

立法會
Legislative Council

LC Paper No. LS40/08-09

**Paper for the House Committee Meeting
on 13 February 2009**

**Further Report by Legal Service Division on
Road Traffic (Driving-offence Points) (Amendment) Bill 2009**

In the report of the Legal Service Division for the House Committee meeting of 6 February 2009 (LC Paper No. LS34/08-09) on the above Bill, Members were informed that clarification was being sought from the Administration in relation to the effect of the proposed section 16(1A)¹ on the court's discretionary power to try a charge in the absence of the defendant, and the legal consideration for the introduction of the section. Our letter and the Administration's reply are attached as **Annex I** and **II** respectively for Members' perusal.

2. In summary, the Administration is of the view that a disqualification order made under the Road Traffic (Driving-offence Points) Ordinance (Cap. 375) may affect the livelihood of a professional driver. Article 10 of the Hong Kong Bill of Rights provides, among other things, that everyone shall be entitled to a fair and public hearing in the determination of his rights and obligations in a suit at law. Therefore, the driver concerned must have the right to be present at the court's hearing where his civil rights are determined. The proposed section 16(1A) is introduced to ensure that the driver can defend himself in front of an independent, impartial and competent tribunal.

3. As the Administration has not provided the clarification sought in relation to the effect of the proposed section 16(1A) in its reply, it has been asked to provide a supplementary response. Further report will be made.

Encl

Prepared by

Kelvin Ka-yun LEE
Assistant Legal Adviser
Legislative Council Secretariat
10 February 2009

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.

Annex I

LS/B/3/08-09
2867 9209
2877 5029

By Fax (3904 1774)

2 February 2009

Miss Rosanna LAW
PAS for Transport and Housing (Transp) 2
14/F, Murray Building
Garden Road
Hong Kong

Dear Miss LAW,

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

We are scrutinizing the legal and drafting aspects of the above Bill and have certain queries set out in the attached sheet. It is appreciated that your reply in both Chinese and English could reach us by close of play, 4 February 2009.

Yours faithfully,

(Kelvin Ka-yun LEE)
Assistant Legal Adviser

c.c. LA
SALA2
Miss Francoise Lam, SGC (DoJ)

Section 16(1) of the Road Traffic (Driving-offence Points) Ordinance (Cap. 375) provides that :-

"(1) Where a summons has been served on a person under section 8 a reasonable time before the hearing and that person fails to appear at the hearing, the magistrate may proceed to deal with the matter in the absence of that person.".

2. Section 5 of the Bill introduces, among other things, a new section 16(1A) which provides that :-

"(1A) Subsection (1) does not empower the magistrate to order a person to be disqualified from holding or obtaining a driving licence in the absence of that person.".

3. In common law, a charge may be tried in the absence of the defendant provided that the court is satisfied there can be a fair trial despite the defendant's absence (paragraphs 3-108 to 3-110 Hong Kong Archbold 2007 and the Fourth Supplement to the 2007 Edition). This is a discretionary power. Please clarify whether the proposed section 16(1A) will affect the court's discretion.

4. I also understand that the introduction of the proposed section 16(1A) is based on human right consideration. For Members' benefit, please set out the legal basis of such consideration.

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

附件 II
Annex II

政府總部
運輸及房屋局
運輸科
香港花園道美利大廈



本局檔號 OUR REF.: THB(T)CR 2/14/3231/00
來函檔號 YOUR REF.: LS/B/3/08-09

Transport and
Housing Bureau
Government Secretariat
Transport Branch
Murray Building, Garden Road,
Hong Kong.

電話 Tel. No.: 2189 2182
傳真 Fax No.: 3904 1774

4 February 2009

Mr Kelvin Lee
Assistant Legal Adviser
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central
Hong Kong

By Fax
(Fax No. 2877 5029)

Dear Mr Lee,

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

Thank you for your letter of 2 February 2009.

Our reply to your queries is set out in the attached sheets, both in English and Chinese.

Yours sincerely,

(Rosanna Law)
for Secretary for Transport and Housing

c.c.

DoJ	(Attn: Ms Francoise Lam)	2869 1302
	(Attn: Ms Karen Lee)	2869 0670
	(Attn: Ms Lily Ho)	2845 1609
	(Attn: Mr Y M Lai)	2869 0720

ROAD TRAFFIC (DRIVING-OFFENCE POINTS) (AMENDMENT) BILL 2009

Rationale for Introduction of a new section 16(1A)

Section 16(1) of the Road Traffic (Driving-offence Points) Ordinance (Cap. 375) provides that where a summons has been served on a person a reasonable time before a hearing, and that person fails to appear at the hearing, the magistrate may proceed to deal with the matter (which includes the right to make a disqualification order under section 8 of the Ordinance, although in practice the magistrate would not choose to proceed this way) in the absence of that person.

2. As some persons have tried to avoid receiving summonses under the Ordinance issued to them and any disqualification order to be made against them, legislative amendments are proposed to deem a summons to have been served if it is served on a person by registered post at the person's address shown in the record of driving licences kept by the Transport Department, even if it is returned undelivered to the person.

3. Introducing the proposed "deemed served" provision without amendment to section 16(1) would mean that the invocation of the disqualification procedure under section 8 of the Ordinance is possible and a disqualification order might in such circumstances be made against a person in his absence. Since a disqualification order may jeopardize the pecuniary interest of a professional driver and may even affect his livelihood, the driver concerned must have the right to be present in such proceedings where his civil rights are being determined. This right is protected under Article 10 of the Hong Kong Bill of Rights, which provides that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

4. A new section 16(1A) is on the basis of the above consideration included in the Amendment Bill. Its purpose 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.

《2009年道路交通(違例駕駛記分)(修訂)條例草案》

增訂第16(1A)條的理據

《道路交通(違例駕駛記分)條例》(《條例》)(第375章)第16(1)條訂明，如傳票在聆訊前的一段合理時間送達某人而該人沒有出席聆訊，裁判官可在該人缺席的情況下着手處理該事項(包括有權根據《條例》第8條作出取消駕駛資格的命令，儘管實際上裁判官不會選擇這樣做)。

2. 由於有些人避收法庭根據《條例》發出的傳票以迴避法庭取消其駕駛資格的命令，我們於是建議修訂法例，規定如果有關傳票按照運輸署備存的駕駛執照記錄所示的登記地址，以掛號郵遞方式向當事人送達，即使傳票因無法派遞予當事人而被退回，傳票也當作已送達論。
3. 加入擬議的「當作已送達」條文而不修訂第16(1)條意味法庭可按《條例》第8條援用取消駕駛資格的程序，並可在當事人缺席聆訊的情況下，作出取消駕駛資格的命令。由於該命令或會損及職業司機的金錢利益，甚至影響其生計，有關司機必須有權出席會判定其民事權利的法律程序。出席相關程序的權利受《香港人權法案》第十條保障；該條訂明，任何人應有權受獨立無私之法定管轄法庭公正公開審問。
4. 基於上述考慮因素，第16(1A)條被加入修訂條例草案，旨在確保當事人不會在沒機會到獨立無私的法庭席前反駁「當作已送達」條文，以及為自己辯護的情況下，被取消駕駛資格。