

立法會

Legislative Council

LC Paper No. CB(1)2512/10-11(01)

Ref. : CB1/BC/8/10

Bills Committee on Road Traffic (Amendment) Bill 2011

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper sets out the background to the Road Traffic (Amendment) Bill 2011. It also provides a summary of the major views and concerns expressed by Legislative Council Members on related issues.

Background

2. The increasing trend in drug driving cases during the past few years and the potential road safety hazards they pose have caused serious concerns in the community. As recently reported, there were 84 arrest cases involving drug driving in 2010, which was more than seven times the number in 2009¹. Among the 84 arrest cases in 2010, 73 (or 87%) of them involved ketamine, and the rest involved cocaine, cannabis, etc. Twelve of the 84 cases involved traffic accidents. Although under section 39 of the Road Traffic Ordinance (RTO) (Cap. 374), it is an offence to drive a motor vehicle on any road under the influence of drugs to such an extent as to be incapable of having proper control of the motor vehicle, there are no provisions that require a person suspected of committing the offence to provide his/her blood or other body fluid specimens for drug analysis. This therefore makes a charge difficult to prove.

3. According to the Administration, combating drug driving involves complex legal and practical issues which may affect the majority of the driving population. There is hence a need to exercise care in drawing up new offences and the accompanying enforcement powers in order to ensure that on one hand, drivers who drive while being influenced or impaired by drugs can be

¹ The number of arrest cases involving drug driving was 11 in 2009.

effectively prosecuted and road users can be protected and, on the other hand, safeguards can be built in to ensure that the legitimate rights of the drivers would not be affected. There is also a need to search for a preliminary test to facilitate effective enforcement and to increase the deterrent effect on potential offenders. The Transport and Housing Bureau set up an inter-departmental Working Group² in early 2010 to conduct study on the matter.

Major proposals of the Administration

4. After studying the results of a research conducted by the Working Group on overseas experience in tackling drug driving, the Administration has proposed to adopt a “zero tolerance” control against the most commonly abused drugs, i.e. driving with any concentration of such drugs is prohibited. However, as some of these drugs, namely triazolam, midazolam, zopiclone, nimetazepam and cough medicine are either prescription drugs or may be bought over-the-counter and are widely used for medical treatment, it has also been proposed that only commonly abused drugs but not those that have wide common use for medical treatment should be subject to “zero tolerance” control.

5. Apart from the proposed “zero tolerance” control, the Administration has also suggested that another overall tier of control be maintained to provide for an offence of driving under the influence of or when impaired by any drugs, and that whether a person drives under the above condition should be established by objective tests. This is similar to but more objective than the offence currently provided under section 39 of RTO. However, since some people take drugs for medical purpose, a defence would be provided for a person charged with the drug driving offence to prove that he does not know and could not reasonably have known the permissible non-prescription drug or the prescription drug, or the combination of those drugs, so found in his body would impair driving if consumed or used according to medical advice.

Preliminary tests

6. To effectively enforce drug driving offences, it would be necessary to require the drivers who are suspected to drive under the influence of drugs to give blood and other body fluid specimens for analysis. To enable the police

² The Working Group, chaired by the Transport and Housing Bureau, comprises members from the Security Bureau, the Police Force, the Transport Department, the Government Laboratory, the Department of Health and the Hospital Authority.

officers to screen out, using an objective method, suspected drivers for laboratory testing on presence of drugs, the Administration has proposed that the Police should be empowered to conduct some preliminary tests. A charge would not be laid unless the presence of drugs in the drivers so screened out is confirmed by detailed analysis of the drivers' blood or other body fluid specimens in the laboratory.

7. The impairment test³ and oral fluid testing device are two preliminary testing methods that are currently being adopted by overseas jurisdictions. The Administration at first proposed that the Police should be empowered to conduct the impairment test or/and the rapid oral fluid test (ROFT), and that if the ROFT device on the most commonly abused drugs was not yet available on implementation, the impairment test would be the only preliminary test. This was because, according to the Administration's preliminary research conducted in early 2010, no ROFT device on ketamine was available in the market for enforcement purposes. On the other hand, the impairment test, which is widely adopted in European countries, might be implemented within a relatively shorter period of time when the required facilities and training for police officers were provided and the procedures drawn up. After consulting the Panel on Transport (the Panel) and the public however, the Administration subsequently proposed that Drug Influence Recognition Observation (DIRO)⁴ would also be conducted as a preliminary test.

8. In gist, the Administration proposed that the DIRO, the ROFT (if available) and the impairment test would be introduced as preliminary screening and evidence gathering tools to help police officers establish prima facie cases for drug driving offences. The then proposed assessment procedures are at **Appendix I**. The current 'general drug driving offence' (section 39 of RTO) would be retained. A new 'zero-tolerance offence' would be provided for to deter driving with the commonly abused illicit drugs, namely heroin, ketamine, 'ice', cannabis, cocaine and 'ecstasy'. Suitable defences would be provided for the offences. The penalties of the offences would be basically aligned with drink driving offences. To reflect the community's concern over the 'zero-tolerance offence', the penalties for the 'zero-tolerance offence' were proposed to be

³ An impairment test comprises various procedures including pupillary examination, horizontal gaze nystagmus, balance test, walk and turn test, one leg stand and finger to nose test. The process will take about 30 minutes.

⁴ The DIRO will be carried out on the roadside. The police officer will ask the driver some simple questions, and ask the driver to walk out of the vehicle. The police officer will observe the driver's reactions (e.g. whether he is able to respond in a normal way, or whether he needs to lean on the vehicle to support himself when standing out of the vehicle) to form a view whether the driver is under the influence of drugs.

aligned with those for Tier 3 drink driving offence, and those for the 'general drug driving offence' to be aligned with those for Tier 1 drink driving offence. The proposed preliminary drug driving enforcement procedures, which have been drawn up with reference to overseas experience, are set out in **Appendix II**. Details of the above legislative proposals are set out in **Appendix III**.

Panel discussion on the proposals

9. The Panel was consulted on the initial proposals at its meeting on 23 July 2010. At the Panel meeting on 26 November 2010, the Administration reported on the outcomes of the consultation on the initial proposals and on the Administration's proposed legislative plan to amend RTO. At these two Panel meetings, members expressed the following views and concerns about the proposals.

The need to differentiate between genuine and inadvertent drug driving

10. Some Panel members expressed concern that some illicit drugs and certain cough medicines might be used for medical purposes. There was therefore a need to ensure that clear explanations on their likely adverse influence on a person's driving ability would be given, and that they could not be easily purchased over the counter to prevent drivers from being inadvertently caught drug driving. Panel members also stressed the need to differentiate between drivers who really abused drugs and those who took drugs for medical purposes, especially as doctors or nurses in general seldom spared time to explain the side effects of drugs (e.g. causing drowsiness) to patients. Moreover, a driver might just take over-the-counter drugs without knowing their side effects. If a driver inadvertently committed the drug driving offence under the above circumstances, there might be implications on his third party risk insurance.

11. The Administration explained that according to section 39 of RTO, it was already an offence for a person to drive a motor vehicle under the influence of drugs to such an extent as to be incapable of having proper control of the motor vehicle. The relevant legislative proposals therefore only sought to enhance the objectivity of this provision and facilitate evidence collection. Moreover, existing drug labelling requirements and codes of practice for doctors and dentists had already provided that the side effects of drugs should be clearly explained to patients and, to tie in with the legislative proposals, improvements in drug labelling in terms of consistency and clarity would be

considered in consultation with relevant associations. Publicity and education efforts would also be geared up.

12. Some members, however, pointed out that the font size of drug label warnings was always very small. Non-drowsiness claims of drugs might also not be reliable. The Administration explained that relevant provisions had already required the warnings to be presented in a clear and legible manner. A small dosage of mild medicines for treating colds or pain would also unlikely cause drivers to perform poorly in the preliminary test. As to members' concern about how the labelling requirements would apply to Chinese prescription medicines, the Administration explained that most Chinese medicines were mild and would not cause drowsiness unless overdosed, or prepared to treat insomnia.

Preliminary drug tests

Concerns about the impairment test

- Location

13. Some members questioned the proposal to conduct the preliminary impairment test at a police station instead of at the scene, pointing out that the effects of drug(s) on the driver concerned might have worn off when he reached the police station. Moreover, if there were goods or passengers on board, the above proposal would cause even greater inconvenience and nuisance. There was also concern that the drivers concerned might be denied fair treatment with no third parties present at the police station.

14. The Administration responded that given the road environment in Hong Kong, it was considered that the impairment test could produce more accurate results if conducted indoors (such as at a police station). As to how vehicles carrying passengers would be handled if the drivers concerned had to undergo the preliminary impairment test at the police station, these passengers would be handled in the same way as those affected by road blocks. The Police would also help ensure the security of goods, if any, on the vehicles concerned. Moreover, a driver would be required to undergo the preliminary impairment test only when the Police had reasonable cause to believe that the driver was suspected to be influenced or impaired by drugs. Regarding the concern about unfair treatment, it should be noted that the preliminary impairment test would be conducted with video-recording by trained police officers according to approved procedures. Conduct of the impairment test at roadside would give

rise to difficulty in video-recording and have privacy implications.

- *Objectivity and reliability*

15. Some members also questioned the objectivity and reliability of the proposed preliminary impairment test, pointing out that because the movements required to be performed could be difficult even for normal people, a person who had not taken drugs might still fail the tests. Some other members, on a different note, expressed concern that the effect of drugs on driving ability might take time to show, and that drivers tested might use physical problems to account for failure in the test.

16. The Administration assured members that apart from providing sufficient training to police officers and developing proper testing standards to ensure objectivity and fairness of the impairment test, the Administration would also clearly explain to the public the operational details of the test before its introduction. Moreover, with ten years' experience in regulating drug driving, the United Kingdom (UK), the experience of which would be referred to, had already developed scientific guidelines for conducting impairment tests with test standards set for each of the five components to take into account physical conditions of individual drivers which might affect their performance. In fact, the success rate of the test in UK was as high as 94%.

17. Certain members expressed concern about the impact of the conduct of the impairment test on human rights. The Administration responded that only police officers who had been professionally trained to an internationally comparable standard and accredited might conduct the impairment test. The training concerned had been developed through years of research worldwide, so that officers so trained would identify for action only those drivers who had been grossly impaired by drug abuse, and not drivers who had taken drugs for medical purposes although they might show similar signs and symptoms.

The feasibility of conducting rapid oral fluid test as a preliminary test at roadside

18. Members consider the conduct of the preliminary test at the scene to ensure objectivity and fairness important, and hence have proposed that to minimize disputes, equipment should be used for preliminary screening as in Australia, where a ROFT device was adopted to conduct preliminary tests at roadside. The Administration explained that the Australian experience could

not be directly applied to Hong Kong because the equipment used there could not detect ketamine, the most common drug of abuse in drug driving cases in Hong Kong.

19. When briefing the Panel on the results of consultation on the initial proposals in November 2010, the Administration reported that some progress had been made in identifying the ROFT device. Members noted that ROFT devices for testing five out of the six specified illicit drugs proposed for the purpose of the 'zero-tolerance offence' were being adopted in overseas jurisdictions for enforcement purposes. As regards the testing device for the remaining proposed specified illicit drug, i.e. ketamine, prototypes of such devices had been developed and some preliminary tests had been conducted on them. The Police and Government Laboratory were in the process of obtaining test data and other relevant information from the suppliers to ascertain the accuracy of the devices. The Administration would work towards the objective of having such a device fully tested and calibrated for enforcing the 'zero-tolerance offence' on six illicit drugs upon the enactment of the relevant legislative proposals. Before then the Police would carry out DIRO that would normally take no longer than five minutes before forming an opinion whether the driver was under the influence of drugs and that an impairment test was required. This would increase the efficiency of the whole process and would ensure that only persons who were reasonably suspected to be drug driving would undergo the impairment test.

Other views and concerns about the preliminary tests

20. Members also raised a number of questions and concerns about other implementation details of the preliminary tests. In particular, certain members asked whether preliminary drug tests could be conducted randomly as the random breath test (RBT) conducted to deter drink driving. A member also expressed concern about the justifications and appropriateness of the following proposed arrangements regarding the preliminary tests –

- (a) That the driver might be required to go directly to a ROFT in case the police officer had suspicion that he had consumed a zero tolerance drug although the driver had shown no sign of impairment and therefore a DIRO would be superfluous; and
- (b) That even though ROFT indicated that the driver had not taken any of the specified illicit drugs, the police officer could still

arrest the driver and conduct the impairment test on him in a police station if the police officer reasonably suspected that the driver was under the influence of drugs other than those tested for by ROFT.

21. The Administration said that random drug tests would be considered only when they could be conducted as efficiently and reliably as RBTs to detect all the six specified illicit drugs. Regarding the arrangement in paragraph 20(a) above, the Administration clarified that it would only apply to exceptional occasions such as that when the police officer saw the driver consume the drug concerned. As for the arrangement in paragraph 20(b), the Administration explained that ROFT was in fact conducted for rapid screening. If ROFT indicated that the oral fluid of the driver contained any of the specified illicit drugs, the police officer would, without any need to conduct the impairment test, arrest the driver straight away and require him to submit blood and/or urine specimens. Only when ROFT indicated that the driver had not taken any of the specified illicit drugs but there was reasonable suspicion would the police officer go through the step of conducting the impairment test on him

Request for early enactment of the relevant legislative proposals

22. Noting that it might take over a year for the drug driving legislative proposals to take effect, some Panel members enquired about measures that would be taken in the interim to combat the drug driving problem to ensure road safety. The Administration assured members that the existing section 39 of RTO had already provided that it would be an offence for a person to drive a motor vehicle under the influence of drugs to such an extent as to be incapable of having proper control of the motor vehicle. The legislative proposals only sought to enhance the objectivity of this provision and facilitate evidence collection. The Police had also stepped up enforcement efforts through setting up road blocks with satisfactory results in bringing about changes in driving behaviour.

23. Panel members, however, still considered it necessary to introduce measures to combat drug driving expeditiously in recognition of grave public concern about drug driving. At the Panel meeting on 23 July 2010, a member proposed that to expedite the legislative process concerned, the necessary empowering provisions should be incorporated in the Road Traffic (Amendment) Bill 2010 (the Amendment Bill 2010) then under scrutiny. Some members of the Bills Committee concerned also suggested that the

Administration should consider proposing Committee Stage amendments (CSAs) to the Amendment Bill 2010 to include a list of illicit drugs under the "zero tolerance" control, which would constitute a circumstance of aggravation in all dangerous driving offences if the driver concerned was found to have taken such drugs, so as to provide greater deterrence against drug driving. A similar provision had in fact been included in the initial proposals which the Administration put forward to combat drug driving in July 2010. Details of the Bills Committee's discussion in this regard as elaborated in its report are given in **Appendix IV**.

24. Having considered the above suggestion, the Administration subsequently moved CSAs to the Amendment Bill 2010 to provide that driving under the influence of or when impaired by the specified illicit drugs would be made a circumstance of aggravation in all dangerous driving offences under which the maximum penalties in terms of fine and imprisonment, and the minimum disqualification period for the offences concerned would each be increased by 50%. The Amendment Bill 2010 was passed at the Council meeting on 8 December 2010.

Latest development

25. The Road Traffic (Amendment) Bill 2011 was tabled at the Council meeting on 25 May 2011. The House Committee decided on 27 May 2011 to set up a bills committee to scrutinize the Bill.

Relevant papers

26. A list of relevant papers is in **Appendix V**.

**Proposed General Enforcement Procedures
To Enforce Drug Driving Offences**

1. A police officer will be empowered to require a person to conduct a preliminary drug test if :

- (a) the police officer has reasonable cause to suspect that the driver is under the influence of drug;
- (b) the driver is involved in a traffic accident; or
- (c) the driver commits a moving traffic offence.

2. If a person is under the influence of drug, he will display signs of impairments. For instances, the common signs for those who have taken ketamine and heroin will be nystagmus, hypersalivation, increased urinary output, insensitivity to pain, slurred speech and lack of coordination and for those who have taken 'ice' or MDMA, there will be increase in physical and emotional energy, visual disturbances, dilated pupils, dry mouth, sweating, muscle tension and involuntary jaw clenching. The police officer will look for these signs of drug influence.

3. The following procedures will apply:

Drug Influence Recognition Observation (DIRO)

- (a) If the driver shows signs that he is under the influence of drugs, a DIRO will be conducted. The DIRO will normally be carried out on the roadside. The police officer will observe the signs and reactions of the driver through interactions to assess whether the driver is under the influence of drug¹. A DIRO will normally take about 5 minutes.

¹ In a DIRO, the police officer will ask the driver some simple questions and perform some actions (such as telling his name, displaying his driving licence or walking out the vehicle).

- (b) If the police officer, after the DIRO, is of the opinion that the driver is not under the influence of or impaired by drug, he will release the driver unless other offences have surfaced, otherwise he will require the driver to perform a Rapid Oral Fluid Test (ROFT).

Rapid Oral Fluid Test (ROFT)

- (c) The police officer will conduct a ROFT with the driver on the roadside or in the police officer Station² to test whether the driver has consumed the specified illicit drugs. The ROFT will take about 5 to 10 minutes. The police officer will inform the driver immediately of the test result.
- (d) If the ROFT indicates that the oral fluid of the driver contains any of the specified illicit drugs, the police officer will arrest the driver and the latter will be required to submit blood and/or urine specimens.
- (e) If the ROFT indicates that the driver has not taken any of the specified illicit drugs, the police officer will release the driver unless other offences had surfaced or he reasonably suspect, that the driver is under the influence of drugs that is other than those tested for by the ROFT, in such circumstances, he will then arrest the driver and conduct the Impairment Test (IT) in a Police Station.
- (f) There may be exceptional occasions when the driver shows no sign of impairment and therefore a DIRO would be superfluous. In case the police officer still has suspicion that the driver has consumed a zero tolerance drug, the driver may be required to go directly to a ROFT.
- (g) It is an offence for refusing to perform a ROFT.

Impairment Test (IT)

- (h) An IT will only be performed in a Police Station by an authorized police officer who normally would not be the same police officer who conducted the DIRO. The process will be video-taped.

² The ROFT is to be carried at or near to the location where the driver is stopped, or at a Police Station when the driver reports an accident at a Police Station.

- (i) An IT comprises various procedures including pupillary examination, horizontal gaze nystagmus, balance test, walk and turn test, one leg stand and finger to nose test. The process will take about 30 minutes. After an IT and together with the observations made in the DIRO, the police officer would be able to distinguish whether the driver is likely to be under the influence of one or a combination of the following drugs categories, namely: cannabis, opiates, central nervous system depressants, central nervous system stimulants, hallucinogens, inhalants, and dissociative anesthetics. For example, ketamine is usually classified under the category of dissociative anesthetics.
- (j) If the police officer, after the IT, is of the opinion that the driver is not under the influence of drug, he will release the driver unless other offences have surfaced, otherwise the driver will be requested to submit blood or/and urine specimens for laboratory analysis.
- (k) It is an offence for refusing to perform the IT.

Taking blood and/or urine specimen for analysis

- (l) If a driver who is required to provide blood or urine specimen requires medical attention, he will be sent to hospital for treatment. The medical practitioner attending to the driver may give his opinion whether the driver is physically fit to provide blood and/or urine. Otherwise, blood and urine specimens could be taken in a Police Station and that only approved medical practitioner, registered or enrolled nurse will take blood. The specimens will be divided into two portions, one of which will be handed to the driver and the other portion to the Government Laboratory for analysis.
- (m) It will be an offence for the driver refusing to provide blood and/or urine specimen.
- (n) Once the request to provide blood and/or urine specimens is made, the driving license of the driver shall be suspended for 24 hours. The driver shall surrender his license to the Police. The vehicle concerned will be dealt with according to existing procedures³.

³ The police officer will ascertain if the driver can arrange any person to drive away his car as soon as possible, or the police officer will arrange the vehicle to be taken to a Police Station temporarily.

Operation Procedures for Assessing Drug Impairment

There are five specific components in assessing drug impairment, namely:

1. Eye Examinations,
2. Modified Romberg Balance Test,
3. Walk and Turn Test,
4. One Leg Stand Test,
5. Finger to Nose Test.

1. Eye Examinations

The eye assessment consists of :

- (a) An examination of the driver's pupils to determine whether they are
 - (i) Constricted
 - (ii) Dilated
 - (iii) Normal
 - (iv) And to ascertain their reaction to light
- (b) Gaze Nystagmus Examination

The assessing officer observes and notes whether the subject's eyes track together, whether both pupils are equal in size, whether the subject's eyes are able to pursue the stimulus smoothly, or with an involuntary jerky motion.

Observations

Any drug that affects the nervous system or the brain can almost always produce an influence on the eye. Since proper function requires extremely good precision of very small nerves and muscles, even small dosages of drugs may affect the eye. The aim of the eye examination is to determine whether constriction, dilation or normality of the pupils, caused by drugs, is present. Drugs such as opiates are known to cause pupil constriction whereas

hallucinogens and stimulants are known to cause pupil dilation. A pupil size of between 3 and 6.5 mm in diameter is considered to be normal.

Gaze Nystagmus examination is used to determine :

- (a) whether nystagmus is visible in the left eye when the eye is held as far to the left as possible or in the right eye when the right eye is held as far to the right as possible (Nystagmus at maximum deviation)
- (b) whether, when each eye is observed separately, nystagmus is observable in the left eye before the left eye has moved beyond 45 degrees from the extreme left position, or in the right eye before the right eye has moved beyond 45 degrees from the extreme right position, (Angle of Onset) or
- (c) whether vertical nystagmus is present.

Horizontal Gaze Nystagmus will be seen on persons who are under the influence of :

- (a) Depressants, (i.e. Alcohol, GHB)
- (b) Inhalants (i.e. Nitrous Oxide) and
- (c) Dissociative Anaesthetics (i.e. Ketamine)

Vertical Gaze Nystagmus will also be seen in all of the above, predominantly in high doses but also Cannabis.

2. Modified Romberg Balance Test

The Modified Romberg Balance Test is an indicator of a person's internal clock and body sway.

The subject is asked to stand up straight with their feet together and head tilted backwards. While in this position the subject is asked to estimate the passage of 30 seconds and when finished bring their head forward and say stop.

The test is comprised of two parts, the instructions stage and the performance stage. During the instructions stage the subject will be expected to stand in the

position demonstrated by the officer during that stage. This is also a key component of divided attention.

Observations

Certain drugs taken will either speed up or slow down the body clock and some drugs will cause the subject to sway from side to side or back to front.

During the test the officer will observe such things as :

- (a) an ability to follow instructions
- (b) being able to stand still or steady
- (c) body and eyelid tremors (particularly prevalent in heavy Cannabis users)
- (d) the amount of time taken

An estimation of time between 25 and 35 seconds is considered to be normal for most people, however persons under the influence of a Stimulant, for example Cocaine, may estimate the passage of 30 seconds in as little as 10 seconds, whereas someone under the influence of an Opiate may well take well beyond 30 seconds and could be up to 90 seconds where the officer would terminate the test in any case.

3. Walk and Turn Test

The Walk and Turn test requires the subject to stand with the heel of the right foot touching the toe of the left foot then walk nine steps along a straight line. They must turn in the prescribed manner, as demonstrated by the officer, and return nine steps.

The walk and turn test is a test that divides attention between balancing and information processing and is comprised of two stages, the instructions stage and the walking stage.

During the instruction stage, the person must stand with the right foot directly in front of the left foot. The heel of the right foot must touch the toe of the left foot and hands must be down by the side. The subject must stand in this position while the officer gives the instructions.

During the walking stage, the person must take nine heel to toe steps in a straight line, turning about then walking another nine steps. During this exercise the subject must count each step out loud.

Both stages are essential parts of the test and each can reveal important evidence.

Observations

The walk and turn test is a validated test and there are eight major observations. The first two (Balance and starting too soon) are checked strictly during the instruction stage and can only be accumulated once. The next six observations are checked during the performance stage, and include :

- (a) Stops while walking
- (b) Steps off line
- (c) Takes wrong number of steps
- (d) Misses heel to toe
- (e) Uses arms to balance and
- (f) Turns improperly

Of all the tests, this is the test that will produce the most evidence of impairment. Experience has shown that those persons who are impaired will exhibit many of the observations mentioned above plus others and will consistently fail to count the steps out loud. Persons under the influence of stimulants tend to want to complete the test quickly thereby making mistakes, but those under the influence of drugs that depress the central nervous system will tend to complete the test more slowly but less accurately.

4. One Leg Stand Test

This test requires the subject to stand on one leg, whilst the other leg is extended out in front about 6 – 8 inches (15 – 20 centimetres) off the ground. The divided attention part of the test requires the subject to be able to balance and count out loud and again is comprised of two stages, the instructions stage and the balance and counting stage.

During the instruction stage the person is required to stand up straight with their feet together and arms down by the sides.

During the balance and counting stage the person stands on one leg with the other leg held out straight for a period of 30 seconds. The subject however is not informed of the duration of the test and is required to continue counting until the officer instructs them to stop.

Observations

There are four validated observations for this test that the officer may observe :

- (a) Noticeable swaying from side to side or back to front
- (b) Raising arms more than six inches to balance
- (c) Hopping
- (d) Dropping the raised foot

Other observations that have been noticed through experience is an inability to follow instructions, in that the subject is asked to count out loud in the following manner, one thousand and one, one thousand and two and so on until told to stop. Many subjects under the influence fail to count in the correct manner and this is particularly predominant in those under the influence of depressant drugs. Hopping and dropping the foot can be seen under most categories and provides a good indication of impairment.

5. Finger to Nose Test

The finger to nose test is a test of co-ordination and depth perception. The test requires the subject to bring the tip of the index finger up to touch the tip of the nose, with their head tilted backwards and their eyes closed. This test differs from other test's as it is the only test where the officer must continue to give instructions to the subject throughout the test. The test comprises of two stages, the instructions stage and the command stage.

During the instructions stage the person is told to stand up straight with their feet together, while holding out their hands in front of them, with their hands closed and the index finger extended, palms side out.

During the command stage the person is told to touch the tip of their nose with the tip of their finger. The order of instructions from the officer begins with the left hand, thus:

Left, Right, Left, Right, Right, Left. The change of hands through the test ensure that the subject is listening to the officer and quite often an impaired person will not comply with the right, right, instruction.

Observations

Persons who are impaired will sometimes miss the tip of their nose and fail to use the proper finger. Observations would include :

- (a) That the officer should note where the finger touches the nose or face.
- (b) Was the speed in which the hand was brought up fast or slow, this helps to assess the person's depth perception, for example. The subject is slow and appears to be fishing around to find their nose in space, or the person is very fast and pokes their face because they misjudge where there nose is.
- (c) Was the correct hand used.
- (d) Body sway.
- (e) Whether the subject followed instructions.

Legislative Proposals to Amend RTO to combat Drug Driving

New zero-tolerance offence

- (i) It will be an offence for a person to drive or attempt to drive or is in charge of motor vehicle on any road with any amount of a specified illicit drug, irrespective of whether the drug has any effect on the driver, i.e. zero-tolerance offence.
- (ii) The following six drugs, which are either narcotics or psychotropic substances, will be subject to the zero-tolerance:
 - (a) heroin
 - (b) ketamine
 - (c) methylamphetamine
 - (d) cannabis
 - (e) cocaine
 - (f) 3,4-methylenedioxymethamphetamine ('MDMA')

These six illicit drugs will be specified in a Schedule which will be updated from time to time as necessary. Amendment to the Schedule will be published by notice in the Gazette, and will not come into operation until after the time provided for the LegCo to debate the notice.

- (iii) It will be a defence for a person charged with the offence in (i) if the presence of specified illicit drug in the blood or other body fluid is a result of lawful use of the substance for medical treatment. This is to provide an avenue of defence for persons who have been administered with two of the above illicit drugs, namely ketamine and cocaine, albeit very limited¹.
- (iv) A person who, commits any dangerous driving offence with any amount of a specified illicit drug present in his blood or urine will trigger the aggravating circumstance and is liable to higher penalties in terms of fine, imprisonment, and minimum disqualification period for the offence concerned (i.e. each to be increased by 50%)².

¹ Ketamine is an anesthetic medication used in human and for veterinary use. There are four products containing ketamine that are registered in Hong Kong. Cocaine is occasionally used as an anesthetic. There is one medical product containing cocaine that is registered in Hong Kong.

² This legislative proposal has been included in the Road Traffic (Amendment) Bill 2010.

General drug driving offence

- (v) It will be an offence for a person to drive or attempt to drive or is in charge of a motor vehicle on road under the influence of any drug to such an extent as to be incapable of having proper control of the vehicle (this is the existing drug drive offence in section 39 of the Road Traffic Ordinance).
- (vi) The following defence will be provided for this offence – if the person does not know and could not reasonably have known the permissible non-prescription drug or the prescription drug, or the combination of those drugs, so found in his body would adversely affect driving if consumed or used in accordance with medical advice.
- (vii) For the purpose of the defence in (vi), medical advice means the written or oral advice given to the person concerned by a healthcare professional in relation to the drug or combination of drugs, and includes anything written on a label accompanying the drug.

Preliminary test and laboratory analysis

- (viii) A police officer in uniform may require a driver to take preliminary tests (impairment test and/or rapid oral fluid test) if they have suspected the driver is under the influence of drugs; if the driver is involved in a traffic accident or has committed a moving traffic offence. The preliminary impairment test will only be carried out on drivers who do not need immediate medical attention.
- (ix) A police officer in uniform may require a person who is driving or attempting to drive, or is in charge of, a motor vehicle on a road for a rapid oral fluid test for the specified illicit drugs (i.e. random drug testing). This provision will only come into operation until it is published by notice in the Gazette, and after the time provided for the LegCo to debate the notice.
- (x) A police officer in uniform may require a person who ‘fails’ the preliminary tests (i.e. oral fluid test or impairment test) to provide blood or/and urine specimens for laboratory analysis with regard to the presence and amount of drugs for determination of prosecution.
- (xi) It will be an offence for drivers to refuse to perform the preliminary tests or to refuse to provide blood and/or urine specimens for laboratory analysis without reasonable excuses.

- (xii) In case consent to take blood and/or other body fluid specimens cannot be obtained because the person suspected of drug driving is unconscious or is under the influence to an extent that he is unable or incapable to give consent, the Police is empowered to take blood specimen (likely be part of the normal preliminary medical treatment) from such a person while he is unconscious/incapable. When the person is sober, the Police will seek consent from him to have the blood tested, which if refuses will be an offence. The same requirement should be applicable to suspected drink drivers.
- (xiii) A driver who ‘fails’ in the preliminary tests or refuses to provide blood and/or urine specimens for laboratory analysis is required to surrender his driving licence to the Police for 24 hours as they are unfit for driving immediately.
- (xiv) The same requirement in (xiii) will apply to a driver who refuses to perform a screening breath test, or who fails in an evidential breath test for alcohol;

Proposed Penalties

- (xv) Proposed penalties for drug driving offences are given in the table below:

Drug Driving Offence	Maximum Fine	Maximum Imprisonment	Minimum Driving Disqualification	
			First Conviction	Subsequent Conviction
Drive with any amount of a specified illicit drug, irrespective of whether the drug has any effect on the driver (‘zero-tolerance offence’)	\$25,000	3 years	2 years	5 years
Drive under the influence of drugs to such an extent as to be incapable of having proper control of a motor vehicle (‘general drug driving offence’)	\$25,000	3 years	6 months	2 years

Refuse to perform the preliminary tests or/ provide blood and/or urine specimens for laboratory analysis	\$25,000	3 years	2 years	5 years
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The penalties proposed for the ‘zero-tolerance offence’ is aligned with the those for Tier 3 drink drive offence, and those for the ‘general drug driving offence’ is aligned with those for Tier 1 drink drive offence.

- (xvi) In addition to the penalties above, a person convicted of the above drug driving offences will incur 10 Driving-offence Points and will be required to attend mandatory Driving Improvement Course.

Eligibility to drive commercial vehicles

- (xvii) A person who has a previous conviction record of any of the drug driving offences mentioned above shall not be eligible to apply for a full driving licence to drive commercial vehicles³, unless the date of committing the offence concerned is no less than five years from the date of application of the driving licence.

³ A commercial vehicle means a taxi, a public light bus or private light bus; a public bus or private bus; a medium goods vehicle; a heavy goods vehicle; or a special purpose vehicle.

立法會

Legislative Council

Extract

LC Paper No. CB(1)602/10-11

Ref : CB1/BC/9/09

Report of the Bills Committee on Road Traffic (Amendment) Bill 2010

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Drug driving

35. The Bills Committee is very concerned about the recent traffic accidents caused by driving under the influence of drugs, particularly drugs of abuse. Some members including the Chairman and Hon Andrew CHENG have called on the Administration to introduce measures to combat drug driving and consider moving CSAs to include such measures in the Bill. However, some other members including Hon Jeffery LAM opine that the issues of drink driving and drug driving should be addressed separately. They consider that the Administration should act swiftly to legislate for drink driving without further delay, and should avoid enacting laws on drug driving hastily before conducting a comprehensive study on the effect of each type of drug on driving behaviour.

36. The Administration has emphasized that it attaches great importance to combating drug driving. In view of the rising trend of drug driving cases, the Administration has set up a dedicated inter-departmental Working Group in early 2010 to work on the matter in full steam. The Working Group has been taking prompt action to examine the control framework required, including the feasibility of adopting a "zero-tolerance" approach, to deal with specified dangerous drugs that are commonly abused and have no or very limited medical use.

37. The Administration has advised that in order to tackle the complex issue of drug driving effectively, the Administration is not only

required to examine the scope of regulatory control, but also the more fundamental issue of how best to facilitate evidence gathering and enforcement work by the Police. It has to be very careful in drawing up new offences and ensuring the enforcement power by the Police is balanced, so that while drivers who drive while being influenced or impaired by drugs are prosecuted and road users are protected, the offences would not adversely affect the majority of the law-abiding driving population who may need to take drugs for genuine medical purpose.

38. The Administration also points out that, under section 39 of the RTO, it is an offence for a person to drive a motor vehicle on any road under the influence of drugs to such an extent as to be incapable of having proper control of the motor vehicle. This provision is broad enough to cover all drugs and has been successfully invoked by the Police in prosecutions involving drug driving cases. However, the existing legislation does not empower the Police to require drivers who are suspected to have taken drugs to submit to rapid tests, to give blood samples or to provide other body fluid as specimens for analysis. A charge under section 39 is therefore difficult to be proved before a court in the absence of objective evidence. The Administration further points out that an offence must be accompanied by the necessary enforcement powers in order to be effective, or else, any efforts to create new offences will be fruitless. The Working Group needs to consider very carefully how the Police may be empowered in order that the drug driving offences can be effectively enforced, and that the rights of motorists are not unjustly undermined. The Administration therefore considers it prudent and appropriate to deal with drink driving and drug driving separately.

39. Some Bills Committee members including the Chairman and Hon Andrew CHENG opine that the Administration should provide a timeframe for coming up with a legislative proposal on combating drug driving. The Administration should in the meantime formulate interim administrative measures, such as preliminary tests, to tackle the problem.

40. The Administration has advised that to combat drug driving, it is necessary to empower the Police to screen out drivers who are impaired by drugs through preliminary tests, namely impairment test or oral fluid test or both. These preliminary tests will be an objective method to help police officers establish a prima facie case, before the suspected driver is required to give blood or/and urine for laboratory analysis to ascertain

whether he has taken any drugs. In overseas experience, the introduction of preliminary drug tests requires the enactment of legislation and cannot be effected through administrative measures. At present, preliminary tests on drug driving has not been introduced in Hong Kong. The Administration is still looking for a rapid oral fluid test device in the market for the testing of Ketamine which is a major type of illicit drug abused by Hong Kong drivers in detected cases. The Police intend to train a team of trainers who will provide in-house training for frontline traffic police officers to conduct the preliminary tests. The Police are consulting overseas experts for advice and training in this respect.

41. The Administration has stressed that it is very concerned about the trend of traffic accidents caused by driving under the influence of illicit drugs, and is determined to introduce measures as soon as possible to tackle the problem. In fact, the Administration has drawn up initial proposals to combat drug driving and has recently completed public consultations on this subject. Various views have been received on the proposed new offences and preliminary tests from medical and pharmaceutical professionals, transport trades and members of the public. While there is a general support to combat drug driving, some have expressed concerns on the implementation arrangements. Notably, concerns have been expressed about how impairment tests are performed, e.g. the procedures and the place for the test, the time required and the checks and balances available. The Administration is refining the detailed legislative proposals with due regard to the consultation feedback and will report the matter to the Panel on Transport (the Panel) by the end of November 2010. Subject to the Panel's support, the Administration will commence law drafting work immediately. As complex legal issues are involved and the whole process involving drafting, consultation and consideration of drafts would take at least several months, the Administration would endeavour to introduce a separate Bill into LegCo in the second half of the 2010-2011 legislative session. At the Bills Committee's request, the Administration will provide an estimate of the number or percentage of frontline police officers trained and ready to conduct preliminary tests for drug driving offences, and also the timetable for completing the training of all frontline officers in this respect when the Administration introduces the relevant Amendment Bill into LegCo.

42. Some Bills Committee members including the Chairman have suggested that the Administration should consider proposing CSAs to the Bill to include a list of illicit drugs, under the "zero tolerance" control,

which would constitute a circumstance of aggravation in all dangerous driving offences if the driver concerned is found to have taken such drugs, so as to provide deterrence against drug driving in addition to drink driving.

43. Having considered members' suggestion, the Administration agrees to move CSAs to the Bill to provide for the following:

- (a) a person commits an offence in circumstance of aggravation if at the time of committing the dangerous driving offence, any amount of a drug specified in Schedule 1A is present in the person's blood or urine;
- (b) for the purpose of (a), six illicit drugs⁵ will be specified in Schedule 1A, which may be amended by the Secretary for Transport and Housing by way of subsidiary legislation through the negative vetting procedure. These six illicit drugs are –
 - (i) Heroin;
 - (ii) Ketamine;
 - (iii) Methylamphetamine;
 - (iv) Cannabis;
 - (v) Cocaine;
 - (vi) 3,4-methylenedioxymethamphetamine (MDMA); and
- (c) for persons who are caught by the circumstance of aggravation in (a), the maximum penalty in terms of fine, imprisonment and disqualification for the dangerous driving offences concerned are each increased by 50%.

44. Hon Andrew CHENG has urged the Administration to speed up the legislative process on combating drug driving and submit the relevant Amendment Bill to LegCo in the first half of the current legislative session. He considers that the Police should be empowered to conduct impairment test on drivers as soon as possible. He has proposed to move a CSA to include a code of practice on drug impairment test in this respect. The Administration is of the view that the matter should be dealt with by the Administration to contemplate in a more comprehensive manner in the next Amendment Bill.

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Appendix V

Bills Committee on Road Traffic (Amendment) Bill 2011

List of relevant papers

Committee	Date of meeting	Paper
Panel on Transport	23.7.2010 (Item II)	<u>Agenda</u> <u>Minutes</u>
Panel on Transport	26.11.2010 (Item IV)	<u>Agenda</u> <u>Minutes</u>
Bills Committee on the Road Traffic (Amendment) Bill 2010		<u>Agendas, papers and minutes</u>