (3) may be served on the person by sending it by post to his address.

(5) Where a person against whom an order under subsection (1) has been made fails to comply with the order, he shall, for the purposes of section 68 of the Magistrates Ordinance (Cap. 227), be deemed to have failed to pay the sum adjudged to be paid by a conviction and shall be liable to be imprisoned under that section.

(6) Where a person against whom an order under subsection (1) has been made has complied with the order, he shall not be liable to be prosecuted or convicted for the scheduled offence to which the order relates.

9. Proof produced for application under section 8

(1) Notwithstanding any provisions of the Magistrates Ordinance (Cap. 227), in an application under section 8(1), an order under that section shall be made upon the production by the applicant to the magistrate of—

(a) a copy of the notice served under section 6(2) together with a certificate of posting of that notice under section 29 of the Evidence Ordinance (Cap. 8); and

(b) a certificate referred to in subsection (2).

(2) In an application under section 8(1), a certificate in the prescribed form stating the matters specified in subsection (3) and purporting to be signed by or for the Authority shall be admitted in evidence without further proof upon its production to the magistrate.

(3) The certificate referred to in subsection (2) shall state that—

(a) payment of the fixed penalty for the scheduled offence specified in a notice under section 6(2) was not made before the date of the certificate;

(b) the person specified in the certificate had not, before the date of the certificate, notified the Authority that he wished to dispute liability for the scheduled offence; and

(c) the address specified in the certificate was at the time so specified the address of the person.

(4) Unless there is evidence to the contrary—

(a) it shall be presumed that the certificate referred to in subsection (2) is signed by or for the Authority; and

(b) the certificate shall be evidence of the facts stated in it.

10. Review of order

(1) Where a magistrate is satisfied that a notice served under section 6(2) has not come to the personal notice of the person to whom it relates without any neglect by that person, the magistrate may, upon an application by that person, rescind the order made under section 8(1) in respect of the notice.

(2) A person who makes an application under subsection (1) shall give reasonable notice of the application to the Authority who applied for the order.

(3) Upon rescinding the order under subsection (1), the magistrate may—

- (a) if the person wishes to dispute liability for the scheduled offence to which the order relates, give leave to that effect; or
- (b) if the person does not wish to dispute liability for the scheduled offence—
 - (i) order him to pay the fixed penalty concerned within a period of 10 days; and
 - (ii) order that, if he fails to pay the fixed penalty within that period, he shall pay immediately the fixed penalty, an additional penalty equal to the amount of the fixed penalty and the sum of \$300 by way of costs.

(4) An application under subsection (1) may be made in person or by counsel or solicitor on behalf of the applicant, and the magistrate, for the purpose of securing the attendance of witnesses and generally for conducting the proceedings, shall have all the powers of a magistrate hearing a complaint under the Magistrates Ordinance (Cap. 227).

(5) An application under subsection (1) shall be made within 14 days from the date that the magistrate is satisfied to be the earliest date on which the order made under section 8(1) came to the personal notice of the person to whom that order relates.

(6) Where a magistrate gives leave under subsection (3)(a), proceedings may be taken, notwithstanding section 26 of the Magistrates Ordinance (Cap. 227), within 6 months from the date on which the magistrate gives the leave.

(7) A magistrate may for good cause, upon an application by the Authority at any time, rescind any order for the payment of a fixed penalty and any other order made in the same proceedings.

(8) Where a person against whom an order under subsection (3)(b) has been made fails to comply with the order under subsection (3)(b)(ii), he shall, for the purposes of section 68 of the Magistrates Ordinance (Cap. 227), be deemed to have failed to pay the sum adjudged to be paid by a conviction and shall be liable to be imprisoned under that section.

(9) Where a person against whom an order under subsection (3)(b) has been made has complied with the order, he shall not be liable to be prosecuted or convicted for the scheduled offence to which the order relates.

11. Service of summons of proceedings

Where a person—

- (a) has notified the Authority, in accordance with a notice under section 6(2), that he wishes to dispute liability for a scheduled offence; or
- (b) has been given leave to dispute liability for the offence under section 10(3)(a),

then a summons issued in any proceedings against him in respect of the offence may be served on him in accordance with section 8 of the Magistrates Ordinance (Cap. 227).

12. Additional penalty imposed in proceedings on liability

(1) This section applies where a person—

- (a) has notified the Authority, in accordance with a notice under section 6(2), that he wishes to dispute liability for a scheduled offence; or
- (b) has been given leave to dispute liability for the offence under section 10(3)(a),

and in consequence of the notification or leave, appears in any proceedings in answer to a summons.

(2) Where this section applies, if the person is convicted of the scheduled offence after having offered no defence or a defence which is frivolous or vexatious, the magistrate before whom the proceedings are heard shall, in addition to any other penalty and costs, impose an additional penalty equal to the amount of the fixed penalty for the offence.

13. Payment of fixed penalty after issue of summons

(1) Notwithstanding that proceedings have been taken against a person who has notified the Authority in accordance with a notice under section 6(2) that he wishes to dispute liability for a scheduled offence, if the person pays the full amount of the fixed penalty for the offence together with an additional penalty equal to the amount of the fixed penalty and the sum of \$500 by way of costs in accordance with subsection (2), the proceedings shall then terminate.

(2) Payment under subsection (1) shall be made at any magistracy not less than 2 days before the day specified in the summons for the person's appearance, and the summons shall be produced at the time of payment.

(3) No public holiday shall be included in the computation of the 2 days' period mentioned in subsection (2).

PART 3

MISCELLANEOUS

14. Protection for public officers acting in good faith

(1) A public officer shall not be personally liable in respect of any act done by him while exercising any of his powers under this Ordinance and within the scope of his employment, if he did that act in the honest belief that he was entitled to do it.

(2) Nothing in this section shall be construed as relieving the Government from liability in respect of the acts of public officers.

(3) In this section, “public officer” (公職人員) includes a person specified as the Authority under section 17(1)(a).

15. Obstruction of public officers

A person who resists or wilfully obstructs a public officer exercising his powers under this Ordinance commits an offence and is liable on conviction to a fine at level 4 and to imprisonment for 6 months.

16. Power to make regulation

The Secretary for Food and Health may by regulation—

- (a) prescribe any notice or certificate which under this Ordinance is to be or may be prescribed;
- (b) specify the persons to whom and the places at which a fixed penalty, an additional penalty or any other sums payable under this Ordinance may be paid;
- (c) specify the manner of payment of a fixed penalty, an additional penalty or any other sums payable under this Ordinance; and
- (d) provide for the better carrying out of the provisions of this Ordinance.

17. Specification of Authority and public officer

(1) The Secretary for Food and Health may, for the purposes of this Ordinance and in relation to a scheduled offence, by notice specify—

- (a) the Authority; and
 - (b) a public officer or a class of public officers.
- (2) A notice under subsection (1) shall be published in the Gazette.

18. Revision of fixed penalty

The Legislative Council may by resolution vary the fixed penalty in relation to a scheduled offence.

19. Consequential amendments

(1) Section 113C(1)(c) of the Criminal Procedure Ordinance (Cap. 221) is amended by repealing “or the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570)” and substituting “, the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570) or the Fixed Penalty (Smoking Offences) Ordinance (of 2008)”.

(2) Section 2(1B) and (3) of the Rehabilitation of Offenders Ordinance (Cap. 297) is amended by repealing “or the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570)” and substituting “, the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570) or the Fixed Penalty (Smoking Offences) Ordinance (of 2008)”.

SCHEDULE

[s. 2]

SCHEDULED OFFENCE

Item	Provision of the Smoking (Public Health) Ordinance	Description	Fixed Penalty
1.	Section 3(2)	Smoking in areas designated as no smoking areas	\$1,500
2.	Section 4(1)	Smoking in public transport carriers	\$1,500

Explanatory Memorandum

The object of this Bill is to enable a person who has committed a certain smoking-related offence to discharge his liability to conviction by the payment of a fixed penalty.

2. Clause 3 provides that a public officer who has reason to believe that a person is committing or has committed a scheduled offence may give the person an opportunity to discharge his liability to conviction by the payment of a fixed penalty. This is done by giving the person a notice requiring the payment of the fixed penalty within 21 days. The scheduled offences for which fixed penalties are so payable are set out in the Schedule.
3. Clause 4 provides 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 for the purposes of—
 - (a) serving any document under this Bill on the person; or
 - (b) issuing a summons in respect of the offence.
4. Clause 5 creates an offence. It is an offence for a person, in purported compliance with a requirement made under clause 4, to supply any particular of his name, address or contact telephone number which he knows to be false or misleading.
5. Clause 6 provides that where a person fails to pay a fixed penalty within 21 days from the date of the giving of a notice under clause 3(1), or where a person refuses to accept a notice intended to be given to him under clause 3(1), the Authority, which is to be specified by notice published in the Gazette, may issue a further notice. This further notice serves to demand payment of the fixed penalty and to require the person to notify the Authority if he wishes to dispute liability.
6. Clause 7 provides that a notice given under clause 3(1) or served under clause 6(2) may be withdrawn. This clause also provides for the repayment of a penalty already paid under the notice before it has been withdrawn.
7. Clause 8 provides that where the notice served under clause 6(2) is not acted upon, the magistrate may, upon the application made in the name of the Secretary for Justice, order payment of the fixed penalty, an additional penalty equal to the fixed penalty and a fixed cost of \$300.
8. Clause 9 provides for the proof required to be produced for an application under clause 8.
9. Clause 10 provides for the review of an order made under clause 8. Under this clause, the magistrate may rescind the order if he is satisfied that the notice under clause 6(2) to which the order relates has not come to the personal notice of the person concerned (“Alleged Offender”) without any neglect by the Alleged Offender. Upon rescinding the order, the magistrate may give leave for the Alleged Offender to dispute liability or, if the Alleged Offender does not wish to dispute liability, order that he shall pay the fixed penalty concerned

within a period of 10 days and that if he fails to do so, he shall pay immediately the fixed penalty, an additional penalty and a fixed cost of \$300. This clause also provides for the consequences of compliance and non-compliance of such an order.

10. Clause 11 provides for the service of a summons in proceedings instituted in respect of a scheduled offence where a person has notified the Authority that he wishes to dispute liability for the offence, or where he has been given leave to do so.

11. Clause 12 provides that where a person has notified the Authority that he wishes to dispute liability for a scheduled offence, or has been given leave to dispute liability for the offence, the magistrate may impose an additional penalty if the person is convicted of the offence after having offered no defence or one which is frivolous or vexatious.

12. Clause 13 enables a person to pay the fixed penalty for a scheduled offence to discharge his liability after the institution of proceedings in respect of the offence, but if he does so, he must also pay an additional penalty equal to the amount of the fixed penalty and a fixed cost of \$500.

13. Clause 14 exempts a public officer from personal liability in respect of any act done by him while exercising his powers under this Bill and within the scope of his employment, if he honestly believed that he was entitled to do the act.

14. Clause 15 creates an offence. It is an offence for a person to resist or wilfully obstruct a public officer exercising his powers under this Bill.

15. Clause 16 enables regulations to be made by the Secretary for Food and Health for the carrying out of the provisions of this Bill.

16. Clause 17 provides that the Secretary for Food and Health may specify the Authority and public officers for the purposes of this Bill by notice published in the Gazette.

17. Clause 18 empowers the Legislative Council to vary a fixed penalty under this Bill by resolution.

18. Clause 19 deals with consequential amendments necessitated by this Bill.