

LEGISLATIVE COUNCIL BRIEF

FIXED PENALTY (SMOKING OFFENCES) BILL 2008

INTRODUCTION

At the meeting of the Executive Council on 22 January 2008, the Council ADVISED and the Chief Executive ORDERED that the Fixed Penalty (Smoking Offences) Bill 2008 (at **Annex A**) should be introduced into the Legislative Council.

JUSTIFICATIONS

2. Under the Smoking (Public Health) Ordinance (Cap. 371), smoking or carrying a lighted cigarette, cigar or pipe in a statutory no smoking area or a public transport carrier is an offence punishable on summary conviction by a maximum fine of \$5,000. The work involved in the prosecution of an offender, apart from court proceedings, includes preparing investigation reports, application for summons through the CASEMAN system¹, preparing brief facts of the case as well as relevant witness statements for submission to court and giving instructions to the prosecutor. For undelivered summonses, the Tobacco Control Office (TCO) would have to obtain the respective addresses of the relevant offenders from other departments and arrange to re-issue a summons if there has been any change to an offender's address. This 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. A number of other offences/contraventions of similar degree of gravity are now being dealt with by an FPS. These include offences/contraventions under the Fixed Penalty (Traffic Contraventions) Ordinance (Cap. 237), the Fixed Penalty (Criminal Proceedings) Ordinance

¹ "CASEMAN" stands for "Case and Summons Management System for Magistracies"

(Cap. 240) and the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570). Introducing an FPS to deal with the offence of smoking or carrying a lighted cigarette, cigar or pipe in a statutory no smoking area or a public transport carrier would save time and better utilize the limited resources of the government and the courts. Enforcement officers could then take more enforcement actions, which would increase the strength and effectiveness of our whole enforcement strategy. There may be a reduction of court's workload if offenders are ready to pay the fines without fighting the cases.

3. Under the existing arrangements for taking out prosecution proceedings, it may take up to 3 months after the day on which the offence takes place before a defendant appears in court. As the prosecution and the possible fine are not immediate, the deterrent effect on the offender is diminished. In some cases, the deterrent effect is further diluted by the low level of fine imposed. A standard fixed penalty level that is sufficiently high, together with the immediate obligation to pay the penalty, would be a stronger deterrent and would also convey a more consistent message on the Government's efforts to enforce the smoking ban uniformly.

FEATURES OF THE PROPOSED FIXED PENALTY SYSTEM

Offence to be covered

4. We propose that the proposed FPS should only be applied to section 7(1) of the Smoking (Public Health) Ordinance (Cap. 371), which provides that contravention of the statutory smoking ban as stipulated under section 3(2) and section 4(1) of the Ordinance is 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, shopping malls, escalators and the Wetland Park) and in public transport carriers (such as public buses, trams taxis and ferries) respectively. We do not propose to deal with other offences provided for by the Ordinance through an FPS, for example, the sale of tobacco products to persons under 18 years of age or the display of tobacco advertisement, as these may involve proof of complicated facts of the case in prosecution.

Penalty Level

5. The penalty level should be set at a level sufficiently high to achieve the desired deterrent effect without being unduly harsh. We propose 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. In our public consultation, this is also the penalty level that attracted majority support.

Operation of the Proposed Fixed Penalty System

6. The operation of the proposed FPS is similar to existing FPS under other Ordinances. We propose that if an authorized enforcement officer has reason to believe that a person is contravening or has contravened the statutory smoking ban, he may give that person a fixed penalty notice (or FPN), recipient of which could then have an opportunity to discharge his liability to conviction by payment of the fixed penalty within 21 days. The person concerned shall no longer be liable to be prosecuted or convicted for that offence. The FPN would be a form to be prescribed in subsidiary legislation to be made under the Bill.

7. If the person to whom an FPN is issued wishes to dispute liability, he may do so by notifying the enforcement authority of his intention in writing. A summons will then be served on him. If a person who receives an FPN from a TCO officer, a police officer or officers of other Government departments as listed out in paragraph 16 wishes to dispute liability, the prosecution case will be handled by the relevant enforcement authority to which the officer who issues the FPN belongs.

8. If an authorized enforcement officer has reason to believe that a person is committing or has committed a scheduled offence, he may, for the purposes of serving any document under the proposed Bill on the person, or issuing a summons in respect of the offence under the Smoking (Public Health) Ordinance (Cap. 371), require that person to supply his name, address and contact telephone number, and to produce proof of identity. Failure to supply these personal particulars or to produce proof of identity, or the supply of false or misleading personal particulars is an offence and the offender concerned is liable on summary conviction as decided by the

court to a fine at level three (\$10,000), as provided by section 5 of the proposed Bill.

9. Nonetheless, even with an FPS in place, enforcement officers could still initiate summary proceedings in exceptional circumstances. For example, if a person refuses to produce proof of identity for inspection by an enforcement officer for the purpose of issuing an FPN, the enforcement officer may have to request the Police to assist. In such a case, the person concerned will be prosecuted through summary proceedings for smoking in a statutory no smoking area as well as for failing to comply with the requirement of the enforcement officer to produce proof of identity. For an offender who persistently refuses to produce proof of identity in the presence of a police officer and where section 15 of the proposed Bill is applicable, the offender would be prosecuted for wilfully obstructing a public officer to exercise his powers or performing his duties, on top of the two offences for smoking in a statutory no smoking area and failing to comply with the requirement to produce proof of identity. Section 4(3) of the proposed Bill also provides for the power of arrest, which may be invoked against the offender. These arrangements are to bring home to the person concerned the message that non-cooperation with enforcement officers in the carrying out of their duties would have serious consequences so as to deter him and others from doing so again.

Default payment of fixed penalty

10. The arrangements on default payment are the same as those adopted under the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570). We propose that a person who has been issued with an FPN should be given 21 days from the date of issue of the notice to make payment of the full amount of the fixed penalty. If no payment of the full amount is received within 21 days, we propose that the enforcement authority shall serve by post on the person another notice (the reminder), which shall be a prescribed form, to demand payment of the fixed penalty within 10 days from the date of the reminder.

11. If no payment of the full amount of the fixed penalty is received within 10 days from the date of issue of the reminder and no notification of the person's intention to dispute liability for the offence is received during

the same period, we propose that the person concerned should be considered to have defaulted in payment of the fixed penalty. We propose that in such a case, an application will be made to the magistrate for a court order, requiring the person to pay the fixed penalty amount together with an additional penalty equal to the fixed penalty amount plus an administrative costs of \$300 (i.e. \$3,300 in total if the fixed penalty level is \$1,500, the same amount as is imposed by the existing Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570)) within 14 days from the date on which the court order is served. If subsequent to the making of the court order the person concerned duly pays the full amount of the fixed penalty together with the additional penalty and administrative costs within the specified 14 days, he shall no longer be liable to be prosecuted or convicted for that particular offence.

12. However, if no payment of the full amount of the fixed penalty and the additional penalty plus administrative costs is received within the specified time limit, a non-payment of fine warrant will be issued and the usual judicial procedures for non-payment of fines will follow. Specifically, the person concerned shall be deemed to have failed to pay the sum adjudged to be paid by a conviction and be sentenced under section 68 of the Magistrates Ordinance (Cap.227). These proposed arrangements are the same as those adopted under the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570). A flow chart showing the workflow is at **Annex B**.

Additional penalty in court proceedings with frivolous or vexatious defence

13. If a person who has received an FPN under section 6 of the proposed Bill has notified that he wishes to dispute liability and summary proceedings are initiated against him, and if in the court proceedings the person concerned offers no defence or a defence which is considered frivolous or vexatious by the magistrate, we propose to provide that the magistrate shall, in addition to any other penalty and costs the court may impose, impose an additional penalty equal to the amount of the fixed penalty. There is a similar provision in the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570).

Payment of fixed penalty after issue of summons

14. If a person who has notified the authority in accordance with an

FPN under section 6 of the proposed Bill that he wishes to dispute liability and summary proceedings have been initiated against him but he then changes his mind and wishes to discharge liability by paying the fixed penalty, we propose that he should be allowed to do so as long as the fixed penalty, an additional penalty that equals to the amount of the fixed penalty and an administrative costs of \$500 (i.e. \$3,500 in total if the fixed penalty is \$1,500) are paid at any time up to two working days before the appointed day of hearing of the case by the court. The administrative costs payable by the person concerned are higher in this case than in the case of default payment because the administrative work involved in initiating summary proceedings is more labour-intensive than in the issue of a court order to a defaulter. However, we propose that this provision should not apply in cases where it is the enforcement authority who initiates the summary proceedings against the person concerned in exceptional circumstances through withdrawal of the FPN. These proposed arrangements are the same as those adopted under the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570).

Exceptional Cases

15. There would be cases in which the offender could not afford to pay the fixed penalty or has other reasons to plead for different treatment. To retain flexibility for any compassionate consideration, a magistrate may for good cause, on an application by the enforcement authority at anytime, rescind any order for the payment of a fixed penalty and/or any additional penalty imposed and/or any administrative costs, or any other order made in the same proceedings.

Enforcement Officers

16. At present, Tobacco Control Inspectors of the TCO are empowered to enforce Section 7(1) of the Smoking (Public Health) Ordinance (Cap. 371). Police officers may also take enforcement actions pursuant to their powers under the Police Force Ordinance (Cap. 232). We propose that TCO officers should remain the leading enforcement agency under the proposed FPS, and should 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.

For certain public venues managed by Government departments and frequented by members of the public, we propose that specified public officers of the departments concerned who are the venue managers or who assist in the management should also be empowered to issue FPNs to offenders. This would enhance the enforcement capacity in these venues. The Government departments concerned and the relevant statutory no smoking areas include -

Enforcement Department	Relevant Statutory No Smoking Areas
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	Statutory no smoking areas within public housing estates under the management and control of the Housing Authority/Housing Department

17. The empowerment of officers of these Government departments to issue fixed penalty tickets is meant to complement the work of the TCO in the premises listed above. Issuing FPNs on detection of smoking offences will form part of their management work, but will not overtake their current work priorities and is subject to the feasibility of manpower deployment of the departments concerned.

18. Specific ranks of officers to be authorized to enforce the law would be specified by the Secretary for Food and Health by notice subsequent to the enactment of the proposed Bill and the notice shall be published in the Gazette. We will develop enforcement guidelines for enforcement officers of all departments to follow so that there is consistency in the enforcement work.

Regulation Making Power

19. The Bill also provides for the Secretary for Food and Health to make regulations to deal with various technical matters including prescribing the fixed penalty notices and other forms and specification of payment methods and manners. The regulation will be made before the commencement of the Ordinance (if enacted).

OTHER OPTIONS

20. The only alternative for us is to continue with the existing means of prosecuting offenders through summary proceedings. All the administrative inefficiencies as laid out in paragraphs 2 and 3 would continue, rendering it a highly undesirable option. This would also fail to meet public expectation for an early introduction of the FPS for smoking offences.

THE BILL

21. The proposed Bill contains 3 Parts and a Schedule.

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

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

- (a) the giving and withdrawal of an 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.

24. Part 3 provides for miscellaneous matters such as –
- (a) creation of an offence of obstruction of public officers;
 - (b) empowering the Secretary for Food and Health 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.

LEGISLATIVE AND IMPLEMENTATION TIMETABLE

25. The legislative timetable is proposed to be –

Publication in the Gazette	6 February 2008
First Reading and commencement of Second Reading debate	20 February 2008
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

26. The Department of Health has been liaising with relevant government departments and consulting the Judiciary to prepare for the necessary practical procedures and information system to support the issue of FPNs and related follow-up actions. It is estimated that about ten months would be needed to put in place the practical arrangements necessary for supporting the operation of the FPS including the information technology system after enactment of the primary legislation. Our current target is for the FPS to come into force in the first half of 2009.

IMPLICATIONS OF THE PROPOSALS

Basic Law and Human Rights Implications

27. The proposals are in conformity with the Basic Law, including the provisions concerning human rights.

Binding Effect of the Legislation

28. The Bill does not contain any express binding effect provision.

Financial Implications

29. A non-recurrent cost of \$9.894 million was approved in November 2006 for setting up a fixed penalty information system. Additional recurrent resources of \$10 million in a full year were allocated to the Department of Health from 2007-08 onwards (involving 78 new posts) for promoting a smoke-free culture and stepping up related enforcement actions. To further strengthen enforcement of smoking ban and help prepare for the introduction of the FPS, a funding allocation of \$4.2 million in a full year has been made from 2008-09 onwards, providing eight new posts.

30. The FPS would streamline prosecution procedures and save administrative costs, although the quantum of savings has yet to be ascertained.

Civil Service Implications

31. The three departments mentioned in paragraph 16 (LCSD, FEHD and HD) are consulting their staff concerned with a view to authorizing them to become public officers to issue FPNs under the proposal. As the enforcement of the statutory provisions against smoking offences through issuing FPNs will form part of the venue-management work of these departments but will not overtake their current work priorities and is subject to the feasibility of manpower deployment of the departments concerned, there are no implications on the establishment of these departments.

Economic Implications

32. With strengthened enforcement powers, the compliance rate with the statutory smoking ban should be higher. Public exposure to second hand smoke in statutory no smoking areas would also be reduced. Some smokers may choose to quit smoking and some may reduce their daily consumption of cigarettes or other tobacco products. This should contribute towards better health of the local population, with intangible benefits on productivity and also saving in medical costs which would otherwise be incurred by smoking-related diseases.

Environmental Implications

33. The proposal is not expected to have any environmental implication.

Sustainability Implications

34. In line with the sustainability principle of pursuing policies which promote and protect the physical health of the people of Hong Kong, the proposal may encourage more smokers to quit or reduce their consumption of tobacco products, thereby improving the health conditions of the general population of Hong Kong.

PUBLIC CONSULTATION

35. During the scrutiny of the Smoking (Public Health) Amendment Bill 2005 in the Legislative Council (LegCo) Bills Committee, LegCo members have expressed support for the early introduction of an FPS to be introduced to deal with the smoking offence. We consulted the LegCo Panel on Health Services of the proposal on 1 June 2007 and the Panel also expressed that such a system should be implemented as soon as possible. We also consulted the 18 District Councils and there was general support for the proposal. There was, however, a minority who held a different view on the penalty level and on the number of Government departments who should take part in the enforcement action. Some others are also worried about the potential confrontation the FPS would bring about between enforcement officers and smokers, especially elderly smokers.

PUBLICITY

36. A press release will be issued and a press briefing would be held upon gazetting of the Bill. A spokesperson would be available to answer media enquiries. Upon enactment of the Bill by LegCo, we will launch another publicity campaign to raise public awareness of the statutory smoking ban and of the new FPS.

BACKGROUND

37. The Smoking (Public Health) Ordinance (Cap 371) was first enacted in 1982 to provide a legal framework for restricting the use, sale and promotion of tobacco products in Hong Kong. The Ordinance was last amended in 2006. Statutory no smoking areas under the Ordinance were expanded to cover a vast expanse of venues, including all indoor workplaces and indoor public places, swimming pools, bathing beaches and stadia under the management of LCSD, the Hong Kong Wetland Park under the management of the Agriculture, Fisheries and Conservation Department, schools, hospitals and a number of other institutions, except for certain exemptions, with effect from 1 January 2007. With the expansion of statutory no smoking areas, there is a need for more manpower to enforce the smoking ban, as well as for a more efficient enforcement system.

38. The present Smoking (Public Health) Ordinance also empowers the Director of Health to designate public transport interchanges (PTIs) as statutory no-smoking areas. However, in view of the varying designs of PTIs, the designation of a no-smoking area in every PTI will require the support of additional resources and manpower. In accordance with the priorities of resource utilisation, we will designate no-smoking areas in PTIs after the introduction of a FPS for smoking offences. Our initial plan is to first designate covered PTIs as statutory no-smoking areas. Designation of open PTIs as statutory no-smoking areas will be considered in the next stage.

ENQUIRIES

39. For any questions about the Bill, please contact Miss Anita Chan at 3150 8978 or Miss Christine Au at 2973 8240.

Food and Health Bureau
(Health Branch)
February 2008

FIXED PENALTY (SMOKING OFFENCES) BILL

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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 on 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 the 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 wilfully obstruct or resist 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 the Bill.

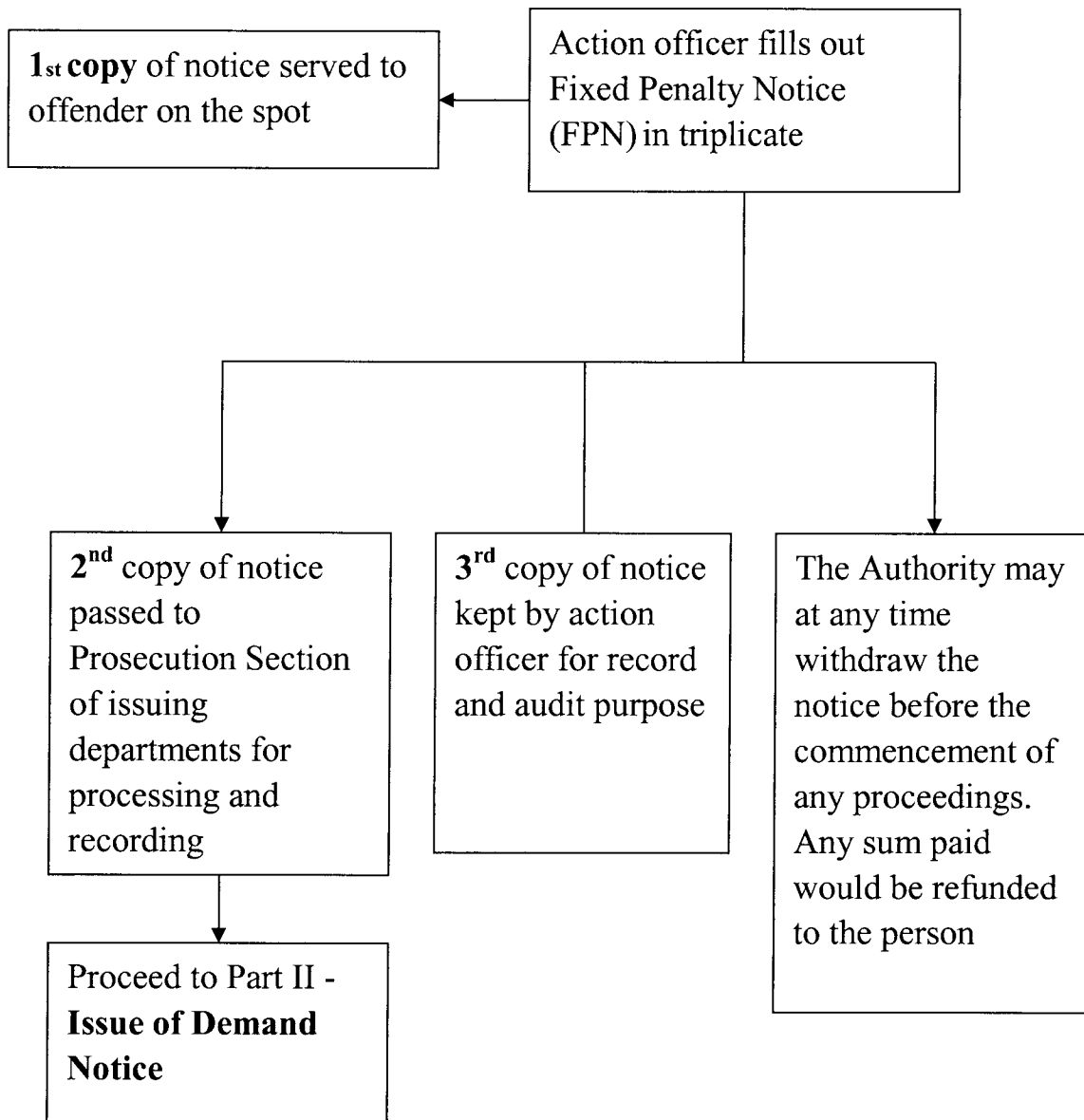
16. Clause 17 provides that the Secretary for Food and Health may specify the Authority and public officers for the purposes of this Bill by notice published in the Gazette.

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

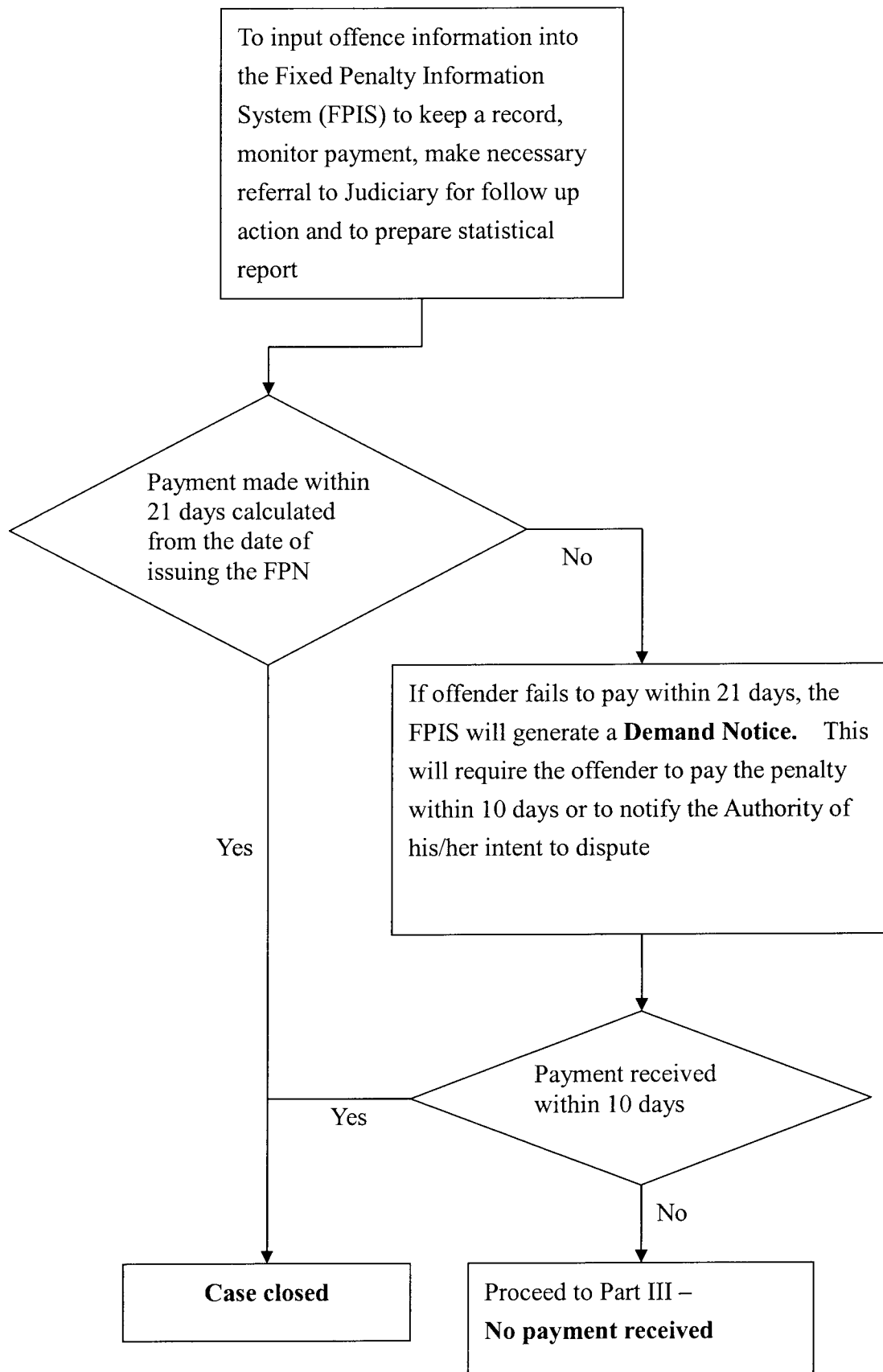
18. Clause 19 deals with consequential amendments necessitated by this Bill.

Proposed Flowchart for Processing Fixed Penalty (Smoking Offences) Notice

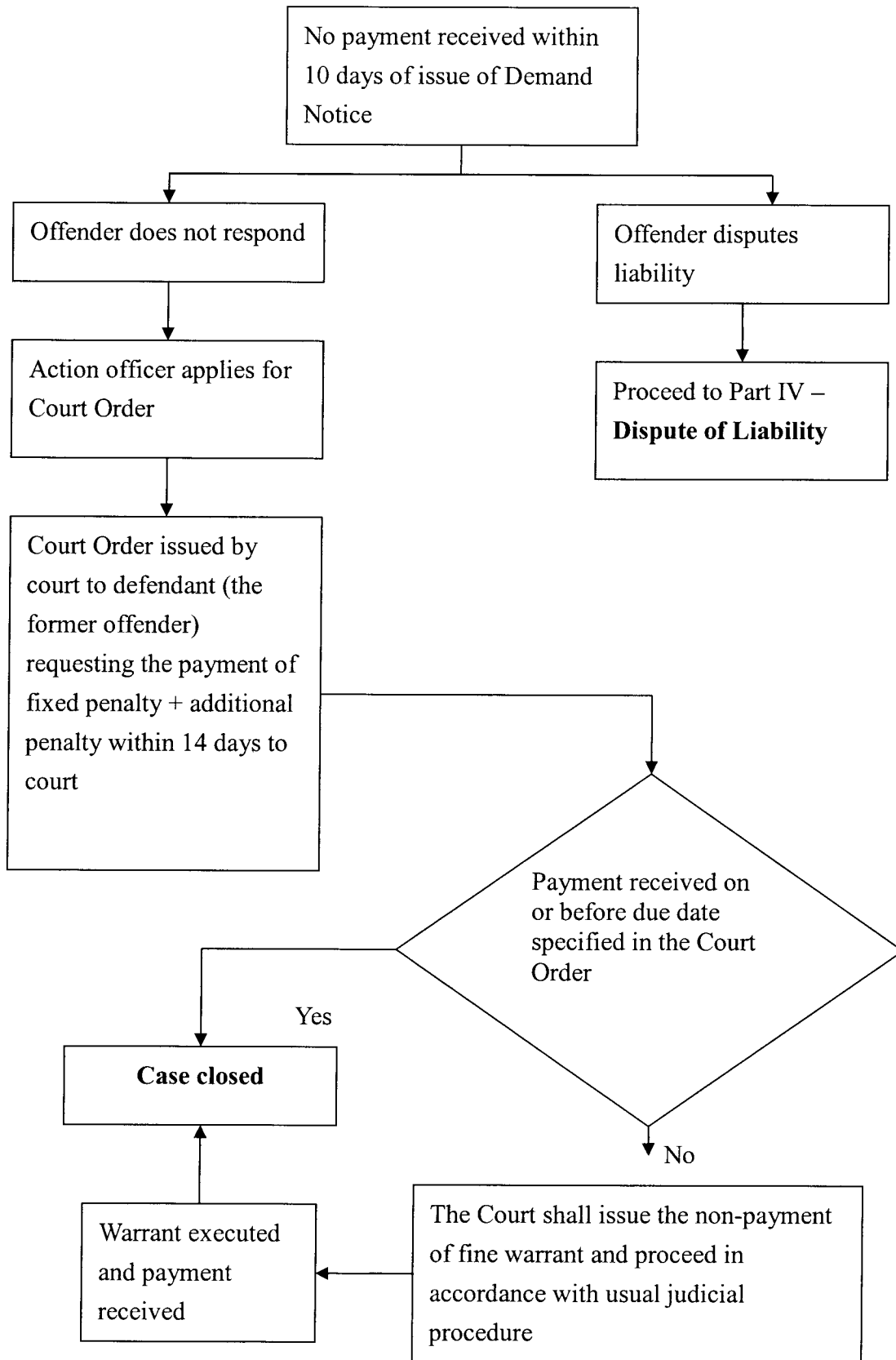
Part I – Issue of Fixed Penalty Notice



Part II- Issue of Demand Notice



Part III- No payment received



Part IV - Dispute of Liability

