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Legislative Council

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Paper for the House Committee meeting on 17 February 2012

**Report of Subcommittee on Road Traffic (Impairment Test) Notice
and Road Traffic (Amendment) Ordinance 2011 (Commencement)
Notice 2012**

Purpose

This paper reports on the deliberations of the Subcommittee on Road Traffic (Impairment Test) Notice and Road Traffic (Amendment) Ordinance 2011 (Commencement) Notice 2012.

Background

2. The number of drug driving arrest cases rose sharply in recent years. 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, 73 (or 87%) involved ketamine, and the rest involved cocaine, cannabis, etc. Twelve of the 84 cases involved traffic accidents. The increasing trend in drug driving cases and the potential road safety hazards they pose have caused serious public concerns.

3. Against the above background and making reference to overseas practices in tackling drug driving, the Administration introduced the Road Traffic (Amendment) Bill 2011 (the Bill) in May 2011 to impose stricter controls over drug driving and to provide the police with necessary powers to combat drug driving more effectively. A Bills Committee was then formed to scrutinize the Bill². In gist, the Bill seeks to amend the

¹ In 2009, the number of arrest cases involving drug driving was 11.

² Please refer to the report of the Bills Committee (LC Paper No. CB(1)478/11-12) for details of the major legislative proposals contained in the Bill and the relevant deliberations.

Road Traffic Ordinance (RTO) to, among others, create new offences in connection with driving motor vehicles after the consumption or use of drugs, provide means to test for impairment by drugs and the presence of drugs in body fluids, and provide procedures to obtain specimens of blood and urine for laboratory tests. During discussion of the administration of the preliminary drug tests by the Bills Committee, members had expressed concerns on the safeguards to prevent abuse of power by the Police.

4. Under the Bill, a preliminary drug test means a Drug Influence Recognition Observation (DIRO), a Rapid Oral Fluid Test (ROFT) or an Impairment Test (IT) (paragraph 6 below), which are drawn up with reference to the practices of overseas jurisdictions that are experienced in combating drug driving. According to the information provided by the Administration to the Bills Committee, ROFT is a short test whereby the driver will be required to provide oral fluid specimens for testing the presence of specified illicit drugs. A ROFT will take about 5 to 10 minutes. DIRO will normally be carried out at the roadside. 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 getting out of the vehicle). A DIRO will normally take about 5 minutes.

5. Following scrutiny by the Bills Committee, the Road Traffic (Amendment) Ordinance 2011 (the Amendment Ordinance) was enacted by the Legislative Council (LegCo) on 14 December 2011 and published in the Gazette on 23 December 2011.

Road Traffic (Impairment Test) Notice (L.N. 1)

6. Under the new section 39M of RTO as added by the Bill, a police officer may require a driver to undergo preliminary drug tests if the police officer reasonably suspects that the driver has been driving under the influence of drugs, was driving a vehicle at the time when it was involved in a traffic accident, or has been driving a vehicle and has committed a traffic offence while the vehicle was in motion. IT is one of the preliminary drug tests. According to the new section 39T(1) of RTO as added by the Bill, the Commissioner of Police may publish a notice in the Gazette to specify the tests to be carried out for the purpose of assisting a police officer to form an opinion as to whether or not a person's ability to drive properly is impaired by the consumption or use of drugs. In January 2012, the Commissioner of Police made the Road Traffic

(Impairment Test) Notice (L.N.1) to specify five tests to be included for such a purpose. The five tests are -

- (a) Eye Examination Test, consisting of pupillary examination and Gaze Nystagmus examination;
- (b) Modified Romberg Balance Test, an indicator of a person's internal body clock and ability to balance;
- (c) Walk and Turn Test, to test a person's ability to divide attention between walking, balancing and processing instructions;
- (d) One Leg Stand Test, to test a person's bodily coordination, balancing and ability to count out loud according to instructions; and
- (e) Finger to Nose Test, to test a person's depth of perception and ability to balance and process instructions.

The notice will come into operation on 15 March 2012, the same date most parts of the Amendment Ordinance will take effect by virtue of L.N. 2.

Road Traffic (Amendment) Ordinance 2011 (Commencement) Notice 2012 (L.N. 2)

7. L.N. 2 was made by the Secretary for Transport and Housing under section 1(2) of the Amendment Ordinance to appoint 15 March 2012 as the day on which the Amendment Ordinance (except section 14 of the Amendment Ordinance in so far as it relates to the new section 39N of RTO) comes into operation.

8. Section 14 of the Amendment Ordinance adds sections 39J to 39U to RTO, which, among other things, provide the police with the necessary powers to combat drug driving. Section 39N of RTO empowers a police officer to require a driver to undergo a ROFT. According to the explanation of the Administration during the deliberation of the Bills Committee, as the technology involved in ROFT is still maturing and as there is a need to search for and develop a ROFT device suitable for the use in Hong Kong, ROFT will be introduced when a suitable device is found and validated for use in Hong Kong. IT will be deployed as the main preliminary drug test for drug driving offences before a ROFT

device is available. Therefore, the commencement date of section 39N may be later than the commencement date for the other provisions of the Bill.

9. L.N. 1 and L.N. 2 were gazetted on 6 January 2012 and tabled at LegCo on 11 January 2012. The scrutiny period of the two notices has been extended from 1 February 2012 to 22 February 2012 by resolution of the Council on 1 February 2012.

The Subcommittee

10. At the meeting of the House Committee on 13 January 2012, a subcommittee was formed to scrutinize the two notices. Under the chairmanship of Hon Miriam LAU, the Subcommittee held a meeting with the Administration on 19 January 2012. The membership list of the Subcommittee is at the **Appendix**.

Deliberations of the Subcommittee

11. The Administration has explained to the Subcommittee, by means of a video presentation, how the five tests specified in L.N.1 are conducted. In response to members' concerns about the safeguards to be taken to prevent abuse of power by the Police, the Administration has advised that the following safeguards would be adopted –

- (a) under normal circumstances, police officers will only conduct IT when they have a reasonable cause to suspect that a person is influenced by drugs through DIRO or ROFT (if available);
- (b) the preliminary tests including IT will only be deployed to screen out the drivers who are suspected of driving under the influence of a drug and hence should be required to undergo the next step of testing, i.e. provision of blood and/or urine specimens for detailed drug testing. A charge may only be laid if the presence of drugs is confirmed by the detailed laboratory analysis that follows;
- (c) only police officers who are properly trained to conduct the preliminary drug tests and authorized by the Commissioner of Police will be tasked to conduct the preliminary drug tests.

According to the Administration, the training provided to the officers is of a very high standard and delivered by experts from the United Kingdom (UK). The training syllabus follows closely that in the UK with adaptations to comply with local laws and operational requirements. The officers have to pass a test at the end of the training before they would be considered for authorization to perform IT;

- (d) if after the screening process through DIRO or ROFT (if available), 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 more senior in rank than the former officer who conducted DIRO or ROFT (if available);
- (e) IT will be conducted in an IT suite in a police station³ and the whole process will be video recorded;
- (f) detailed procedures and special instructions will be drawn up and provided in the internal police procedures; and
- (g) in order to facilitate authorized police officers to form an objective opinion, IT will be conducted by using standardized procedural forms in a systematic manner. The procedural forms and the video recording of the whole IT process will form part of the evidence if the case is brought to the court. Both a copy of the video recording and the procedural forms will be made available to the accused to prepare for his defence.

12. Hon Miriam LAU has enquired whether all ITs have to be conducted in a police station as she notes that in some overseas jurisdictions (e.g. UK), such tests can be conducted at the roadside. She considers that the latter arrangement could facilitate drivers and save their time. The Administration has advised that while IT is usually conducted at the roadside in UK, IT is conducted in police stations in Australia. In fact, under normal circumstances, police officers will only conduct IT when they have a reasonable cause to suspect that a person is influenced by drugs through DIRO or ROFT (if available). The Administration has

³ The Police have identified two police stations in each of five Police Regions covering the New Territories, Kowloon and Hong Kong Island for conducting IT.

explained that the proposal to conduct IT at roadside requires careful consideration because of privacy implications and the difficulty it may cause to video-recording. According to the Administration, the accuracy of IT, particularly the Eye Examination Test which consists of pupillary examination, will be higher if it is conducted in an indoor light-controlled environment.

13. Hon Miriam LAU and Hon CHAN Hak-kan have expressed concerns on whether drivers suspected of drug driving but injured in traffic accidents would still be required to undertake IT before medical treatment. The Administration has advised that IT will only be carried out on drivers who do not need immediate medical attention. The Administration has further advised that in case the person suspected of drug driving is unconscious or is under the influence of drug to an extent that he is unable or incapable to perform IT, the Police are empowered to request a medical practitioner to take blood specimen from such a person while he is unconscious/incapacitated. The purpose is to preserve evidence because drug metabolizes quickly in the body. When the person is sober, the Police will seek consent from him to have the blood tested, which if refused will be an offence.

14. The Subcommittee notes that L.N. 1 does not contain details of the practices and standards adopted for the five tests specified in the notice. The Subcommittee has enquired whether such details should be provided in L.N.1 to enable verification of whether the tests have been properly conducted where necessary. The Administration has explained that the five tests specified in L.N.1 are common components of IT adopted in overseas jurisdictions although their practices may vary. To make the law sufficiently clear, the nature or purpose of the five tests are already specified in L.N.1 so that the public will know what these tests are about. Furthermore, prior to the commencement of the new legislation, there will be a series of publicity activities on matters of public concern including how and where IT will be conducted.

15. The Subcommittee has enquired about the arrangements to be made to effect any changes to the standards and practices in relation to the five tests specified in L.N.1. The Administration has advised that if the changes do not affect the nature or purpose of the five tests as specified in L.N.1, no legislative amendment would be required to effect the changes. If the changes will result in a change in the purpose or nature of the test, the Commissioner of Police will, in accordance with the new section 39T(1) of RTO, effect the changes by a notice published in the Gazette, and the notice will be subject to negative vetting by LegCo.

In any event, the public will be informed of any such changes.

16. The Subcommittee has stressed the need to widely publicize how an IT will be conducted prior to the commencement of the new legislation in March 2012. The Administration has undertaken to publicize the new offences under the Amendment Ordinance, information on IT, and some examples of commonly used medicinal drugs that may impair a person's ability to drive properly for reference by professional drivers. Channels of dissemination of such information may include broadcast of Announcements in the Public Interest on TV and Radio, display of banners and advertising boards at prominent locations at tunnel entrances/exits and footbridges, as well as advertisement on bus bodies, etc.

17. The Administration and the Subcommittee have not proposed to move any amendment to the two notices.

Advice sought

18. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 1
Legislative Council Secretariat
16 February 2012

**Subcommittee on Road Traffic (Impairment Test) Notice and Road
Traffic (Amendment) Ordinance 2011 (Commencement) Notice 2012**

Membership list

Chairman Hon Miriam LAU Kin-yee, GBS, JP

Members Dr Hon Philip WONG Yu-hong, GBS
Hon Andrew CHENG Kar-foo
Hon CHEUNG Hok-ming, GBS, JP
Hon CHAN Hak-kan
Hon WONG Sing-chi
Hon Tanya CHAN

(Total : 7 Members)

Clerk Ms Joanne MAK

Legal Adviser Mr Kelvin LEE

Date 19 January 2012