

Information Paper

Legislative Council Panel on Security

Breath Tests for Enforcing Drink Driving Offences

Introduction

At the Special Meeting of the Legislative Council Panel on Security held on 21 October 2008, Members expressed concern about the decision to offer no evidence on the drink driving charge in a recent court case. Members were also concerned about the adequacy of the operational guidelines for frontline police officers in enforcing drink driving offences and asked for remedial measures to be taken in this regard. This paper provides the information requested by Members

Legislation and Police Operations

2. Under the Road Traffic Ordinance (Cap. 374) (the "Ordinance"), it is an offence for a person to drive a motor vehicle with an alcohol concentration exceeding the prescribed limit. The current prescribed limit is –

- 22 micrograms of alcohol per 100ml of breath; or
- 50 milligrams of alcohol per 100ml of blood; or
- 67 milligrams of alcohol per 100ml of urine.

3. Key provisions relating to tests for concentration of alcohol in a driver's body under the Ordinance are as follows:-

- (a) A police officer can require a person to provide a specimen of breath for a screening breath test if there is a reasonable cause to suspect that the person has alcohol in his body when driving a motor vehicle, or if he has been involved in a traffic accident, or has committed a traffic offence while the vehicle is in motion (section 39B);
- (b) A police officer may require a person, (i) whose screening breath test indicates that the proportion of alcohol in that person's breath is likely to exceed the prescribed limit; or (ii) who fails to provide a specimen for the screening breath test

with reasonable excuse, to provide two specimens of breath for analysis (commonly called “evidential breath tests”); or to provide a specimen of blood or urine for a laboratory test (section 39C(1));

- (c) The police officer shall decide that the person is to provide a specimen of blood and urine if the police officer (i) has reasonable cause to believe that for medical reasons a breath specimen cannot be provided or should not be required; or (ii) at the time of the requirement, an approved breath analysing instrument is not available or it is not practicable to use the instrument (section 39C(2)); and
- (d) It is an offence if a person, who without reasonable excuse, fails to provide a specimen of breath for a screening breath test; or a specimen (including breath or blood or urine) when required for analysis (sections 39B(6) and 39C(15)).

4. The Police have a set of established procedures to enforce drink driving. The procedures were drawn up in accordance with the law. The relevant procedures are set out in **Annex A**.

The Recent Drink Driving Case of Interest to the Public

5. A note setting out the brief fact of the case of concern to the Security Panel is at **Annex B**.

6. As indicated in the note, the police officer at the scene had followed the established procedures in handling the drink driving case and made a judgement not to require the driver to conduct a blood or urine test, having regard to the circumstances of the case. He had acted within the law.

7. The decision to offer no evidence on the drink driving charge was based on advice from the Department of Justice (DoJ), taking into account all the circumstances of the case, including the weight of evidence available to the Prosecution and argument raised by the Defence, in particular whether there is reasonable excuse on the defendant for failing to give a breath specimen, and that the defendant was not demanded to give blood or urine specimen for analysis. DoJ advised that the drink driving charge should not proceed as subsequent medical finding of chest wall tenderness at the hospital may avail the defendant of

the statutory defence of reasonable excuse. On this basis, the Police agreed to the advice to offer no evidence on the drink driving charge.

The Way Forward

8. Drink driving is a serious offence and we are determined to combat drink driving through legislative means and effective enforcement actions. Since the introduction of the drink driving legislation in 1995, the Police have been taking very active enforcement actions against drink driving offences. The legislation on drink driving are clear, unambiguous and are generally well understood by the public. On the other hand, the Police have a well-established set of procedures which has been drawn up in accordance with the law, and is kept under continuous review in the light of operational experiences and court rulings.

9. In the light of the experiences in this case, the Police will seek to review and further enhance the relevant procedures, including providing guidelines to better assist police officers to determine whether drivers who fail to provide a breath specimen may have a reasonable excuse and should be given the opportunity to provide blood or urine specimen for analysis. Meanwhile, our effort in enforcing drink driving offences with a view to enhancing road safety will continue.

The Hong Kong Police Force
October 2008

Drink Driving Offences

Police Procedures

Drink Driving offences under Section 39A of the Road Traffic Ordinance, Cap 374, were enacted in 1995 with the introduction of the screening breath test (SBT) and Evidential Breath Test (EBT). At that time, police enforcement procedures were largely adapted from the UK practice with the agreement of legislators, Police and other government departments. Review of Police procedures and amendments to the law have taken place over the years to enhance enforcement against Drink Driving in pursuance of road safety.

2. Section 39B of the Road Traffic Ordinance empowers Police officers to conduct a SBT under the following conditions : -

- (a) the driver has committed a traffic offence while the motor vehicle was in motion; or
- (b) the police officer suspects that the person has been driving or attempting to drive or been in charge of a motor vehicle on a road with alcohol in his body and that the person still has alcohol in his body; or
- (c) if an accident occurs owing to the presence of a motor vehicle on any road and a police officer has reasonable cause to suspect that the person was driving or attempting to drive or in charge of the vehicle at the time of the accident.

3. Before conducting the SBT, all drivers are asked to complete a form (Pol. 973). Paragraph 3 of the form states the power conferred by law to conduct the SBT and a warning that failure to provide a specimen may be liable to prosecution. It also provided the opportunity for the driver to state whether there are any reasons that would make it difficult or impossible for him to provide the specimen of breath. A copy of the completed form is provided to the driver.

4. Depending on the outcome of the SBT, the following Police action will be taken in accordance with well established procedures : -

(a) Over the Prescribed Limit

If the test was successfully conducted with a reading over 22 micrograms of alcohol in 100 millilitres of breath (the prescribed limit), the driver is arrested and brought to the nearest police station and then to a designated Breath Test Centre for EBT.

(b) Without Reasonable Excuse

Section 39B of the Road Traffic Ordinance, Cap 374 : If the driver failed to provide a breath specimen **without reasonable excuse**, he will be arrested and charged with the offence of “Failing to Provide a Breath Specimen”.

(c) With Reasonable Excuse

Section 39C (1) of the Road Traffic Ordinance : A police officer may require a person whose SBT indicates that the proportion of alcohol in that person’s breath is likely to exceed the prescribed limit or who fails to provide a specimen for the SBT **with reasonable excuse** :-

- (i) to provide two specimens of breath for EBT; or
- (ii) to provide a specimen of blood or urine for a laboratory test.

5. Section 39C (2) of the Road Traffic Ordinance states that the police officer shall decide that the person is to provide a specimen of blood or urine if :-

- (a) the Police officer making the requirement has reasonable cause to believe that for medical reasons a specimen of breath cannot be provided or should not be required; or
- (b) at the time the breath specimens are required, an approved EBT instrument is not available.

A Drink Driving Case of Interest to the Public

Brief Facts

Facts

- At 0009 hours on 2008-02-09, a private car driven by LEE Man-fai (LEE) was travelling towards Clear Water Bay and crossed onto the opposite carriageway and collided head-on with a taxi.
- Two passengers in the taxi were injured and were conveyed to hospital where they were treated and discharged. The taxi driver was not injured.
- At 0025 hours a police officer at the scene conducted a Screening Breath Test (SBT) on LEE. The officer followed set procedures and asked LEE whether or not there were any reasons that would make it difficult or impossible for him to provide the specimen of breath; LEE replied no. LEE made three attempts to provide a breath sample, the officer then gave a demonstration to LEE confirming that the SBT device was working properly. LEE was given the chance to make one more attempt but did not activate the SBT device. At 0035 hours, the officer arrested LEE for failing to provide a specimen of breath.
- At 0027 hours a second police officer conducted a SBT on the taxi driver using a second SBT device; the reading was zero.
- At 0037 hours, within two minutes of his arrest, LEE complained of chest pain and was conveyed to hospital, where he was treated and discharged with a medical finding of chest wall tenderness. LEE was released on police bail.
- On 2008-05-14, LEE was charged with Careless Driving and Failing to Provide a Specimen of Breath. The case was mentioned in court on 2008-05-27; 2008-06-10; 2008-06-30 and 2008-07-14.
- On 2008-09-08 the legal representative appeared for the defence and stated his client would be prepared to plead guilty to the careless driving charge but he would contest the drink driving charge.

- On 2008-10-20, the prosecution offered no evidence on the drink driving charge and the defence entered a plea of guilty to careless driving. The Magistrate fined LEE \$1,200 with 5 driving-offence points incurred.

Judgement Made by the Arresting Police Officer

- Before conducting the SBT, the police officer had, according to procedures, asked LEE to state whether there are any reasons that would make it difficult or impossible for him to provide the specimen of breath. In response to LEE's reply, the police officer ticked "No" in the relevant form (Pol. 973) and LEE signed the form indicating that he had no reasonable excuse.
- LEE complained of chest pain 2 minutes after he was arrested. It was the judgement of the arresting officer not to demand that LEE provide breath specimens for analysis by the Evidential Breath Test (EBT) instrument and not to demand blood or urine specimens for analysis because LEE had not, in the officer's opinion, provided a reasonable excuse.