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**Extract from the report of the Bills Committee
on Road Traffic (Driving-offence Points) (Amendment) Bill 2009**

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Circumvention problem in the service of summons

6. According to the Administration, some drivers have tried to circumvent the DOP system by avoiding receiving summonses issued under Cap. 375 and any disqualification order to be made against them. For example, they do not answer the door when the summonses are served by hand to the addresses they have registered with TD, or there are claims that the persons named on the summonses are not living thereat. For such cases, since summonses have not been served on the drivers, the magistrate cannot issue an arrest warrant under section 18A of Cap. 227, and in that connection, the Police cannot arrest the drivers concerned. According to the Administration, as at end January 2009, the number of drivers who incurred 15 DOPs or more to whom summonses could not be served was about 650.

7. Furthermore, under the existing legislation, the Commissioner for Transport (the Commissioner) has no authority to refuse to issue, reissue or renew the driving licence of a person even if he has failed to appear before a magistrate in answer to the summons.

8. In order to address the circumvention problem, the Administration introduced the Bill into the Legislative Council (LegCo) on 4 February 2009.

The Bill

9. The Bill proposes to amend Cap. 375 and the Road Traffic (Driving Licences) Regulations (Cap. 374 sub. leg. B) (the Regulations). The purposes of the Bill are to –

- (a) specify the manner in which a summons issued under Cap. 375 is to be served;
- (b) provide that a summons served by registered post in accordance with Cap. 375 is deemed to have been served even if it is returned as undelivered; and
- (c) require the Commissioner to refuse to issue, reissue or renew a driving licence to a person under the Regulations if the person fails to appear in court to answer a summons served on the person under Cap. 375.

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Deliberations of the Bills Committee

Introducing a self-contained mechanism on the service of summons for the DOP system and the "deemed served" provision (Clause 4)

12. At present, the service of a DOP summons issued under Cap. 375 is governed by section 8(2) to (4) of Cap. 227. Clause 4 amends Cap. 375 by adding a new section 14A to specify the manner in which a summons issued under Cap. 375 is to be served. The self-contained mechanism on the manner in which a summons should be served as specified in the new section 14A is essentially the same as that specified in Cap. 227. Express provisions are made to specify that a summons must be served by hand or by post. If it is to be served by post, it must be served by forwarding it by ordinary post or registered post to the driver by prepaying and posting an envelope (containing the summons) addressed to him at his address registered with TD. Under the proposal, the existing arrangement that a summons issued by the magistrate is to be served by ordinary post to the driver in the first instance will continue.

13. A new section 14A(5) is proposed in clause 4 to provide that a summons is deemed 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 Commissioner, even if it is returned undelivered to the person. If the driver fails to appear in court at the date and time specified in the summons, the summons would then be served to the person again by registered post, and as proposed, the summons would be regarded as "deemed served" even if it is returned undelivered to the driver. The effect of the proposed section 14A(5) is that, if the driver fails to appear in court at the time and place specified in the summons served on the driver by registered post, a warrant of arrest may be issued under section 18A of Cap. 227 against the driver.

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Rationale for adding a new section 16(1A) to Cap. 375
(Clause 5)

24. Section 16(1A) proposed to be added to Cap. 375 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. The Administration has explained that the purpose of the provision 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.

25. The legal adviser to the Bills Committee has sought the Administration's clarification on the effect of the proposed section 16(1A) on the court's discretionary power to try a charge in the absence of the defendant, and explanation of the rationale for the introduction of the provision.

26. The Administration has pointed out that 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. The Administration has pointed out that, however, under the "deemed served" provision, 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. On this basis, the Administration has proposed that the court shall not order a person to be disqualified from driving in his absence, with a view to safeguarding the person's right to fair hearing, which is protected under Article 10 of the Hong Kong Bill of Rights. This will also help to ensure that if a person has genuine reasons for not having received a summons delivered by registered post to his address, and is therefore unable to attend a court hearing, the person may rebut the "deemed served" provision if cogent evidence to the contrary is produced when the person eventually appears in court for the relevant proceedings.

27. The Administration has further pointed out that a disqualification order may jeopardize the pecuniary interest of a professional driver and even affect his livelihood. Moreover, it is noted from the prosecution experience that DOP-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. The Administration has advised that it has consulted the Judiciary in coming up with the proposed section 16(1A).

28. Hon Miriam LAU has expressed grave concern that the proposed section 16(1A) may render the Bill ineffective in tackling the problem that some

drivers have intentionally circumvented the mechanism for the service of DOP summons and, therefore, evaded disqualification. She has pointed out that those drivers can still continue to drive and pose a danger to road safety until they are tracked down by the Police and brought before the magistrate. She has asked the Administration to provide the reasons for not considering empowering the Commissioner to suspend the driving licence of a driver who has accumulated 15 or more DOPs or in his absence. The Bills Committee has noted that The Ombudsman has also raised the same concerns in announcing the decision to initiate direct investigation into the implementation of the DOP system on 19 March 2009.

29. While supporting the need to safeguard a person's right to fair hearing, Hon Ronny TONG has expressed a similar concerns about the effectiveness of the Bill as he considers that the proposed "deemed served" provision will mainly facilitate the issue of arrest warrant by the magistrate under section 18A of Cap. 227. He has pointed out that the Bill proposes no further measures to help stop those repeat traffic offenders from driving on the road.

30. The Administration has responded that it has also considered whether a driver should be deemed to have been disqualified from driving once he has incurred 15 or more DOPs within a period of two years but found it not appropriate to introduce any mechanism whereby a driver will be disqualified from driving automatically.

31. The Administration has explained that automatic disqualification is a deviation from the existing provisions under Cap. 375 and may give rise to the following practical concerns -

- (a) the driver who does not appear in the hearing would not hand over his driving licence as required under section 10 of Cap. 375¹;
- (b) he may not be aware that a disqualification order has been made on him, and is still driving on the road;
- (c) 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
- (d) the anomaly of the record of his DOPs for the summons concerned would be cleared upon the completion of the disqualification period ordered by the court without the driver

¹ 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.

even knowing that the disqualification order was made against him, would occur.

32. The Administration has advised that the above situations may also give rise to insurance concerns. If a driver causes an accident whilst driving during his automatic disqualification period (assuming that he has no notice of the disqualification order made against him), an argument as to the effectiveness of the insurance policy, insofar as the driver is concerned, during his driving of the vehicle may arise. The Administration has pointed out that the fact that no disqualification order has ever been imposed in the absence of the driver shows that the court has been fully aware of the problems of making a disqualification order in the absence of the driver.

33. The Administration has advised that the rate of successful execution of non-appearance arrest warrants arising from DOP-incurred traffic summonses issued in 2006 and 2007 were consistently over 80%, and the same level of execution is expected to be achieved for those issued in 2008. With an arrest warrant issued, the defendant chased by the Police can be added to the Immigration Department's "Watch List" where circumstances warrant. The Administration has advised that this measure will be particularly effective for apprehending the defendant who cannot be located by other means.

34. Instead of proposing automatic disqualification, the Administration is of the view that the "deemed served" provision, if introduced, will be effective in overcoming the problem of "unserved" DOP summonses and non-appearance of the driver concerned at court hearing, and help bring a person to go through the disqualification proceedings. The provision will also allow triggering the mechanism whereby the Commissioner may refuse to issue, reissue or renew a person's driving licence if the person fails to appear before the court after the summons has been served (please refer to paragraph 37). The Administration considers that this mechanism will also achieve deterrent effect.

35. In view of members' concern about the effectiveness of the Bill in overcoming the circumvention problem, the Administration has also undertaken to review the effectiveness of the Bill about six months after its implementation, and to consider any other necessary additional measures in the light of comments received.

36. The Bills Committee has received a written submission made by The Ombudsman on the background to his direct investigation into the implementation of the DOP system. The Bills Committee has noted that The Ombudsman is in the course of exploring with the Administration his initial views about additional measures to tackle the circumvention problem. The Bills Committee has sought the Administration's confirmation that the Administration will continue discussion with The Ombudsman and consider any necessary improvement in the context of the review on the effectiveness of the Bill to be

conducted by the Administration.

The Commissioner to refuse issue or renewal of driving licence
(Clause 6)

37. Clause 6 amends regulation 6 of the Regulations so that the Commissioner shall not issue, reissue or renew a driving licence to a person if the person fails to appear in court to answer a summons served on him under Cap. 375, including a summons that is deemed to have been served.

38. In view of the long validity of driving licences (mostly 10 years), Hon James TO has asked the Administration to consider proposing that in the above circumstances, the Commissioner shall also refuse issue or renewal of the person's vehicle licence(s), which is/are renewable every 12 months, so as to enhance the deterrent effect.

39. The Administration has pointed out that the above proposed measure will not be able to pinpoint professional drivers who are hired to drive without owning any vehicle. The Administration has advised that in coming up with the current proposal, the Administration has considered the proportionality principle, as well as the general principle under existing road traffic legislation that a driver is penalized by not issuing or not renewing his vehicle licence(s) only when he has committed offences relating to vehicle maintenance, not offences relating to inappropriate driving behaviour.

Possibility of whether a driver may evade the accumulation of DOPs

40. Hon James TO and Hon Ronny TONG have expressed concern whether it is possible that after the enactment of the Bill, some drivers would evade incurring DOPs by -

- (a) not paying the fixed penalty in accordance with a notice served on him under the Fixed Penalty (Criminal Proceedings) Ordinance (Cap. 240); or
- (b) not responding to or avoiding to receive summonses issued to them in respect of a scheduled traffic offence to which the driver can plead guilty by letter.

41. These members are concerned that by evading incurring DOPs, a driver can evade the accumulation of 15 or more DOPs and will, therefore, not be subject to the "deemed served" provision. The Administration has advised that offenders who have committed DOP offences may be prosecuted by way of charges², summonses and fixed penalty tickets. According to the DOP records

² For more serious cases including dangerous driving causing death, dangerous driving, driving under the influence of drink or drugs, and driving in a motor race.

kept by TD, about 90% of the DOP offences are dealt with through the issue of fixed penalty tickets, while some 10% are dealt with by way of summons and charges. A breakdown of the 217 200 DOP cases in 2008 is given below –

No. of cases dealt with by fixed penalty	193 840 (89.25%)
No. of cases dealt with by summonses	21 730 (10%)
No. of cases dealt with by charge	1 630 (0.75%)
Total:	(217 200)

42. The Administration has explained that traffic cases where charges are to be laid cover more serious traffic offences. Should the defendant, who is usually on bail, fail to appear before the court to answer the charge(s), the magistrate may issue a warrant of arrest against the defendant. The Administration has assessed that upstream circumvention for such cases is unlikely a concern.

43. The Administration has also advised that the great majority of DOP offences are relatively minor in nature and are dealt with by fixed penalty tickets. The person to whom a fixed penalty ticket is issued may discharge liability to conviction for the offence by payment of the fixed penalty, and the relevant DOPs will be recorded under the DOP system.

44. Under Cap 240, if a person has not paid the fixed penalty and has not notified the police that he wishes to dispute liability in writing, a Demand Note will be issued to that person. Upon expiry of the payment date specified in the Demand Note, the Police may under section 3A(1) of Cap. 240 apply in the absence of that person to the magistrate to issue a court order for the person to pay the fixed penalty together with an additional penalty equal to the amount of the fixed penalty and cost. Once the court order is issued and signed, the relevant DOPs will be recorded under the DOP system. On the other hand, if a person has notified the police that he wishes to dispute liability, the Police will apply for a summons to bring the person before the court. As the person has made a complaint, it is his own will to attend court to dispute his case. Such summonses are rarely unserved. The Administration has advised that upstream circumvention is also unlikely a concern for traffic offences dealt with by fixed penalty tickets.

45. For DOP offences that are to be dealt with by way of summons, defendants may choose to plead guilty by letter for offences specified in Schedule 3 to Cap. 227. The Administration's assessment is that the risk of upstream circumvention is relatively low. The Administration has advised that when it is evident that a defendant has tried to evade receiving the summons, the Police will apply to the court for the issue of an arrest warrant under section 9 of

Cap 227.

Strengthening of supportive measures to enhance the implementation of the DOP system

46. Members have requested that to tie in with the new measures proposed in the Bill, the Administration should take effective measures to ensure that summonses will be issued to the updated address of the person concerned because, under the "deemed served" provision, a summons issued to the defendant's old address by registered post will also be deemed to have been served even if it is returned undelivered.

47. The Administration has informed the Bills Committee that TD and the Judiciary have jointly reviewed the work procedures for the issue of DOP summonses under Cap. 375 and have agreed on a set of revised work procedures. To tie in with the new measures proposed in Bill, the computer systems of TD and the Judiciary have been enhanced to allow data transfer. Under the revised work procedures, when TD makes an application to the court for issue of DOP summons to a person, his latest address shown in the record of driving licences kept by TD will be passed to the court for issue of the summons. The summons will first be served by ordinary post. Two days before and on the day of hearing, TD will check the address of the person concerned again. If there is any change of address and the person concerned is absent from the scheduled hearing, TD will ask the court to arrange re-issue of the summons with the updated address, if any. The summons will then be served to the person concerned by registered post again. The revised work procedures are aimed at ensuring that summonses will be issued to the updated address of the person concerned.

48. Hon WONG Kwok-hing has suggested that the Administration should step up prosecution against persons in breach of the existing statutory requirement that a person holding a driving licence has to notify the Commissioner if there is any change to his particulars, including his address, under regulation 18 of the Regulations. In response, the Administration has undertaken that it will step up publicity on this notification requirement and make sustained efforts in encouraging persons to provide TD with their updated addresses.

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