

香港特別行政區政府
The Government of the Hong Kong Special Administrative Region

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23 February 2009

Mr Kelvin Lee
Assistant Legal Adviser
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8 Jackson Road
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Hong Kong

Dear Mr Lee,

**Road Traffic (Driving-offence Points)
(Amendment) Bill 2009**

Thank you for your letter of 11 February 2009, in which you asked the Administration to further clarify the intention of the proposed section 16(1A),¹ particularly on the court's discretionary power to try a charge in the absence of the driver. We would like to set out our response in the ensuing paragraphs.

Purpose of the Proposed Section 16(1A)

As indicated in the attachment to my letter to you dated 4 February 2009, the purpose of the proposed section 16(1A) is to ensure that a person would not be disqualified from driving without being given a chance of rebutting the deeming provision and defending himself in front of an independent, impartial and competent tribunal.

¹ The proposed section 16(1A) provides that a magistrate is not empowered to order a person to be disqualified from holding or obtaining a driving licence in the absence of that person.

There is no dispute that a magistrate may in criminal proceedings make an order as he sees fit against a person in his absence if evidence shows that such person is deliberately absent from a hearing.

However, in the case of a disqualification order, the possibility of a driver not having received a summons served by registered post on him, and hence not attending the hearing where his civil rights would be determined, cannot be dismissed in its entirety. The problems are therefore how to ascertain that the driver has made a deliberate choice not to attend the hearing, and that the driver would be aware of the disqualification order made against him so that he would not commit an offence of driving whilst disqualified.

The intention of the proposed section 16(1A) is to deal with the above problems whilst at the same time achieving the purpose of ensuring that a person would not be disqualified from driving without being given a fair hearing. It is noted from the prosecution experience that driving-offence points-related proceedings where the driver fails to attend the hearing as required by the summons are typically adjourned for hearing at a further date. No disqualification order has ever been imposed by the court in the absence of the driver. This shows that the court has been fully aware of the problems of making a disqualification order in the absence of the driver. The Administration has no intention to interfere with the magistrate's discretionary power and in fact, in coming up with proposed section, we have consulted the Judiciary.

Effect of a disqualification order

We wish also to point out that the effect of making a disqualification order under Cap 375 is different from that of a sentence ordered by the court in other criminal trials where the sentence can only be served after the Defendant is apprehended.

In a disqualification hearing, the driver would be explicitly told that a disqualification order is made against him; he is then required to hand over his driving licence; and his relevant driving offence points incurred in respect of the offences shown on the summons would be cancelled in the register of points maintained by the Transport Department upon the completion of the disqualification period ordered by the court.

If a disqualification order were to be made in a disqualification hearing in the absence of the driver,

- (1) the driver who does not appear in the hearing would not hand over his driving licence² as required;
- (2) he would have no knowledge that the disqualification order was made against him;
- (3) ignorant of the fact that he was disqualified from driving, he might continue to drive and commit the offence of driving whilst disqualified under section 44 of the Road Traffic Ordinance (Cap 374); and
- (4) the anomaly of the record of his driving-offence points for the summons concerned would be cleared upon the completion of the disqualification period ordered by the court without the driver even knowing that the disqualification order was made against him, would occur.

The above are not the intention of Cap. 375. As mentioned above, no disqualification order has ever been imposed by the court in the absence of the summonsed person in the Cap. 375 context.

We hope this would clarify the effect of the proposed section 16(1A) and our intention.

Yours sincerely,

(Rosanna Law)
for Secretary for Transport and Housing

² Under section 10 of Cap.375, where a magistrate makes an order that a person shall be disqualified from holding or obtaining a driving licence, the person shall deposit the licence with the magistrate within 72 hours of the making of the order or such longer period as the magistrate may determine.