

# 立法會

## *Legislative Council*

LC Paper No. LS47/07-08

### **Paper for the House Committee Meeting on 22 February 2008**

#### **Legal Service Division Report on Fixed Penalty (Smoking Offences) Bill**

#### **I. SUMMARY**

- 1. Object of the Bill** To provide for a fixed penalty to be payable for certain offences in contravention of the Smoking (Public Health) Ordinance (Cap. 371); the recovery of the fixed penalty; and related matters.
- 2. Comments** The Bill provides for a fixed penalty of \$1,500 in respect of offences of "smoking in areas designated as no smoking areas" and "smoking in public transport carriers" (scheduled offence). The Bill also provides a scheme for the operation of the proposed fixed penalty system, regulation making power by the Secretary for Food and Health to specify the enforcement officers under the proposed fixed penalty system, and the court's power to deal with persons against whom proceedings have been taken for committing a scheduled offence. The Bill further provides for consequential amendments to related ordinances.
- 3. Public Consultation** The Administration has consulted the 18 District Councils (DCs) and there was general support for the proposal. There was, however, different views on the penalty level and on the number of Government departments which should take part in enforcement. Some others were also concerned about potential confrontation the proposed fixed penalty system would bring between enforcement officers and smokers.
- 4. Consultation with LegCo Panel** The Administration consulted the Panel on Health Services (the Panel) on 1 June 2007 on the proposal to introduce a fixed penalty system for smoking offence. The Panel expressed support, in general, for the fixed penalty system for smoking offence, and urged the Administration to introduce the bill as soon as practicable.
- 5. Conclusion** In light of the concerns expressed by the DCs during public consultation and members at the Panel's meeting over the proposals in the Bill, Members may wish to form a Bills Committee to consider the Bill in detail.

## **II. REPORT**

### **Object of the Bill**

To provide for:-

- (a) a fixed penalty to be payable for certain offences in contravention of the Smoking (Public Health) Ordinance (Cap. 371);
- (b) recovery of the fixed penalty; and
- (c) related matters.

### **LegCo Brief Reference**

- 2. CR 3/52/581/89 of February 2008 from Food and Health Bureau (Health Branch).

### **Date of First Reading**

- 3. 20 February 2008.

### **Comments**

- 4. The Bill proposes to empower public officers to be designated by the Secretary for Food and Health (the Secretary) in regulation after passing of the Bill, to issue a fixed penalty notice (FPN) to a person who has committed the following offences (scheduled offence):-

- (a) smoking in areas designated as no smoking areas (section 3(2) of the Smoking (Public Health) Ordinance); or
- (b) smoking in public transport carriers (section 4(1) of the Smoking (Public Health) Ordinance).

- 5. Under section 7(1) of the Smoking (Public Health) Ordinance, any person who contravenes section 3 or 4 of the Smoking (Public Health) Ordinance is liable on summary conviction to a fine of \$5,000. In the Bill, the fixed penalty level for a scheduled offence is fixed at \$1,500.

6. Under the Bill, the Secretary may by notice specify a public officer or class of public officers to issue FPNs. In paragraph 16 of the LegCo Brief, the Administration proposes that Tobacco Control Inspectors and police officers be empowered to issue FPNs in all statutory no smoking areas as well as in public transport carriers. For certain public venues managed by Government departments and frequented by members of the public, the Administration proposes that public officers of the departments who are the venue managers or who assist in the management should also be empowered to issue FPNs.

7. Members may note that even with the fixed penalty system in place, enforcement officers could still initiate summary proceedings in certain circumstances, such as the person concerned failing to produce proof of identity and is prosecuted for related offences at the same time. Members may refer to paragraph 9 of the LegCo Brief for details.

8. A person, to whom an FPN has been given, may discharge his liability by paying the FPN within 21 days from the date of giving of the FPN.

9. Under clause 17 of the Bill, the Secretary may appoint a person to be "the Authority" (defined in clause 2(3) of the Bill). The Authority may serve on a person who has not paid the FPN or refused to accept the FPN a notice in the prescribed form (the reminder) demanding payment of the FPN and informing such person that if he wishes to dispute liability for the offence he should notify the Authority within 10 days. If no payment of the fixed penalty is received or no notification of the intention to dispute liability is received within 10 days, a magistrate shall, upon application, order the offender to pay the fixed penalty, an additional penalty equal to the amount of the fixed penalty and the sum of \$300 by way of costs. Where the offender fails to comply with the order, he shall be deemed to have failed to pay the sum adjudged to be paid by a conviction and shall be liable to be imprisoned under section 68 (Scale of imprisonment for non-payment of money, etc.) of the Magistrates Ordinance (Cap. 227).

10. A magistrate may, upon application by a person claiming that the reminder has not come to his notice without neglect by that person, rescind the order made. A magistrate may also for good cause, upon an application by the Authority at any time, rescind any order for payment of a fixed penalty and any other order made in the same proceedings.

11. If a person, who wishes to dispute liability for a scheduled offence, is convicted of such an 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.

12. Notwithstanding that proceedings have been taken, a person who has notified the Authority that he wishes to dispute liability may pay the fixed penalty, an

additional penalty equal to the amount of the fixed penalty and the sum of \$500 by way costs. After such payment the proceedings shall then terminate.

### **Public Consultation**

13. According to paragraph 35 of the LegCo Brief, the Administration has "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 fixed penalty system would bring about between enforcement officers and smokers, especially elderly smokers."

### **Consultation with LegCo Panel**

14. The Administration consulted the Panel on Health Services (the Panel) on 1 June 2007 on the latest progress of the proposal to introduce a fixed penalty system for smoking offence.

15. A member asked whether the FPNs for smoking offence could be incorporated into the prescribed forms of the FPNs for public cleanliness offences, so as to provide convenience to those enforcement departments which were vested with the authority to issue both fixed penalty notices. The Administration advised that it would be complicated to do so, as the FPNs for smoking offence would be underpinned by a separate primary legislation and mechanism. Nevertheless, it would be possible for all enforcement departments for the fixed penalty system for smoking offence to use the same prescribed form of the FPN for smoking offence.

16. Another member asked whether consideration could be given to also involving the Food and Environmental Hygiene Department (FEHD) inspectors to issue FPNs for smoking offence which took place on food premises. The Administration advised that it would not be practicable to do so as inspections to food premises by FEHD inspectors mainly focused on the kitchen and related food preparation areas, rather than areas for serving patrons. Moreover, FEHD inspectors were not stationed on the food premises, but only carried out inspection to the premises on a regular basis in accordance with the track record and risk classification of the premises ranging from once every four to 20 weeks.

17. The Panel expressed support for the fixed penalty system for smoking offence, and urged the Administration to introduce the bill as soon as practicable.

## **Conclusion**

18. The Legal Service Division has raised some queries on the legal and drafting aspects of the Bill and is still waiting for the Administration's reply. In light of the concerns expressed during public consultation and by the Panel, Members are recommended to form a Bills Committee to consider the Bill in detail.

Prepared by

LAM Ping-Man, Stephen  
Assistant Legal Adviser  
Legislative Council Secretariat  
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