

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

政府總部
運輸及房屋局
運輸科
香港花園道美利大廈



Transport and
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本局檔號 OUR REF.:
來函檔號 YOUR REF.:

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15 June 2010

Mr. Kelvin Lee
Assistant Legal Adviser
Legislative Council Building
8 Jackson Road
Central
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Fax : 2877 5029

Dear Mr Lee,

Road Traffic (Amendment) Bill 2010

Thank you for your letter and email of 2 and 3 June 2010 respectively, which you seek clarifications on a number of issues. We would like to set out our responses in the ensuing paragraphs.

The use of “shall” and “must”

You point out that clause 6 of the Bill introduces amendments to, among other things, section 36(2) and (7) of the Road Traffic Ordinance (Cap. 374) (RTO). You notice that “must” is used in clause 6(5) of the Bill, but “shall” is used in section 36(2), (7) and (9) of RTO, and you have similar observations in clauses 8 and 10. While there is no other proposed amendment to replace “shall” with “must” in Bill, you ask whether it would be more consistent to use either “shall” or “must” in the same RTO.

In an Information Paper¹ presented to the Panel on Administration and Legal Services on 15 December 2009, the Law Drafting Division of Department of Justice (DoJ) briefed the Panel on the change from "shall" to "must" when imposing an obligation by legislation, both in new legislation and when amending existing legislation. It is stated at paragraph 7 of the paper that:

We are confident that the use of "must" to impose an obligation in an enactment in which "shall" has been used for the same purpose will not lead to an interpretation that "shall" has a different legal effect from "must" or vice versa. There are existing Ordinances in which both "shall" and "must" have been used to impose an obligation and we are not aware that this has caused any problems in interpretation. The modern trend to use "must" instead of "shall" to impose an obligation is a widely known plain language practice of which courts, lawyers and others involved in legislation would be aware. We would however look for opportunities in amending exercises to change "shall" to "must" (especially in provisions in the proximity of those in which "must" is used), for the sake of tidiness.

The DoJ is confident that, given the wide understanding of this modern drafting trend by courts, lawyers and other users of legislation, no difficulty will arise from allowing "shall" to remain in existing provisions while using "must" in any new provisions. The legal meaning of any existing "shall" is not affected by the use, merely because of a well publicised change of drafting practice, of a new term for imposing an obligation. While for the sake of tidiness, the DoJ will consider changing an existing "shall" that imposes an obligation to "must" in a provision (for example, a subsection) in which the department is inserting a "must" for the same purpose, it is not necessary legally to change a "shall" in an existing subsection of a section just because it is inserting a "must" in a newly added subsection of that section.

On the basis of the above, there are no proposed amendments in the Bill to replace "shall" with "must" in a wholesale manner.

¹ LC Paper No. CB(2)512/09-10(04). Paragraphs 7 to 11 are relevant.

Circumstances of Aggravation

You ask whether this is the policy intent to exclude other “circumstances of aggravation” in the Bill at this stage. You also ask the rationale of adopting the current Chinese translation “犯罪情節特別嚴重” in the Bill.

Under clauses 6 to 8 as drafted, there is only one "circumstances of aggravation", namely, having a tier 3 proportion of alcohol in breath, blood or urine. It is not the policy intent that the court should be given the discretion to consider what, other than the prescribed circumstance, might amount to "circumstances of aggravation".

As regards the Chinese translation of “circumstances of aggravation” as "犯罪情節特別嚴重", please note that there is no instance of the expression "circumstances of aggravation" in the existing legislation of Hong Kong. While there are references to aggravated burglary or injuries in certain legislative provisions, they do not involve the same concept introduced by the expression "circumstances of aggravation". Therefore, when formulating the Chinese rendition for "circumstances of aggravation", we could not rely on any Chinese precedent in the existing legislation of Hong Kong. With reference to the legislation of the Mainland and of Taiwan, it is noted that the expression "情節嚴重" is quite commonly adopted in contexts that involve the concept of "circumstances of aggravation". Accordingly, the Chinese rendition "犯罪情節特別嚴重" is adopted in this Bill.

Start of Disqualification Period

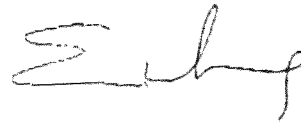
You ask whether “released from custody” in the new section 69A to RTO refers to the completion of serving the term of imprisonment computed under section 67A of the Criminal Procedure Ordinance (Cap. 221) with any remission granted under rule 69 of the Prison Rules (Cap. 234. sub. Leg.A), and whether disqualification should only start to run after the completion of all the terms of imprisonment

Our policy intent is that "released from custody" would cover the situation of being released having served a term of imprisonment computed under section 67A of the Criminal Procedure Ordinance (Cap. 221) with any remission granted under rule 69 of the Prison Rules (Cap. 234 sub. leg. A). Disqualification only starts to run until the expiration of all terms of imprisonment or detention, unless the court for special reasons decides not to make such a direction.

Consideration is currently being given to whether the proposed new section 69A would benefit from a technical clarification as to when a disqualification period starts.

We hope this would clarify the issues.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Erica Ng', written in a cursive style.

(Erica Ng)

for Secretary for Transport and Housing