

**For discussion**  
**17 November 2011**

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

**Response to Members' Request for Information**

**Purpose**

This paper provides the Administration's responses to the questions raised by Members at the meeting of the Bills Committee (BC) on Road Traffic (Amendment) Bill 2011 (the Bill) on 2 November 2011.

**Prosecution policy in relation to the proposed offence of driving under the influence of a drug other than a specified illicit drug**

2. The BC noted that in a case where the accused driver claims that he has taken drug(s) bought over-the-counter or prescribed by a medical professional outside Hong Kong, it is not always feasible for the Police to verify the authenticity of the information provided by the driver. The BC would like to know whether the prosecution would be prepared to give the suspect the benefit of the doubt in such case and not institute prosecution.

3. The Prosecutions Division of the Department of Justice reaffirms that when considering whether to prosecute, the prosecution will consider whether the evidence is sufficient to support the charge and whether the public interest requires a prosecution. The prosecution would also consider any defences which are plainly open to or have been indicated by the accused, and any other factors which could affect the prospect of a conviction. In a case involving driving under the influence of a drug other than a specified illicit drug, if it is believed that the suspect did not know and could not reasonably have known that the drug he bought outside Hong Kong would make him incapable of having proper control of a motor vehicle, and he has consumed the drug according to healthcare professional's advice, that is a factor which, together with other relevant factors (such as the seriousness of the offence, the

consequences of the case, and the driving record of the suspect), the prosecution would consider before a decision is made. A decision to prosecute would only be taken after the evidence and the surrounding circumstances have been fully evaluated.

### **Taking blood specimen from a person incapable of consenting**

4. At the last BC meeting, while examining new section 39C(11A)(b)(ii) in Clause 12, Members were concerned that in actual operation, a police officer, who has not undergone medical training, might not be in a position to assess whether the incapacity of the suspect to give consent is due to medical reasons or not. Members requested that the relevant provisions be reviewed.

### **Sections 39C(11A)(b)(ii) and (11B) related to drink driving; and sections 39P(1)(b)(ii) and (2) related to drug driving**

5. Under the existing legislation, a specimen of blood must not be taken from a driver suspected of driving under the influence of drink or drug unless with the consent of the person concerned. However, there are circumstances that a suspected drink or drug driver may not be capable of providing a valid consent. Making reference to overseas legislation, we propose in the Bill (sections 39C(11A)(b)(ii) and (11B) related to drink driving; and sections 39P(1)(b)(ii) and (2) related to drug driving) that a medical practitioner may, at the request of a police officer, if the medical practitioner thinks fit, take blood from a suspected drink or drug driver if it appears to the police officer that the driver is incapable of giving a valid consent and the incapacity is due to medical reasons. The purpose is to preserve evidence, because drug and alcohol metabolize quickly in the body.

6. The proposed provisions in the Bill are modelled on relevant provisions of the Road Traffic Act of United Kingdom, which have been introduced since 2002. To our knowledge, the provisions work smoothly and no major problems or challenges have been reported so far.

7. If a driver suspected of drink driving or drug driving appears as if he may be incapable of providing a specimen of breath; undergoing a preliminary drug test; or giving a valid consent to the taking of a specimen of blood, in the majority of cases, the incapacity would be due to physical injuries or intoxication by alcohol or drugs to such an extent that the person is unconscious or delirious. These are all “medical reasons”. The police officers authorized to perform the drink or drug driving enforcement duties will be properly trained to ensure that they possess the required knowledge, skills and experience in differentiating a person showing a medical condition from a person not showing a medical condition.

8. All patients attending the Accident & Emergency Departments of Hospital Authority, including drivers suspected of drink or drug driving and escorted by Police, would be subject to triage, assessment and treatment according to the patient’s clinical condition upon arrival. The primary concern of a medical practitioner is the proper care and treatment of the driver. In the new sections 39C(11B) and 39P(2), upon request by a police officer, a medical practitioner will take blood from the suspected person only if he thinks fit.

9. According to the Police, the procedures for handling typical cases involving a suspected drink or drug driver who may be incapable of giving valid consent to the taking of a specimen of blood and where the incapacity appears to be due to medical reasons are as follows:

- (a) The driver will be sent to a nearby hospital, and in most circumstances, under police escort.
- (b) The police officer will explain to the medical practitioner in charge of the driver his observations and answer relevant questions put by the medical practitioner before he makes the request to take a blood specimen. If the medical practitioner considers it is necessary to administer immediate medical treatment to the driver, that would take priority over everything else.
- (c) If the medical practitioner thinks fit to take blood specimens from the driver upon the request of the police, blood specimens will be taken and handed over to the requesting police officer. If the medical practitioner does not think it fit to take blood specimens from the driver, no blood specimen will be taken.

- (d) The blood specimens will not be subjected to laboratory examination unless consent is obtained from the driver when he becomes capable of giving consent.

10. The new provisions draw a good balance between the rights of the suspect and the public interest to be served. We consider that the relevant provisions should be maintained.

### **Sections 39C(2)(a) related to drink driving; and sections 39O(3) related to drug driving**

11. The term “medical reasons” is also found under existing section 39C(2)(a) of the Road Traffic Ordinance and the new section 39O(3). Section 39C(2)(a) relates to drink driving. It empowers a police officer, who has reasonable cause to believe that for medical reasons a specimen of breath cannot be provided for a breath test, to require the person to provide a specimen of blood or urine. The new section 39O(3) empowers a police officer to require a person on whom a preliminary drug test could not be carried out due to a medical reason or any other reasonable cause, to provide a specimen of blood or urine, if the police officer has reasonable cause to suspect that any concentration of a specified illicit drug is present in his blood, urine or oral fluid, or he is under the influence of any drug. Under these circumstances, the suspects can talk and communicate with the police officer as to why a breath test or preliminary drug test cannot be carried out. As the police officers authorized to perform the drink or drug driving enforcement duties will be properly trained and equipped with the required knowledge, skills and experience in differentiating a person showing medical condition from one who does not, and as consent will be required before blood is taken, we consider that the provisions are in order and no change is required.

### **Penalties of existing traffic offences**

12. In response to a Member’s request, the penalties of existing offence of driving under the influence of drink or drugs, various drink driving offences and dangerous driving offences, which we have submitted in the second meeting of the Bills Committee, are reproduced at the Annex.

## **Advice Sought**

13. Members are requested to note and comment on the Administration's responses set out in this paper.

**Transport and Housing Bureau  
November 2011**



**Penalties of existing Major Traffic Offences**

Existing Traffic Offences	Maximum Fine (\$)	Maximum Imprisonment	Minimum Driving Disqualification	
			First conviction	Subsequent conviction <sup>1</sup>
<b>Drink Driving Offences</b>				
(1) Driving under the influence of drink or drugs (s.39) <sup>2</sup>	25,000	3 years	2 years	5 years
(2) Driving with alcohol concentration above prescribed limit (s.39A)	25,000	3 years	T1 – 6 months T2 – 1 year T3 – 2 years	T1 – 2 years T2 – 3 years T3 – 5 years
(3) Failing to provide a specimen of breath for screening breath test without reasonable excuse (s.39B)	25,000	3 years	2 years	5 years
(4) Failing to provide a specimen of breath, blood or urine for analysis without reasonable excuse (s.39C)	25,000	3 years	2 years	5 years
<b>Dangerous Driving Offences</b>				
(5) Dangerous driving causing death(s.36)				
(a) Non-aggravated	50,000	10 years	2 years (5 years)	5 years (10 years)
(b) Aggravated <sup>3</sup>	75,000	15 years	3 years (7.5 years)	7.5 years (15 years)
(6) Dangerous driving causing grievous bodily harm (s.36A)				
(a) Non-aggravated	50,000	7 years	2 years	5 years
(b) Aggravated <sup>3</sup>	75,000	10.5 years	3 years	7.5 years
(7) Dangerous driving (s.37)				
(a) Non-aggravated	25,000	3 years	6 months	2 years
(b) Aggravated <sup>3</sup>	37,500	4.5 years	9 months	3 years

( ) Proposed penalties under the Road Traffic (Amendment) Bill 2011

## Notes

### **1 Subsequent conviction –**

- For the drink driving offences (i.e. (1), (2), (3) or (4)), a subsequent conviction means a conviction subsequent to a first conviction of any of these drink driving offences, and for offence (2), regardless of the blood alcohol level on the first conviction.
- For dangerous driving offences (i.e. (5), (6), or (7)), a subsequent conviction means a conviction subsequent to a first conviction of the same offence.

**2** The offences involving driving under the influence of a drug are currently prosecuted under s.39 ‘driving under the influence of drink or drugs. Under the Bill, new sections will be provided for new drug driving offences.

### **3 Aggravated penalties –**

A person commits the dangerous driving offences (i.e. (5) (6), or (7)) in circumstances of aggravation if at the time of committing the offence -

- (a) the proportion of alcohol in the person’s breath, blood or urine is tier 3, or
- (b) any concentration of a specified illicit drug is present in the person’s blood or urine.

If an offence is committed in circumstances of aggravation, the maximum penalties in terms of fine and imprisonment, and the minimum disqualification period for the offence concerned are each increased by 50%.

## **Driving-offence Points and Driving Improvement Course**

A person convicted of any of the proposed or existing offences listed in the table shall incur 10 Driving-Offence Points (DOP), and must be ordered to attend and complete a mandatory Driving Improvement Course.

## **Consecutive Implementation of imprisonment and disqualification term**

If a driver is convicted of a second or subsequent ‘10-DOP offence’, regardless of whether that conviction is for the same or for a different offence, the court must order that the disqualification period should commence at the conclusion of the imprisonment sentence, unless the court or magistrate for special reasons decides not to make such a direction.