

**For discussion
19 October 2011**

**Bills Committee on
Road Traffic (Amendment) Bill 2011**

Response to Members' Request for Information/Suggestions

Purpose

This paper provides the information requested and the Administration's response to the suggestions made by Members at the meetings of the Bills Committee (BC) on Road Traffic (Amendment) Bill 2011 (the Bill) on 5 and 12 July 2011 respectively.

Distinction between the offence involving specified illicit drugs and the offence involving any other drug

2. Some Members suggested that driving under the influence of a specified illicit drug (DUISID) and driving under the influence of any other drug (DUIOD) should be dealt with and presented in different clauses of the Bill so that a clear message that these two behaviors are very distinct in nature and severity can be sent to the community. Under the Bill, DUISID and DUIOD already attract different penalties. Accepting the rationale behind Members' suggestion, the Administration now suggests that these two be dealt with and presented in two different sections of the Road Traffic Ordinance (RTO) (Cap. 374), so as to further highlight that they are very different offences. The changes will be textual and will not change the original legislative intent.

Alternate offences

3. The BC's Legal Advisor has suggested to amend the Bill to make it possible for a person found not guilty of an offence within the category of

dangerous driving to be convicted of the new drug driving offences if warranted by evidence.

4. The provision of an alternate offence caters for the situation that when the court is not satisfied that the accused has committed the main offence being charged, the accused will be convicted of the alternate offence if the alternate offence is established by evidence. Dangerous driving may possibly be caused by drug driving, and the two categories of offences could be inter-related. RTO has already provided such an arrangement for dangerous driving offences (the current offence on driving under the influence of drink or drug as provided for in the legislation is already an alternate offence under various dangerous driving offences). The BC's legal adviser's suggestion will facilitate prosecutions, as the prosecution will not be required to have laid an alternative charge in the first place even if the court is satisfied that the defendant is not guilty of the main charge but guilty of the alternate offence. It will also avoid the situation where the defendant pleads guilty to the alternative charge in order to circumvent the possible higher punishment carried by the main charge. To provide for consistency, we further suggest that the dangerous driving offence and careless driving offence should be made alternate offences to the offences of driving under the influence of drink, driving with alcohol concentration above prescribed limit, DUISID, DUIOD and the zero-tolerance offence.

Parameters for the court on the ordering of life disqualification

5. Some Members asked about the legal implications of the Administration's proposal to set parameters for the court on ordering of life disqualification. Under Clauses 6 and 14 of the Bill, we propose that parameters be set for a court to consider, on convicting a person under the two very serious offences of dangerous driving causing death (DDCD) and DUISID, ordering driving disqualification for life, if –

- (a) the person has been convicted of the same offence previously; and

- (b) having regard to the circumstances in which the offence was committed and the behaviour of the person, the court or magistrate is of the opinion that it is undesirable for the person to continue to be allowed to drive a motor vehicle.

6. The proposal of providing the above parameters was a response to recent public calls for more stringent penalties especially in terms of disqualification from driving to be imposed on persons convicted of serious traffic offences to achieve the objective of keeping dangerous drivers especially the repeat offenders off the roads for a longer period of time. The current proposals to increase the minimum disqualification period for the DDCD offence, and to set the period for the newly proposed DUISID offence at 5 years on first conviction, and 10 years on subsequent conviction as well as the above-mentioned parameters to order life disqualifications on conditions would help to achieve the above objective.

7. Although life disqualification is not expressly excluded for other offences, the implication of the proposal is that there is an argument that the court may not be able to order life disqualification for other offences. However, this is an implication that does not have any effect in reality. Members may wish to note that while the power of the court to order life disqualification is currently available under RTO, the court has never handed down such a penalty in the past¹. Having considered all relevant factors including the above implications and the original legislative intent, the Administration is of the view that the current proposal to provide for parameters for the court to consider ordering life disqualification should be maintained.

8. We have also considered the suggestion of adding the “without prejudice” wording to the relevant clauses. Legal advice is that this suggestion may not be practicable because it may give rise to the following anomaly: for DDCD and DUISID offences, the court’s power to order life disqualification would be limited, as it is conditional upon two parameters; but for other offences which are lesser in severity, the court’s power to order life disqualification would be preserved and unconditional.

¹ The highest driving disqualification penalty handed down by the court in recent years was 12 years in a DDCD case.

9. A Member asked if there had been cases where the prosecution failed in its attempt to request the court to disqualify an offender convicted of dangerous driving from driving for life and if so, the reasons concerned. According to the Department of Justice, upon conviction, the court will take into account the sentencing guidelines and mitigating circumstances as appropriate before handing down sentence. The prosecution would provide information required by the court but would not advocate the sentence to be imposed. The prosecution would apply for a review of the penalties handed down if the penalties are considered manifestly inadequate or wrong in principle, with reference to previous sentences of similar cases.

Penalties for DDCD and drug driving offences involving specified illicit drugs

10. A Member suggested that the penalties for drug driving offences involving specified illicit drugs should be increased to a maximum fine of \$50,000 and a maximum term of imprisonment of 5 years. As mentioned above, the Administration's proposals contained in the Bill would render the driving disqualification penalty to be imposed on DDCD and DUIOD the most severe amongst traffic offences, to achieve the objective of keeping dangerous drivers off the road for a longer period of time. The fine and imprisonment term penalties of the offences involving specified illicit drugs are considered appropriate in relation to other traffic offences such as drink driving offences. On the transport trade's call to separately introduce and consult the public on legislative amendments to adjust the penalties for the DDCD offence, we would like to point out that the proposed increase in the driving disqualification penalty for DDCD offence is necessary to maintain the relativity among the penalties for different traffic offences, and is considered appropriate.

Defence for DUIOD

11. On the coverage of the defence for DUIOD, the Bill provides for a defence for a person accused of driving under the influence of drugs if the drug is a lawfully obtained drug. A lawfully obtained drug is defined as a drug which is either prescribed for or supplied to the accused by a healthcare professional, or is a pharmaceutical product or propriety Chinese medicine

registered under relevant Hong Kong laws. As the prosecution would not have information about the medicines or the way they are prescribed or supplied outside Hong Kong, it is not feasible or practicable to verify if the drug in question is a lawfully obtained drug, and thus determine if there is a defence. That notwithstanding, the court will consider all relevant facts and circumstances of a case, including whether the accused has an honest but mistaken belief of the side effects of the drugs, in dealing with such charges. The proposed impairment test (IT) will help to screen out persons who are grossly impaired by a drug to the extent of being incapable of properly controlling a vehicle. Most medicinal drugs, if taken in accordance with advice given by healthcare professional or in drug label, will not cause impairment to an extent such that the person is unable to properly control a vehicle. Professional drivers do not have to be overly concerned.

Rapid oral fluid test

12. Members asked about the availability of rapid oral fluid test (ROFT) devices in the market, as well as the application of ROFT in overseas jurisdictions. ROFT is a newly developed technology, and its accuracy varies to a great extent depending on the product and type of drugs being tested. The Police have approached all the suppliers / manufacturers which are known to produce such products, and asked them to develop prototype device that is suitable for use in Hong Kong. A supplier has recently developed such prototype. The Hospital Authority plans to conduct test on the prototype, which should commence shortly and is estimated to take about half a year to complete.

13. As far as we are aware, Australia and Belgium conduct both ROFT and IT, while UK and New Zealand only conduct IT. We have not learnt of any major problems encountered by these jurisdictions in enforcing drug driving offences.

Guidelines on establishing reasonable suspicion of drug driving and information on dangerous driving and careless driving offences

14. A set of general guidelines prepared by the Hong Kong Police

Force for police officers on how reasonable suspicion of drug driving would be established before the driver concerned is to be taken to the police station for conducting an IT is at Annex A.

15. A breakdown by vehicle type of the drivers charged with dangerous driving offences and with careless driving offences in recent years as requested by Members is provided at Annex B.

Advice Sought

16. Members are requested to note and comment on the issues set out in this paper.

**Transport and Housing Bureau
October 2011**

**Guidelines for establishing suspicion
before requiring a driver to perform an Impairment Test**

Background

There are various reasons leading to an apparent impairment of a driver. Common causes are the physical state and illness of the driver, consumption of alcohol and consumption of drugs.

2. Drug driving cases are less frequent than drink driving. Special training is required to assist police officers to appreciate and to understand the effects of drugs and how they impair a driver. Only police officers who have experience in handling drink driving cases will be trained and authorized to perform the preliminary drug screening tests, including the Drug Influence Recognition Observation (DIRO) and the Impairment Test (IT).

3. Other than being involved in a traffic accident or having committed a traffic offence, a driver would be required to undergo an IT only if the police officer has a reasonable cause to suspect the driver has any concentration of a specified illicit drug present in his blood or urine or is under the influence of any drug. The reasonable cause to suspect may be formed after excluding alcohol as the cause of impairment or based on the result of the driver undergoing a DIRO or a Rapid Oral Fluid Test.

General Guidelines

4. The following are the general guidelines in establishing suspicion before requiring the driver to undergo an IT :-

- (i) Only trained officers who are capable of looking for signs and indications of drug influence on the driver will be authorized to perform DIRO;

- (ii) Observation on drivers will be conducted in a systematic and standardized manner;
- (iii) Observation will be in two phases, namely the physical state of the driver and his manner of driving;
- (iv) The officer will obtain additional evidence through the accounts of witnesses at scene;
- (v) Before asking the driver to undergo a DIRO, the officer will exclude the involvement of alcohol by conducting a breath test;
- (vi) After the breath test, the driver will be dealt with according to procedures for screening of drug driving if the impairment is believed NOT to be caused by alcohol;
- (vii) Through observation and interaction with the driver, the officer would form an opinion whether the driver is under the influence of a drug. If a person is under the influence of drug, he will display signs of impairments. 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 will be increase in physical and emotional energy, visual disturbances, dilated pupils etc. The police officer will look for these signs of drug influence;
- (viii) Throughout the screening process, the behavior of the driver will be carefully observed with appropriate record made;
- (ix) If after the screening process, the police officer has established reasonable suspicion that the driver is under the influence of drug, the driver will be brought back to a police station where he will be required to perform an IT by another officer who is usually senior in rank than the officer conducting DIRO.

**A breakdown by vehicle type of drivers
prosecuted for various dangerous driving offences
and careless driving offence**

(A) Number of drivers prosecuted for Dangerous Driving Causing Death Offence

Vehicle type \ Offence date	2009	2010	2011 (Jan-Aug)
Private Car	12	8	0
Taxi	4	7	1
Public Light Bus	7	10	1
Goods Vehicle	20	14	2
Others	10	9	0
Total	53	48 *	4**

* 2 cases happened in 2010 are still under investigation

** 34 cases happened in 2011 are still under investigation

(B) Number of drivers prosecuted for Dangerous Driving Causing Grievous Bodily Harm Offence¹

Vehicle Type \ Offence date	2010	2011 (Jan-Aug)
Private Car	1	3
Taxi	0	1
Light Goods Vehicle	0	0
Total	1	4[#]

1 case happened in 2011 is still under investigation

¹ The offence has been introduced since 17.12.2010.

(C) Number of drivers prosecuted for Dangerous Driving Offence

Vehicle type \ Offence date	2009	2010	2011 (Jan-Aug)
Private Car	138	321	254
Taxi	45	79	48
Public Light Bus	25	39	20
Goods Vehicle	83	102	60
Others	27	65	36
Total	318	606	418

(D) Number of drivers prosecuted for Careless Driving Offence

Vehicle type \ Offence date	2009	2010	2011 (Jan-Aug)
Private Car	6,213	6,518	4,374
Taxi	2,573	2,549	1,617
Public Light Bus	628	642	436
Goods Vehicle	4,448	4,878	3,102
Others	1,898	1,998	1,221
Total	15,760	16,585	10,750