

**Bills Committee on
Motor Vehicle Idling (Fixed Penalty) Bill**

Questions Raised by Assistant Legal Adviser on 27 October 2010

Administration's Response

Clause 2 (Interpretation)

“Authority” and “director”

(a) *Under clause 2(1), “Authority” means a person specified in column 1 of Schedule 2, i.e. Director of Environmental Protection (DEP), whereas “Director” also means DEP. Please explain why two references are made to the same government officer.*

1. Under clause 2(1) of the Motor Vehicle Idling (Fixed Penalty) Bill (the Bill) –

(a) “Authority” means a person specified in column 1 of Schedule 2, i.e. DEP. The Authority has the powers to issue demand notices under clause 11, withdraw penalty notices and demand notices under clause 12, as well as recover fixed penalty if default under clause 13. In addition, under Divisions 4 and 5 of Part 3, the Authority has powers and functions in proceedings if a person disputes liability, e.g. the powers to sign an evidentiary certificate under clause 24 and make an application to rescind an order for payment under clause 26;

(b) “authorized officer” means a person specified in column 2 of Schedule 2, i.e. traffic warden (TW), senior traffic warden (STW), environmental protection inspector (EPI), senior environmental protection inspector (SEPI) or chief environmental protection inspector (CEPI).

For processing of penalty notices issued by TWs and STWs as well as following up on the matters arose, the Authority, i.e. DEP, will delegate its powers and functions under the Bill to the Commissioner of Police (CP) under clause 30. For penalty notices issued by EPIs, SEPIs and CEPIs, the Authority will remain to be DEP.

2. Under clause 2(1) of the Bill, “Director” means DEP. He or she has the power to exempt a driver or a class of drivers under clause 6. This power could not be delegated to any public officer, including CP.

3. As the Authority and Director have different powers and functions under the Bill, and only the Authority will delegate its powers and functions to CP, we consider that the use of two terms appropriate.

“Driver”

(b) *Under clause 2(1), “driver”, in relation to a motor vehicle, means any person who is in charge of, or assisting in the control of, the vehicle. Firstly, for the purpose of the Bill, is it possible to have more than one driver in a vehicle at the same time? Secondly, must the person who is assisting in the control of the vehicle a licensed driver?*

4. Under clause 2(1) of the Bill, “driver” is defined to mean, in relation to a motor vehicle, any person who is in charge of, or assisting in the control of, the vehicle. Hence, depending on

the circumstances of a case, it is conceivable that more than one person could be qualified as “driver”.

5. To qualify as a “driver” under clause 2(1) of the Bill, there is no requirement that a person who is in charge of, or assisting in the control of, a motor vehicle must hold a driving licence or permit.

“Complaint”

- (c) *Although the Secretary of Justice may appoint any person to make a complaint under clause 16(3) of Division 4 of Part 3 of the Bill, the definition of “judgment amount” in clauses 2(1), 19, 21 and 22 makes reference to a “complainant”. Should there be a definition given to “complainant” in clause 2(1), or a cross reference be made between the definition of “complain” and “complainant” in the Bill?*
6. The enforcement provisions of the Bill are primarily based on the enforcement provisions of the Fixed Penalty (Traffic Contraventions) Ordinance (Cap. 237). That Ordinance refers to “complainant” in a number of sections that are the equivalent of clauses in the Bill, for example section 20A. There is no definition of “complainant” in that Ordinance. The Fixed Penalty (Traffic Contraventions) Ordinance has been in operation for over 30 years and we are not aware of any enforcement problems caused by the lack of a definition of the term. Therefore, for the sake of consistency, it is not desirable to include a definition of “complainant” in the Bill.

“Motor vehicle”

- (d) *In the Bill, “motor vehicle” means “any mechanically propelled vehicle that is constructed or adapted for use on a road” whereas it means “any mechanically propelled vehicle” under section 2 of the Road Traffic Ordinance (Cap. 374). What is the difference between the two definitions and what is the reason for the difference?*
7. The reason that the definition of “motor vehicle” in the Bill differs from that in Cap. 374 is to ensure that the Bill will apply to all vehicles on private roads as well as on other roads. However, the definition of “motor vehicle” in Cap. 374 needs to be read with the definitions of “vehicle” and “road” in that Ordinance. The definition of “vehicle” in Cap. 374 is –

“vehicle” (車輛) means any vehicle whether or not mechanically propelled which is constructed or adapted for use on roads but does not include a vehicle of the North-west Railway or a tram.

The definition of “road” in Cap. 374 is –

“road” (路、道路) includes every highway, thoroughfare, street, lane, alley, court, square, car park, passage, path, way and place to which the public have access either continuously or intermittently, whether or not the same is the property of the Government, and includes the carriageway of the North-west Railway, but does not include any private road, or any part of the carriageway of the North-west Railway designated by the Commissioner for the purposes of this definition by notice in the Gazette.

“Passenger”

- (e) ***In the Bill, “passenger”, in relation to a motor vehicle, means a person carried in or on the vehicle other than the driver. Under Cap. 374, “passenger”, in relation to a vehicle, means any person carried in or on it other than any driver or conductor of it (section 2). What is the reason for deleting “conductor” from the definition of “passenger” in the Bill?***
8. Under section 2 of Cap. 374, “conductor” in relation to a bus includes any person, other than the driver, who is employed to be in charge of, or to guide, passengers on the bus, or as an inspector of any service provided by the bus. In the old days, “conductors” were staff selling tickets on buses. As such position no longer exists, the term “conductor” is not included in the definition of “passenger” under clause 2(1) of the Bill.

Clause 8 (Authorized officer may give penalty notice)

- (f) ***Is the “prescribed form” given by an authorized officer to the person contravening the idling prohibition requiring him to pay the fixed penalty to be prescribed by subsidiary legislation? If so, is this piece of subsidiary legislation subject to the Legislative Council’s (LegCo’s) scrutiny under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1)?***
9. The Secretary for the Environment (SEN) will make regulations under clause 31 of the Bill to prescribe the penalty notice. The regulations will be subject to LegCo’s scrutiny under section 34 of Cap. 1.

Clause 11 (Demand notice)

- (g) ***Is the “prescribed form” of demand notice issued by the Authority under clause 11(2) for the payment of fixed penalty to be prescribed by subsidiary legislation? If so, is this piece of subsidiary legislation subject to LegCo’s scrutiny under section 34 of Cap. 1?***
10. SEN will make regulations under clause 31 of the Bill to prescribe the demand notice. The regulations will be subject to LegCo’s scrutiny under section 34 of Cap. 1.

Clause 19 (Hearing of complaint)

- (h) (i) ***Clause 19(3) seeks to provide that if the defendant does not “at that time” expressly put in issue any allegation of fact stated in a certificate under clause 24 (evidentiary certificate) that has been produced by the complainant, “the defendant cannot at any later time dispute or adduce evidence to contradict that fact”. Does that phrase “cannot... dispute...” mean “not permitted to... dispute”? Furthermore, what time or stage does that phrase “at that time” refer to? If there is a change of circumstance or a piece of evidence is not previously available, does the Bill absolutely prevent the defendant from disputing or adducing that piece of evidence regarding a fact stated in an evidentiary certificate at a later stage (e.g. on appeal, re-trial, or the Authority’s application for rescission of order under clause 26)?***
11. Clause 19 of the Bill is the equivalent of section 20 of Cap. 237. Subject to the views of the Bills Committee, we could add the phrase “without leave of the magistrate” to the end of clause 19(3) to empower the magistrate hearing a complaint to give leave for the defendant to dispute or adduce evidence regarding a fact stated in a certificate under clause 24 at a later

stage.

Clause 22 (Discontinuance of complaint)

(j) *A complainant may discontinue the complaint at any stage before the magistrate has commenced to hear it. Is the complainant required to inform the magistrate or the defendant the reason for discontinuance?*

12. Clause 22 of the Bill is the equivalent of section 20A of Cap. 237.

13. For this question, please refer to Part 29 of the Statement of Prosecution Policy and Practice (the Statement) at <http://www.doj.gov.hk/eng/public/pubsoppapcon.htm#29>. In gist, the Department of Justice (DoJ) will give reasons for prosecution decisions made in the course of prosecutions where practicable. Reasons for decision, in general terms, will usually only be given to those with a legitimate interest in the matter (please refer to paragraph 29.2 of the Statement).

(k) *Would the defendant be entitled to apply for any legal costs which he has incurred for preparing his defence, particularly if the notice of discontinuance is given shortly before the hearing date?*

14. Section 3 of the Costs in Criminal Cases Ordinance (Cap. 492) provides that “[w]here (a) an information or complaint laid before a magistrate is not proceeded with... the magistrate may order that costs be awarded to the defendant.”

Clause 24 (Evidentiary certificate)

(l) *Please explain the legal effect of clause 24(3) which provides that unless there is evidence to the contrary, it must be presumed that the certificate stating matters set out in clause 24(2) was signed by or for the Authority.*

15. As a matter of drafting, the phrase “it must be presumed that” in clause 24(3) of the Bill has the same (but clearer) meaning as “it shall be presumed that” in section 9(4)(a) of the Fixed Penalty (Smoking Offences) Ordinance (Cap. 600).

(m) *Again, is the “prescribed form” which contains the certificate referred to in clause 24(1) to be prescribed by subsidiary legislation? If so, is this piece of subsidiary legislation subject to LegCo’s scrutiny under section 34 of Cap. 1?*

16. SEN will make regulations under clause 31 of the Bill to prescribe the evidentiary certificate. The regulations will be subject to LegCo’s scrutiny under section 34 of Cap. 1.

Clause 26 (Power to rescind order on application by the Authority)

(n) *A magistrate may for good cause, on an application made by the Authority, rescind any order for the payment of a fixed penalty, an additional penalty or costs and any other order made under the Bill. Is the defendant entitled to make a similar application?*

17. Clause 26 of the Bill is the equivalent of section 16A(4) of Cap. 237. The defendant is not entitled to make similar application.

- (o) *Please also explain the defendant's right of appeal or review in relation to the penalty and costs order under the proposed fixed penalty system.*
18. The defendant has the rights to appeal and review the magistrate's decision under sections 113 and 104 of the Magistrates Ordinance (Cap. 227) respectively.

Clause 27 (Power and functions of authorized officers)

- (p) *The meaning of "road" under clause 2(1) includes a private road within the meaning of Cap. 374. What is the reason for stating that the powers and functions of authorized officers under the Bill may be exercised or performed "on all roads including private roads"?*
19. The legislative intent of the Bill is to apply the idling prohibition on driver of all motor vehicles on all roads, including private roads, in Hong Kong unless an exemption applies. Clause 27(1) aims to put beyond doubt that the powers and functions of authorized officers under the Bill may be exercised or performed on all roads, including private roads.

Clauses 31 and 32 (Regulations and amendments of Schedules)

- (q) *Please advise whether the regulations made by SEN under clause 31 and his amendment to Schedules under clause 32 are subsidiary legislation and subject to LegCo's scrutiny procedure under section 34 of Cap. 1.*
20. Regulations made by SEN under clause 31 of the Bill and amendments to Schedule 1 or 2 under clause 32 are subsidiary legislation. They will be subject to LegCo's scrutiny under section 34 of Cap. 1

Schedule 1 (Drivers to whom idling prohibition does not apply)

- (r) *Which section or sections of Schedule 1 do "Examples" at p.C337-338 of the Gazette version of the Bill seek to illustrate?*
21. The "Examples" seek to illustrate section 7 of Schedule 1 to the Bill on "vehicles necessarily idling for certain purposes".
- (s) *Are these "Examples" part of the legislation?*
22. The "Examples" are part of the legislation.
- (t) *The five items listed under "Examples" seem to show that idling of a certain vehicle is necessary because of a certain use of that vehicle (e.g. a refrigerator truck for the carrying of perishable freight, a tipper lorry for the operation of a tipping system of loading and unloading refuse, etc), whilst section 7 of Schedule 1 provides for exemption of a driver of a vehicle with specific design and idling that particular vehicle is necessary for the purpose for which that particular vehicle is primarily designed (and not a use of the vehicle). Please explain how the "Examples" illustrate the exemption requirements under section 7 of Schedule 1.*
23. As illustration, a refrigerator truck is lawfully designed primarily for the purpose of carrying perishable freight that is required to be kept at a low temperature. When it is necessary to idle a refrigerator truck for the said purpose, the driver will be exempted under section 7 of

Schedule 1 to the Bill. As explained in the letter from DoJ to the Assistant Legal Adviser dated 28 October 2010, the “Examples” are a form of reader aid aiming to assist the readers to understand and comply with the exemption requirements.

(u) *Individual paragraphs under Schedule 1 are now referred to as “section” (e.g. “In this section...”)* in the Bill. *After the Bill is passed, individual clauses of the Bill will be referred to as “section ___ (of the Ordinance)”.* *For the sake of clarity, please review the reference of individual paragraphs under Schedule 1.*

24. The references to “this section” in Schedule 1 are references to the section of Schedule 1 in which the reference occurs. References to section 5 in the individual sections of Schedule 1 are references to clause 5 of the Bill, which will become section 5 of the Ordinance after the Bill is passed. This is because section 17 of Cap. 1 provides that a reference in an Ordinance to a section by number is a reference to a section of that Ordinance. If Schedule 1 to the Bill contains a cross-reference to another section of Schedule 1, that cross-reference would be to “section ___ of this Schedule”.

**Environmental Protection Department / Department of Justice
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