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Bills Committee on Road Traffic (Amendment) Bill 2011

Purpose

This paper reports on the deliberations of the Bills Committee on Road Traffic (Amendment) Bill 2011 (the Bills Committee).

Background

2. Drug driving poses serious road safety hazards. With a significant increase in the number of drug driving arrest cases in 2010, there have been public calls for effective measures to combat drug driving. According to the Administration, there were 84 arrest cases involving drug driving in 2010, which was more than seven times the number in 2009¹. In 2010, 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. Although it is an offence under existing section 39 of the Road Traffic Ordinance (Cap. 374) (RTO) 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 this offence to provide blood or other body fluid specimens for drug analysis. This makes a charge difficult to prove.

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

The Administration considers that there is an urgent need to introduce stricter controls and to provide corresponding enforcement powers for the Police to effectively combat drug driving.

The Bill

4. The Bill was introduced into the Legislative Council on 25 May 2011. The objects of the Bill include introducing stricter controls over drug driving, providing the Police with the necessary enforcement powers to combat drug driving and other related amendments.

5. The Bill seeks to amend RTO to -

- (a) create new offences in connection with driving motor vehicles after the consumption or use of drugs;
- (b) enhance the penalty of disqualification for the offence of causing death by dangerous driving;
- (c) provide procedures to obtain specimens of blood and urine for laboratory tests;
- (d) provide means to test for impairment by drugs and the presence of drugs in body fluids;
- (e) provide for temporary surrender of driving licences for specified contraventions;
- (f) specify different periods for completing driving improvement courses under different circumstances; and
- (g) make consequential and related amendments to RTO and its subsidiary legislation and to the Road Traffic (Driving-offence Points) Ordinance (Cap. 375).

The Bills Committee

6. At the House Committee meeting on 27 May 2011, Members formed a Bills Committee to scrutinize the Bill. The membership list of the Bills Committee is in **Appendix I**.

7. Under the chairmanship of Hon Miriam LAU, the Bills Committee has held six meetings with the Administration and received views from the public and representatives of various organizations (including the transport trades) at one of the meetings. A list of the organizations which have given views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

8. Bills Committee members in general support the legislative intent of the Bill to combat drug driving and favour the early implementation of the Bill. In the course of deliberation, some members of the Bills Committee have expressed concerns on the proposed penalties for the new drug driving offences, the adequacy of the proposed defence provision, as well as the administration of the preliminary drug tests and safeguards to prevent abuse of power by the Police.

New "zero-tolerance offence" (Clauses 14 & 19 of the Bill)

9. In view of the strong public sentiment regarding the irresponsible behaviour of driving after taking illicit drugs and the great dangers such acts pose to other road users, the Administration has proposed to introduce a new offence to prohibit driving after taking any "specified illicit drug" (referred to as "zero-tolerance offence"). Driving with any concentration of a specified illicit drug in blood or urine is an offence, even if the driver does not show any signs of being under the influence of these drugs. The penalties for the offence will be aligned with that for tier 3 drink driving offence². Under this newly created offence, "specified illicit drug" will be the following six common drugs of abuse –

² Please see Appendix III for details of the penalties.

- (a) Heroin (or any metabolite derived from heroine)
- (b) Ketamine
- (c) Methamphetamine (or methylamphetamine)
- (d) Cannabis (or any active ingredients of cannabis)
- (e) Cocaine (or any metabolite derived from cocaine)
- (f) 3,4-methylenedioxymethamphetamine (MDMA)

10. The above specified illicit drugs are either narcotics or psychotropic substances that could have serious adverse effects on a person's ability to drive. The Administration has advised that the list of "specified illicit drugs" as set out in Schedule 1A to RTO will be updated from time to time to reflect changes in drug abuse trends.

11. The Bills Committee has noted that the proposal on the "zero-tolerance offence" is generally supported by the community to combat driving after taking illicit drugs. Bills Committee members in general are supportive of the creation of the new "zero-tolerance offence" and agree that the new offence is an essential tool for effectively combating drug driving. The Bills Committee also supports the specification of the six illicit drugs proposed for the purpose of the offence.

Offences of driving under the influence of a specified illicit drug and driving under the influence of any other drug
(Clause 14 of the Bill)

12. The Bills Committee has noted that currently under section 39 of RTO, it is already 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 vehicle³. "Drugs" under this section include both illegal and legal drugs. However, as there is no provision to

³ The penalties for the offence under the existing section 39 of RTO are aligned with tier 3 drink driving offence. For details of the penalties, please refer to Appendix III.

require persons who are suspected to have contravened this section to provide blood or other body fluid specimens for laboratory drug analysis, a charge is difficult to prove.

13. It is proposed in the Bill to create a new self-contained provision in RTO to provide for the offence of driving under the influence of any drug (which includes a “specified illicit drug” and any drug other than a “specified illicit drug”), to such an extent as to be incapable of having proper control of the motor vehicle. Under the proposal, a person will commit the offence if his or her ability to drive properly is for the time being impaired, and if the concentration of the drug present in the person’s blood or urine would usually result in a person being unable to drive properly.

14. The Administration has advised that in order to protect the general driving public who have taken appropriate measures to avoid drug driving, a defence⁴ is proposed to be provided for a person who consumed or used the drug in accordance with the advice given by a healthcare professional or on the drug label, and who did not know and could not reasonably have known that the drug would render him or her incapable of having proper control of a motor vehicle if consumed or used in accordance with the advice. Furthermore, it is proposed that a preliminary drug test, such as an Impairment Test (IT)⁵, which is widely adopted in overseas jurisdictions to screen out persons who are grossly impaired by a drug to the extent of being incapable of properly controlling a vehicle should be introduced, so as to set a high threshold for assessing contravention of the offence.

15. The Bills Committee has noted that the penalties for driving under the influence of a drug other than a “specified illicit drug” will be aligned with tier 1 drink driving offence. If the drug involved is a ‘specified illicit drug’, the person will be subjected to much more severe penalties with minimum disqualification periods for first and subsequent convictions being set at 5 years and 10 years respectively.

⁴ The defence for the offence of driving under the influence of any other drug is elaborated in paragraphs 24-32.

⁵ Please see footnote 11 for details of IT.

16. In addition, in order to maximize the deterrent effect for driving under the influence of specified illicit drugs, it is proposed in the Bill that, if the person has previously been convicted of the same offence and, having regard to the circumstances under which the offence is committed and the behaviour of the person, the court is of the opinion that it is undesirable for the person to continue to be allowed to drive a motor vehicle, the court may order driving disqualification for life in addition to imposing the penalties provided for the offence.

17. A comparison table (**Appendix III**) is provided by the Administration showing the penalties for the new drug driving offences and existing serious traffic offences.

18. Bills Committee members in general support the current proposal in the Bill of stipulating stiffer penalties for the offence involving specified illicit drugs to send a clear message that the community does not tolerate driving with illicit drugs, and lighter penalties for the offence involving drugs other than the specified illicit drugs.

19. Some members including Hon LI Fung-ying and Hon IP Wai-ming have, however, suggested that driving under the influence of a specified illicit drug and driving under the influence of any other drug should be dealt with by different sections, so as to send a clear message to the community that these two behaviours are very distinct in nature and severity.

20. The Administration has advised that under the Bill, driving under the influence of a specified illicit drug and driving under the influence of any other drug already attract different penalties. Notwithstanding, the Administration has accepted the rationale behind members' suggestion and has agreed to deal with and present these two behaviours as two different offences in two different sections of RTO. The Administration will move Committee Stage amendments (CSAs) to that effect. The changes will be technical and will not change the original legislative intent.

Penalties for the driving under the influence of a specified illicit drug offence

(Clause 14 of the Bill)

21. The present proposal under the Bill is that the penalties on maximum imprisonment and maximum fine in respect of the category of drug driving offences (including the “zero-tolerance offence”, driving under the influence of a specified illicit drug, and driving under the influence of a drug other than a specified illicit drug) should be set at 3 years and \$25,000 respectively. Hon KAM Nai-wai has proposed that the penalties for the offence of driving under the influence of a specified illicit drug should be increased to a maximum fine of \$50,000 and a maximum term of imprisonment of 5 years, in order to enhance the deterrent effect⁶.

22. The Administration does not accept Hon KAM Nai-wai's proposal on the following grounds –

- (a) a drug other than a specified illicit drug covers a wide range of drugs, including dangerous drugs that have wide medicinal uses but are abused by users at the same time. If higher imprisonment term and fine are imposed for the driving under the influence of a specified illicit drug offence but not for the driving under the influence of any other drug offence, people may switch from taking a specified illicit drug to taking non-specified illicit drug(s), which may be equally dangerous, to avoid the harsher penalties;
- (b) the proposed imprisonment term and fine in respect of drug driving offences are not only consistent amongst those offences, but are also the same as the penalties in respect of drink driving offences as well as the offence of dangerous driving⁷. These offences are similar in severity in terms of consequences and driving manner (all involve driving manner which may endanger the drivers

⁶ Hon KAM Nai-wai's proposal also includes to increase correspondingly the penalties for refusal to undergo preliminary drug tests, or to provide blood and/or urine specimens for analysis without reasonable excuse, to eliminate any incentive for a person to circumvent the law.

⁷ The offence of dangerous driving attracts maximum penalties of 3 years of imprisonment and \$25,000 in fine. The more severe offences of dangerous driving causing grievous bodily harm (DDCGBH) and dangerous driving causing death (DDCD) attract higher imprisonment and fine penalties (7 years and \$50,000 for DDCGBH and 10 years and \$50,000 for DDCD).

themselves and other road users). To set higher imprisonment term and fine for the driving under the influence of a specified illicit drug offence but not the others will affect the relativity and proportionality of the penalties; and

- (c) drivers who drive under the influence of specified illicit drug will be prosecuted for offences under the Dangerous Drugs Ordinance (Cap. 134) such as possession of dangerous drug or trafficking in dangerous drug if there is evidence, and be subject to stringent penalties⁸. This should serve as a sufficient deterrent.

23. The Administration has pointed out that the penalties proposed under the Bill in respect of the drug driving offences are amongst the most severe when compared with similar offences in overseas jurisdictions. Nevertheless, the Administration has agreed that it will review the effectiveness of the drug driving provisions after implementation and consider further enhancement or changes as necessary.

Defence for driving under the influence of any other drug
(Clause 14 of the Bill)

24. At the public hearing of the Bills Committee, the transport trades expressed concern that the medicinal drugs they took might affect or impair driving to a certain extent and they might therefore commit the drug driving offence easily. The trades were worried that drivers might be caught inadvertently if they were not aware that the medicinal drugs they took might affect or impair driving.

25. To address the concerns, the Administration has advised that 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

⁸ According to the Dangerous Drugs Ordinance (Cap.134), a person who is convicted of possession of dangerous drug offence is liable to a fine of \$1 million and imprisonment of 7 years. A person who is convicted of trafficking in dangerous drug offence is liable to a fine of \$5 million and imprisonment for life.

or proprietary Chinese medicine registered under relevant Hong Kong laws. It is a defence for a person who, having consulted medical advice, genuinely does not know and would not reasonably have known that the medicinal drugs he takes would affect or impair driving. “Medical advice” will cover 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.

26. The Administration has further advised that most medicinal drugs, if taken in accordance with medical advice, will not affect driving to the extent of being unable to properly control a vehicle for most people. However, some medicinal drugs, e.g. those containing antihistamine (used for allergic diseases and alleviation of cold symptoms) may cause inability to concentrate and drowsiness. The Administration has advised that suitable drug labelling requirement is already in place. The Pharmacy and Poisons Ordinance and Regulations stipulate that medicines containing antihistamine should not be sold unless they are labelled with the words “*Caution. This may cause drowsiness. If affected, do not drive or operate machinery*” in both English and Chinese. These drugs are mainly over-the-counter medicines. For these medicines, the Administration considers that the labelling requirement would ensure that the purchaser would be warned about the important effect of the medicines even if he/she purchases the drugs for self-medication.

27. According to the Administration, drugs other than antihistamines which are commonly known to cause drowsiness are prescription drugs to be dispensed by doctors, pharmacists and dentists. Whether the patients should drive after taking the drugs concerned requires professional judgment and advice in individual cases. Moreover, there are individual variations to the effects of different medications. Healthcare professionals should advise the individual patients about the possible effect of a particular medicine in affecting driving according to the patient’s condition and drug history. The Administration has pointed out that under the Code of Professional Conduct for the Guidance of Registered Medical Practitioners issued by Medical Council of Hong Kong, and the Code of Professional Discipline for the Guidance of Dental Practitioners in Hong Kong issued by the Dental Council of Hong Kong, it is provided that doctors and dentists shall properly label all medicines they dispense,

including the dosage to be administered and precautions where applicable.

28. Hon LI Fung-ying has expressed concern about whether the above labelling requirements would be applicable for unpacked medicines sold by dispensaries in small quantities. The Administration has advised that dispensaries and pharmacists are subjected to statutory requirements relating to the selling and labelling of medicines and they are required to ensure that the purchasers would be warned about any important side-effects of the medicines they sell.

29. Hon LI Fung-ying has also pointed out that drivers of cross-boundary vehicles have to drive on the Mainland and they might receive medical treatment there. She is concerned that the medicines purchased or dispensed by doctors on the Mainland are not subject to the statutory drug labelling requirements in Hong Kong and therefore may not contain any or detailed warnings on their side-effects in affecting driving. She has asked whether the proposed statutory defence can be expanded to also cover medicines purchased or dispensed by doctors on the Mainland.

30. The Administration has responded that 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 it is not appropriate to expand the statutory defence to cover drugs obtained outside Hong Kong. That notwithstanding, the court will consider all relevant facts and circumstances of a case, including the fact that the accused has taken drugs on the Mainland for medical purpose, when dealing with such charges. Moreover, IT (a preliminary drug test) will help 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 a person is unable to properly control a vehicle. The Administration has advised that professional drivers do not have to be overly concerned.

31. Hon Miriam LAU has expressed the view that, notwithstanding the Administration's explanation that the court will consider all relevant facts, it should be noted that legal proceedings exert tremendous pressure

on the defendant and therefore the decision to charge must not be made lightly. She has requested the Administration to explain the considerations when deciding whether to prosecute in drug driving cases, and whether the prosecution would be prepared to give the suspect the benefit of the doubt in the situation where the Police are not able to verify the authenticity of the information provided by the accused driver.

32. The Administration has advised that according to the Prosecutions Division of the Department of Justice (DoJ), 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.

Preliminary drug tests (Clause 14 of the Bill)

33. In order to effectively enforce drug driving offences, it is proposed in the Bill to include provisions to empower the Police to require a person who is suspected of driving after taking an illicit drug or under the influence of a drug to undergo the preliminary drug test(s). According to the Administration, the preliminary drug tests proposed to be introduced, namely Drug Influence Recognition Observation (DIRO)⁹, Rapid Oral Fluid Test (ROFT)¹⁰ and IT¹¹, are drawn up with reference to the practices

⁹ DIRO will normally be carried out on 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.

¹⁰ 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.

of overseas jurisdictions that are experienced in combating drug driving.

34. The Bills Committee has noted that normally, in terms of procedures, after conducting DIRO, if the police officer is of the opinion that the driver is under the influence of drug, the police officer may require the driver to undergo a ROFT or/and IT. If the police officer, after conducting DIRO, is of the opinion that the person is not under the influence of drug, or no specified illicit drug is detected after conducting ROFT, the person will be released unless another offence has been detected. The Administration has advised that ROFT is capable of detecting drugs at low levels, and is an effective preliminary test for enforcing the “zero-tolerance offence”. The Administration has informed the Bills Committee that 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 use in Hong Kong, initially, IT will be deployed as the main, detailed preliminary drug test for drug driving offences. ROFT will be introduced when a suitable device is found and validated for use in Hong Kong.

35. Hon Andrew CHENG has urged the Administration to make available reliable ROFT devices as early as possible to enable the Police to conduct random drug tests which, in his view, would be an effective tool to deter drug driving. He considers that ROFT devices would provide objective standards for drug driving cases and avoid controversy in implementation. The Administration has explained that ROFT is a newly developed technology, and its accuracy varies to a great extent depending on the product and type of drugs being tested. At the Bills Committee meeting on 19 October 2011, the Administration informed members that a supplier had recently developed a prototype device that could test the six specified illicit drugs as proposed in the Bill. The Hospital Authority planned to conduct tests on the prototype to determine its accuracy and

¹¹ IT will comprise the following five tests :

- (a) Eye Examination Test, consisting of pupillary examination and Gaze Nystagmus;
- (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 loudly according to instructions; and
- (e) Finger to Nose Test: to test a person’s depth of perception and ability to balance and process instructions.

IT will only be performed at a police station by an authorized police officer. The process will be video-taped.

reliability shortly, which was estimated to take about half a year to complete.

36. The Bills Committee considers that random drug tests should be an effective tool to deter drug driving and notes that the Bill will empower the Police to carry out random drug tests. It is proposed that the provision on random drug testing should only commence at a suitable time having regard to the prevalence of drug driving, availability and reliability of ROFT devices and other relevant factors, i.e. the commencement date for this provision may be later than the commencement date for the other provisions of the Bill.

37. In response to members' concerns on the enforcement procedures, the Administration has explained that a police officer is empowered under the Bill to require a driver to undergo one or more preliminary drug test(s), if there is reasonable cause to suspect that the driver –

- (a) is driving after the consumption or use of a drug;
- (b) is involved in a traffic accident; or
- (c) has committed a traffic offence.

38. The Administration has advised that only police officers who are properly trained to conduct the preliminary drug tests and authorized by the Commissioner of Police will be tasked to enforce drug driving duties. It is proposed in the Bill that a driver who, without reasonable excuse, fails to undergo a preliminary drug test commits an offence.

39. Bills Committee members have asked about the overseas experience of application of IT. The Administration has advised that as a screening test, IT has a high accuracy rate for positive cases. In the United Kingdom (UK), in all cases which were assessed to be impaired by drug in roadside impairment tests, drug was confirmed to have been taken by the persons concerned in 94% of the cases. The corresponding figure for Victoria, Australia is 95%. According to the Administration, Australia and Belgium conduct both ROFT and IT, while UK and New Zealand only conduct IT. The Administration has not learnt of any major problems

encountered by these jurisdictions in enforcing drug driving offences.

Safeguards on the enforcement procedures

(Clause 14 of the Bill)

40. Bills Committee members have expressed concern about the safeguards to be taken on the drug driving enforcement procedures and 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 enforce drug driving duties. 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 more senior in rank than the officer conducting DIRO;
- (d) all ITs will be performed in an indoor environment, such as police stations and will be videotaped; and
- (e) detailed procedures and special instructions will be drawn up and provided in the police orders.

41. At the request of the Bills Committee, the Hong Kong Police Force have provided a set of general guidelines prepared 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 for Members' reference (**Appendix IV**).

Taking blood specimen from a person incapable of consenting
(Clause 14 of the Bill)

42. The Bills Committee notes that 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. As there are circumstances that a suspected drink or drug driver may not be capable of providing a valid consent, it is proposed in the Bill (section 39C(11A) and (11B) on drink driving; and section 39P(1) and (2) on drug driving) that a medical practitioner may, at the request of a police officer and 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.

43. Some members including Hon Miriam LAU and Hon KAM Nai-wai have expressed concern that in actual operation, a police officer, who has not undergone medical training, might not be in a position to assess whether or not the incapacity of the suspect to give consent is due to medical reasons. The Bills Committee has requested that the relevant provisions be reviewed.

44. The Administration has advised that the proposed provisions in the Bill are modelled on relevant provisions of the Road Traffic Act of UK, which have been introduced since 2002. To the Administration's knowledge, the provisions work smoothly and no major problems or challenges have been reported so far. The Administration has further explained that, if a driver suspected of drink driving or drug driving appears to 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 trained such that they would possess the required knowledge, skills and experience in differentiating a person showing a medical condition from a person not showing a medical condition. Moreover, upon request by a police officer, a medical practitioner will take a blood specimen from the suspected person only if he thinks fit. If the medical practitioner does not think it fit to take blood specimens from the driver, no blood specimen will be taken. Besides, the blood specimens will not be subjected to laboratory analysis unless consent is obtained from the driver when he becomes capable of giving consent. The Administration considers that the new provisions draw a good balance between the rights of the suspect and the public interest to be served, and that the relevant provisions are in order.

Parameters for the court on the ordering of life disqualification
(Clauses 6 & 14 of the Bill)

45. Under Clauses 6 and 14 of the Bill, it is proposed that parameters be set for a court to consider, on convicting a person under the two very serious offences of dangerous driving causing death¹² and driving under the influence of a specified illicit drug, 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.

46. The Administration has explained that the proposal of providing the above parameters is a response to recent public calls for more stringent penalties, especially in terms of disqualification from driving, to be

¹² Please see paragraphs 51-53 for details of the proposal.

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 set the minimum disqualification period for the offence of driving under the influence of a specified illicit drug at 5 years on first conviction, and 10 years on subsequent conviction as well as the above-mentioned parameters to order life disqualifications, and to increase the minimum disqualification period for the offence of dangerous driving cause death to the same level, would help to achieve the above objective.

47. Hon Miriam LAU has expressed concern that the proposal of providing the above parameters might have the unintended effect that, where such a provision is absent in other road traffic legislation, it might be construed to mean that the court has no power to order life disqualification where necessary. To address the concerns, the legal adviser to the Bills Committee has suggested that if members wish to make it clear that the parameters in the proposed sections 36(2BA)¹³ and 39J(4) should not affect the imposition of life-disqualification on any other traffic offences that are provided in other ordinances, these sections may be amended by adding words to the effect that each subsection is not to be construed as limiting the power of the court or magistrate to impose life disqualification under other road traffic legislation.

48. The Administration has consulted DoJ and advised that, while the parameters in the proposed sections 36(2BA) and 39J(4) may be relevant to construing other RTO provisions, in the absence of a clear intention in other legislation, the parameters are not relevant to construing provisions in other legislation. The Administration considers that the suggested amendment may not clarify the position any further.

Alternate offences (Clause 14 of the Bill)

49. 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

¹³ Will be renumbered by way of CSA as section 36(2AB).

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 of 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 legal advisor to the Bills Committee has suggested amending 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.

50. The Administration considers that the suggestion will facilitate prosecutions, as the prosecution will not be required to lay 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, the Administration has further suggested 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, driving under the influence of a specified illicit drug, driving under the influence of any drug other than a specified illicit drug and the zero-tolerance offence. The Administration has agreed to move CSAs for this purpose.

Adjusting the penalties for dangerous driving causing death offence
(Clause 6 of the Bill)

51. At present, a person convicted of dangerous driving causing death is liable to a maximum fine of \$50,000 and 10 years of imprisonment. The person is also liable to be disqualified from driving for a period of not less than 2 years for a first conviction and 5 years for a subsequent conviction. Following the introduction of the offence of driving under the influence of a specified illicit drug with longer disqualification periods, the Administration considers that there is a need to lengthen the disqualification period for the dangerous driving causing death offence having regard to the seriousness of this offence. It is proposed in the Bill to increase the disqualification period to not less than 5 years and 10 years

for a first conviction and a subsequent conviction respectively. Furthermore, similar to the driving under the influence of a specified illicit drug offence, it is proposed to provide in the legislation that the court may make an order disqualifying a subsequent offender from holding or obtaining a driving licence for life. The Administration considers that the proposed increase in the driving disqualification penalty for the dangerous driving causing death offence is necessary in order to maintain the relativity among the penalties for different traffic offences.

52. The Bills Committee notes that the transport trades have expressed the view that the Administration should not seek to introduce legislative amendments to increase the minimum disqualification periods for dangerous driving offences because, different from drivers who knowingly drive after taking illicit drugs, drivers charged with dangerous driving offences may not be personally responsible for the traffic accidents concerned, which could be attributed to factors beyond the driver's control such as the environmental factor. Moreover, the trades consider that the Administration should separately introduce and consult the public on legislative amendments to adjust the penalties for the dangerous driving causing death offence, instead of seeking to increase the penalties under the Bill which seeks to introduce stricter controls over drug driving.

53. The Administration has, however, advised that the dangerous driving causing death offence is indeed a very serious offence. Having regard to the proposed high level of disqualification penalty for the new offence of driving under the influence of a specified illicit drug, the Administration maintains its views that it is necessary to increase, correspondingly, the disqualification penalty for the dangerous driving causing death offence to maintain the relativity among the penalties for different traffic offences, and it is considered appropriate to introduce the relevant provisions under the Bill.

Other amendments

(Clause 14 of the Bill)

54. The Administration has taken the opportunity to propose amendments to the Chinese text of existing sections 39A(4), 39A(5) and 39B(10)(b) to make the text reflect the legislative intent as expressed by

the corresponding English text more accurately. The Administration has advised that the amendments are also proposed for consistency with similar provisions to be added by the Bill. After taking into account members' views, the Administration will propose certain CSAs to further enhance the readability of the Chinese text proposed. The final Chinese version of sections 39A(4), 39A(5) will read –

- "(4) 任何人如證明以下情況，即當作未有掌管汽車：在關鍵時間，按當時情況，只要該人的呼氣、血液或尿液中的酒精比例，仍相當可能超過訂明限度，該人當時便不可能駕駛該汽車。
- (5) 法庭或裁判官在裁定上述的人是否如第(4)款所述當時不可能駕駛有關汽車時，可不理會該人所受的任何損傷及該車輛所受的任何損害。"

55. For section 39B(10)(b), the final Chinese version will read -

- "(10) 任何人為檢查呼氣測試而提供的樣本，除非—
 - (a)；及
 - (b) 其提供的方式，使該測試得以令人滿意地達到其目的，否則該人即屬沒有提供該樣本。"

56. The Administration has advised that similar provisions proposed to be amended or added by the Bill will be amended accordingly by way of CSAs for the sake of consistency.

Committee Stage amendments

57. Apart from the major CSAs highlighted above, the Administration will also move minor and consequential amendments. A set of CSAs proposed by the Administration and agreed by the Bills Committee is in **Appendix V**.

Resumption of Second Reading debate

58. Subject to the moving of the proposed CSAs by the Administration, the Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting on 14 December 2011.

Advice Sought

59. Members are invited to note the deliberations of the Bills Committee.

Council Business Division 1
Legislative Council Secretariat
1 December 2011

Bills Committee on Road Traffic (Amendment) Bill 2011

Membership list

Chairman	Hon Miriam LAU Kin-yee, GBS, JP
Members	Dr Hon Philip WONG Yu-hong, GBS Hon LAU Kong-wah, JP Hon Andrew CHENG Kar-foo Hon LI Fung-ying, SBS, JP Hon CHEUNG Hok-ming, GBS, JP Hon KAM Nai-wai, MH Hon CHAN Hak-kan Dr Hon LEUNG Ka-lau Hon WONG Sing-chi Hon IP Wai-ming, MH Hon Tanya CHAN (Total : 12 Members)
Clerk	Ms Joanne MAK
Legal Adviser	Miss Evelyn LEE

Bills Committee on Road Traffic (Amendment) Bill 2011

**List of organisations/individuals that have submitted views to the
Bills Committee**

I. Organizations which have made oral representations to the Bills Committee

1. Tai Wo Motors Limited
2. Association of New Territories Radio Taxicabs Limited
3. China Hong Kong and Macau Boundary Crossing Bus Association Limited
4. The Chartered Institute of Logistics & Transport in Hong Kong
5. Hong Kong Kowloon Taxi & Lorry Owners' Association Limited
6. Public Omnibus Operators Association
7. Traffic Services Employees Association
8. Motor Transport Workers General Union (Public Light Bus Branch)
9. United Friendship Taxi Owners & Drivers Association Limited
10. Motor Transport Workers General Union
11. Transport Industry Committee of the Federation of Hong Kong and Kowloon Labour Unions
12. Hong Kong Motor Car Driving Instructors' Association Limited
13. Hong Kong Waste Disposal Industry Association
14. Taxi & P.L.B. Concern Group
15. Motor Transport Workers General Union (Taxi Driver Branch)
16. Motor Transport Workers General Union (Kowloon Bus Branch)
17. Urban Taxi Drivers Association Joint Committee Company Limited

II. Organizations/individuals providing submissions only

1. Mr YEUNG Wai-sing, Eastern District Council Member
2. H.K. Vehicle Transportation Association
3. Hong Kong Doctors Union
4. The Hong Kong Medical Association
5. Federation of Hong Kong Industries
6. The Society of Hospital Pharmacists of Hong Kong
7. Federation of Hong Kong Transport Work Organizations

**Penalties for the proposed main drug driving offences
and existing serious traffic offences**

Traffic Offences	Maximum Fine (\$)	Maximum Imprison- ment	Minimum Driving Disqualification		Parameters for the Court
			First conviction	Subsequent conviction ¹	
New Drug Driving Offences					
(1) Driving with any concentration of a specified illicit drug ² (new s.39K)	(25,000)	(3 years)	(2 years)	(5 years)	-
(2) Driving under the influence of – (a) a specified illicit drug ² (b) any other drug (new s.39J)	(25,000) (25,000)	(3 years) (3 years)	(5 years) (6 months)	(10 years) (2 years)	(Life) ³ -
(3) Failing to undergo a Rapid Oral Fluid Test or Impairment Test without reasonable excuse (new s.39N)	(25,000)	(3 years)	(5 years)	(10 years)	-
(4) Failing to provide specimens of blood or urine for analysis without reasonable excuse (new s.39R)	(25,000)	(3 years)	(5 years)	(10 years)	-
Drink Driving Offences					
(5) Driving under the influence of drink (s.39)	25,000	3 years	2 years	5 years	-
(6) 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	-
(7) Failing to provide a specimen of breath for screening breath test without reasonable excuse (s.39B)	25,000	3 years	2 years	5 years	-
(8) 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	-

Traffic Offences	Maximum Fine (\$)	Maximum Imprison- ment	Minimum Driving Disqualification		Parameters for the Court
			First conviction	Subsequent conviction ¹	
Dangerous Driving Offences					
(9) Dangerous driving causing death (s.36) (a) Non-aggravated	50,000	10 years	2 years (5 years)	5 years (10 years)	(Life) ³
(b) Aggravated ⁴	75,000	15 years	3 years (7.5 years)	7.5 years (15 years)	(Life) ³
(10) Dangerous driving causing grievous bodily harm (s.36A) (a) Non-aggravated	50,000	7 years	2 years	5 years	-
(b) Aggravated ⁴	75,000	10.5 years	3 years	7.5 years	-
(11) Dangerous driving (s.37) (a) Non-aggravated	25,000	3 years	6 months	2 years	-
(b) Aggravated ⁴	37,500	4.5 years	9 months	3 years	-

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

Notes

1 Subsequent conviction –

- For drug driving offences (i.e. (1), (2), (3) or (4)), a subsequent conviction means a conviction subsequent to a first conviction of any of these drug driving offences.
- For the drink driving offences (i.e. (5), (6), (7) or (8)), a subsequent conviction means a conviction subsequent to a first conviction of any of these drink driving offences, and for offence (6), regardless of the blood alcohol level on the first conviction.
- For dangerous driving offences (i.e. (9), (10), or (11)), a subsequent conviction means a conviction subsequent to a first conviction of the same offence.

2 The specified illicit drugs are –

- Heroin (or any metabolite derived from heroin)
- Ketamine
- Methamphetamine
- Cannabis (or any active ingredient of cannabis)
- Cocaine (or any metabolite derived from cocaine)
- 3,4-Methylenedioxymethamphetamine (MDMA)

3 Parameters for ordering life disqualification

A court or magistrate may, on convicting a person, order that the person be disqualified 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.

4 Aggravated penalties –

A person commits the dangerous driving offences (i.e. (12) (13), or (14)) 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 sees fit that both imprisonment and disqualification terms should be implemented concurrently.

**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.

Road Traffic (Amendment) Bill 2011

Committee Stage

Amendments to be moved by the Secretary for Transport and Housing

<u>Clause</u>	<u>Amendment Proposed</u>
4	By adding “39KA,” after “39K,”.
5(1)	By deleting “(2BA)” and substituting “(2AB)”.
5(2)	By adding “39KA (other than subsections (2), (3), (4) and (5)),” before “39L,”.
6(3)	By deleting “(2BA)” and substituting “(2AB)”.
6(9)	By deleting “(2BA)” and substituting “(2AB)”.
6	By adding— <div style="margin-left: 40px;">“(10) Section 36(10)— Repeal “or 39A” Substitute “, 39A, 39J, 39K or 39KA”.”.</div>
7	(a) By renumbering the clause as clause 7(1). (b) By adding— <div style="margin-left: 40px;">“(2) Section 36A(16)—</div>

Repeal

“or 39A”

Substitute

“, 39A, 39J, 39K or 39KA”.”.

8 (a) By renumbering the clause as clause 8(1).

(b) By adding—

“(2) Section 37(9)—

Repeal

“or 39A”

Substitute

“, 39A, 39J, 39K or 39KA”.”.

9(3) In the Chinese text, in the proposed section 39(4), by deleting everything after “以下情況，” and substituting “即當作未有掌管汽車：在關鍵時間，按當時情況，只要該人仍受酒類影響，程度達到沒有能力妥當地控制該汽車，該人當時便不可能駕駛該汽車。”.

9(4) By deleting everything after “**Repeal**” and substituting—

““是否曾有一如第(4)款所述的相當可能”

Substitute

“上述的人是否如第(4)款所述當時不可能駕駛有關汽車”.”.

9 By adding—

“(5) After section 39(5)—

Add

“(6) On the trial of a person charged with an offence under subsection (1), the person charged may be acquitted of the offence under subsection (1) and

be found guilty of one or more offences under section 37 or 38.”.”.

- 10(1) In the proposed section 39A(4), by deleting everything after “以下情況，” and substituting “即當作未有掌管汽車：在關鍵時間，按當時情況，只要該人的呼氣、血液或尿液中的酒精比例，仍相當可能超過訂明限度，該人當時便不可能駕駛該汽車。”.
- 10(2) By deleting everything after “**Repeal**” and substituting—
 ““是否曾有一如第(4)款提述的相當可能”
Substitute
 “上述的人是否如第(4)款所述當時不可能駕駛有關汽車”.”.
- 10 By adding—
 “(3) After section 39A(5)—
Add
 “(6) On the trial of a person charged with an offence under subsection (1), the person charged may be acquitted of the offence under subsection (1) and be found guilty of one or more offences under section 37 or 38.”.”.
- 11(2) In the proposed section 39B(10)(b), by deleting “令該測試得以在令人滿意的情況下” and substituting “使該測試得以令人滿意地”.
- 12(5) By deleting the proposed section 39C(11A)(b)(i) and substituting—
 “(i) if it is a person referred to in paragraph (a)(i), he or she may be incapable of providing a specimen of breath and of giving a valid consent to the taking of a specimen of blood, and if it is a person referred to in paragraph (a)(ii), he or she may be incapable of giving a valid consent to the taking of a specimen of blood; and”.

- 12(8) In the proposed section 39C(19)(b), by deleting “令該分析或化驗得以在令人滿意的情況下” and substituting “使該分析或化驗得以令人滿意地”.
- 14
- (a) In the proposed section 39J, in the heading, by deleting “**any**” and substituting “**specified illicit**”.
 - (b) In the proposed section 39J(1), by adding “specified illicit” after “influence of a”.
 - (c) In the proposed section 39J(1)(b)(iv), by adding “39KA,” after “39K,”.
 - (d) In the proposed section 39J(3), by deleting everything after “to be disqualified—” and substituting—
 - “(a) for a first conviction, is a period of not less than 5 years; and
 - (b) for a subsequent conviction, is a period of not less than 10 years.”.
 - (e) In the proposed section 39J(4), by deleting “for the offence of driving or attempting to drive, or being in charge of, a motor vehicle on any road while he or she is under the influence of a specified illicit drug to such an extent as to be incapable of having proper control of the motor vehicle”.
 - (f) In the proposed section 39J(5)(a), by deleting “not less than the relevant minimum period” and substituting “of not less than 5 years”.
 - (g) In the proposed section 39J(5)(b), by deleting “not less than the relevant minimum period” and substituting “of not less than 10 years”.
 - (h) In the proposed section 39J(6)(a), by deleting “less than the relevant minimum period” and substituting “of less than 5

years”.

- (i) In the proposed section 39J(6)(b), by deleting “less than the relevant minimum period” and substituting “of less than 10 years”.
- (j) In the proposed section 39J(7), by adding “39KA,” after “39K,”.
- (k) In the proposed section 39J(8), by adding “specified illicit” after “influence of a”.
- (l) In the proposed section 39J(9), in the Chinese text, by deleting everything from “是否存在” to “有關” and substituting “上述的人是否如第(8)款所述當時不可能駕駛有關汽車時，可不理會該人所受的任何損傷及該”.
- (m) In the proposed section 39J(10), by adding “specified illicit” after “influence of a”.
- (n) In the proposed section 39J(10)(b), by deleting “drug or of the combination of drugs present in the person’s blood or urine” and substituting “specified illicit drug or of the combination of such drugs present in the person’s blood or urine and to which the charge relates”.
- (o) By deleting the proposed section 39J(11).
- (p) By adding before the proposed section 39J(12)(a)—
 - “(aa) the specified illicit drug or the combination of such drugs found in the person’s blood or urine and to which the charge relates was lawfully obtained;”.
- (q) In the proposed section 39J(12)(a), by adding “specified illicit” after “the lawfully obtained”.
- (r) In the proposed section 39J(12)(b), in the Chinese text, by deleting “藥物或該藥物” and substituting “指明毒品或指明毒品”.

- (s) In the proposed section 39J(13), by deleting “under subsection (1) with driving or attempting to drive, or being in charge of, a motor vehicle on any road while under the influence of a specified illicit drug to such an extent as to be incapable of having proper control of the motor vehicle” and substituting “with an offence under subsection (1)”.
- (t) In the proposed section 39J(13)(a), by deleting “and” and substituting “but may”.
- (u) In the proposed section 39J(13)(b), by deleting everything after “acquitted of the” and substituting “offence under subsection (1) but may be found guilty of an offence under section 39KA.”.
- (v) In the proposed section 39J, by adding—
 - “(13A) On the trial of a person charged with an offence under subsection (1), the person charged may be acquitted of the offence under subsection (1) and be found guilty of one or more offences under section 37 or 38 and, to avoid doubt, subsection (12) does not apply to those offences.
 - (13B) For the purposes of subsection (12), a specified illicit drug is lawfully obtained if it is a specified illicit drug that is prescribed for or administered or supplied to an accused person by a healthcare professional.”.
- (w) In the proposed section 39J(14), in the definition of ***advice***, by deleting everything after “that is referred to in” and substituting “subsection (13B), written or oral advice given to an accused person by the healthcare professional who prescribed, administered or supplied the drug;”.
- (x) In the proposed section 39J(14), in the definition of ***healthcare professional***, by deleting paragraph (c).
- (y) In the proposed section 39J(14), in the definition of ***healthcare***

professional, in paragraph (e), by deleting “, (c)”.

- (z) In the proposed section 39J(14), by deleting the definitions of *lawfully obtained drug* and *relevant minimum period*.
- (za) In the proposed section 39K(1)(b)(iv), by adding “39KA,” after “39J,”.
- (zb) In the proposed section 39K(5)(a), in the English text, by deleting “he or she has attended and completed a” and substituting “the person has attended and completed the”.
- (zc) In the proposed section 39K(5)(b), in the English text, by deleting “he or she has attended and completed a” and substituting “the person has attended and completed the”.
- (zd) In the proposed section 39K(6), by adding “39KA,” after “39J,”.
- (ze) In the proposed section 39K(7), by deleting everything after “to prove that—” and substituting—
 - “(a) if only one specified illicit drug was present in his or her blood or urine, that drug; or
 - (b) if more than one specified illicit drug was present in his or her blood or urine, every such drug,

was a specified illicit drug that was prescribed for or administered or supplied to the person by a healthcare professional.”.
- (zf) In the proposed section 39K(8), in the Chinese text, by deleting everything after “以下情況，” and substituting “即視為未有掌管汽車：在關鍵時間，按當時情況，只要該人的血液或尿液含有任何濃度的指明毒品，該人當時便不可能駕駛該汽車。”.
- (zg) In the proposed section 39K(9), in the Chinese text, by deleting everything from “是否存在” to “有關” and substituting “上述的人是否如第(8)款所述當時不可能駕駛有關汽車時，可不

理會該人所受的任何損傷及該”。

(zh) In the proposed section 39K, by adding—

“(9A) On the trial of a person charged with an offence under subsection (1), the person charged may be acquitted of the offence under subsection (1) and be found guilty of one or more offences under section 37 or 38 and, to avoid doubt, subsection (7) does not apply to those offences.”.

(zi) In the proposed section 39K(10), in the Chinese text, in the definition of *first conviction*, by deleting the full stop and substituting a semicolon.

(zj) In the proposed section 39K(10), by adding—

“*healthcare professional* (醫護專業人員) has the meaning given by section 39J(14);”.

(zk) By adding—

“39KA. Driving motor vehicle without proper control under influence of drug other than specified illicit drug

(1) A person who drives or attempts to drive, or is in charge of, a motor vehicle on any road while he or she is under the influence of a drug other than a specified illicit drug (*non-specified drug*) to such an extent as to be incapable of having proper control of the motor vehicle commits an offence and is liable—

(a) on conviction on indictment, to a fine at level 4 and to imprisonment for 3 years; and

(b) on summary conviction—

(i) on a first offence under this subsection, to a fine at level 3 and to imprisonment for 6 months;

(ii) subsequent to a conviction on indictment under this subsection, to a fine at level 4 and to imprisonment for 12 months;

(iii) subsequent to a summary conviction under this subsection, to a fine at level 4 and to

imprisonment for 12 months; or

- (iv) subsequent to a conviction under section 39J, 39K, 39N(1) or 39R, to a fine at level 4 and to imprisonment for 12 months.
- (2) If a court or magistrate convicts a person of an offence under subsection (1), the court or magistrate must order that the person be disqualified in accordance with subsection (3) or (4) unless the court or magistrate for special reasons orders that the person be disqualified for a shorter period or that the person not be disqualified.
- (3) Subject to subsection (4), the period for which the person is to be disqualified—
 - (a) for a first conviction, is a period of not less than 6 months; and
 - (b) for a subsequent conviction, is a period of not less than 2 years.
- (4) If the court or magistrate has ordered a person to attend and complete a driving improvement course under section 72A(1A), the person is to be disqualified—
 - (a) for a first conviction, for a period of not less than 6 months, or until the person has attended and completed the course at his or her own cost, whichever is the later; and
 - (b) for a subsequent conviction, for a period of not less than 2 years, or until the person has attended and completed the course at his or her own cost, whichever is the later.
- (5) For the purposes of subsection (2), a person to whom subsection (4) applies is disqualified for a shorter period if the period for which he or she is disqualified—
 - (a) for a first conviction, is a period of less than 6 months, or until the person has attended and completed the driving improvement course at his or her own cost, whichever is the later; and
 - (b) for a subsequent conviction, is a period of less than 2 years, or until the person has

attended and completed the driving improvement course at his or her own cost, whichever is the later.

- (6) The court or magistrate may deal with the offence as a first offence, or the conviction of an offence as a first conviction, if, as at the date on which the offence was committed, at least 5 years have passed since the person's last conviction under subsection (1) or section 39J, 39K, 39N(1) or 39R.
- (7) A person is taken not to have been in charge of a motor vehicle if he or she proves that at the material time the circumstances were such that there was no likelihood of the person's driving the motor vehicle so long as he or she remained under the influence of a non-specified drug to such an extent as to be incapable of having proper control of the motor vehicle.
- (8) The court or magistrate may, in determining whether there was such a likelihood as is mentioned in subsection (7), disregard any injury to the person and any damage to the motor vehicle.
- (9) For the purposes of subsection (1), a person is under the influence of a non-specified drug to such an extent as to be incapable of having proper control of the motor vehicle if—
 - (a) the person's ability to drive properly is for the time being impaired; and
 - (b) the concentration of the non-specified drug or of the combination of such drugs present in the person's blood or urine and to which the charge relates would usually result in a person being unable to drive properly.
- (10) It is a defence for a person charged under subsection (1) to prove that—
 - (a) the non-specified drug or the combination of such drugs found in the person's blood or urine and to which the charge relates was lawfully obtained;
 - (b) he or she did not know and could not reasonably have known that the lawfully obtained non-specified drug or the combination of such drugs found in the

blood or urine would render him or her incapable of having proper control of a motor vehicle if consumed or used in accordance with advice; and

- (c) he or she consumed or used that drug or combination of those drugs in accordance with that advice.
- (11) On the trial of a person charged with an offence under subsection (1), the person charged may be acquitted of the offence under subsection (1) and be found guilty of one or more offences under section 37 or 38 and, to avoid doubt, subsection (10) does not apply to those offences.
- (12) For the purposes of subsection (10), a non-specified drug is lawfully obtained if it is—
- (a) a non-specified drug that is prescribed for or administered or supplied to an accused person by a healthcare professional;
 - (b) a non-specified drug that is a pharmaceutical product as defined by section 2(1) of the Pharmacy and Poisons Ordinance (Cap. 138)—
 - (i) that is registered as mentioned in regulation 36 of the Pharmacy and Poisons Regulations (Cap. 138 sub. leg. A); and
 - (ii) for the sale of which a prescription is not required by Hong Kong law; or
 - (c) a non-specified drug that is a proprietary Chinese medicine, as defined by section 2(1) of the Chinese Medicine Ordinance (Cap. 549), that is registered under section 121 of that Ordinance.
- (13) In this section—

advice (指示) means, in relation to a drug that is referred to in—

- (a) subsection (12)(a)—
 - (i) written or oral advice given to an accused person by the healthcare professional who prescribed,

administered or supplied the drug;
and

- (ii) information written on a label, as defined by section 2(1) of the Pharmacy and Poisons Ordinance (Cap. 138), accompanying the prescribed or supplied drug;
- (b) subsection (12)(b), any information written on a label referred to in paragraph (a)(ii) accompanying the drug; and
- (c) subsection (12)(c), any information on the package insert, as defined by section 2(1) of the Chinese Medicine Ordinance (Cap. 549), supplied with the drug;

first conviction (首次定罪) means a conviction on a first offence under subsection (1) (whether a conviction on indictment or a summary conviction);

healthcare professional (醫護專業人員) means—

- (a) a medical practitioner;
- (b) a registered dentist as defined by section 2(1) of the Dentists Registration Ordinance (Cap. 156);
- (c) a registered Chinese medicine practitioner or a listed Chinese medicine practitioner, as defined by section 2(1) of the Chinese Medicine Ordinance (Cap. 549);
- (d) a person whose name is entered on the register of pharmacists under section 5 of the Pharmacy and Poisons Ordinance (Cap. 138); or
- (e) a person acting under the direction or supervision of a person referred to in paragraph (a), (b), (c) or (d);

subsequent conviction (再次定罪) means—

- (a) a conviction subsequent to a first conviction; or
- (b) a conviction referred to in subsection (1)(b)(ii), (iii) or (iv).

- (14) In this section a reference to a conviction for an offence under subsection (1) includes a conviction pursuant to section 39J(13)(b).”.
- (zl) In the proposed section 39N(1)(b)(iv), by adding “, 39KA” after “39K”.
- (zm) In the proposed section 39N(2)(b), in the Chinese text, by deleting everything after “方式 , ” and substituting “使該測試得以令人滿意地達到其目的。 ”.
- (zn) In the proposed section 39N(8), by adding “, 39KA” after “39K”.
- (zo) In the proposed section 39N(9)(b), by deleting “or 39K(1)” and substituting “, 39K(1) or 39KA(1)”.
- (zp) In the proposed section 39N(9)(c), by deleting “or 39K(1)” and substituting “, 39K(1) or 39KA(1)”.
- (zq) By deleting the proposed section 39P(1)(b)(i) and substituting—
- “(i) if it is a person referred to in paragraph (a)(i), he or she may be incapable of undergoing a preliminary drug test and of giving a valid consent to the taking of a specimen of blood, and if it is a person referred to in paragraph (a)(ii), he or she may be incapable of giving a valid consent to the taking of a specimen of blood; and”.
- (zr) In the proposed section 39Q(1), by deleting “or 39K” and substituting “, 39K or 39KA”.
- (zs) In the proposed section 39R(1)(b)(iv), by adding “, 39KA” after “39K”.
- (zt) In the proposed section 39R(2)(b), in the Chinese text, by deleting everything after “方式 , ” and substituting “使該分析或化驗得以令人滿意地達到其目的。 ”.
- (zu) In the proposed section 39R(6)(a), in the English text, by adding a comma after “5 years”.

- (zv) In the proposed section 39R(7), by adding “, 39KA” after “39K”.

New

By adding—

“14A. Section 69A amended (Start of disqualification period)

Section 69A(2)—

Repeal

“the expiration of the term of imprisonment or detention, or of any other term of imprisonment or detention which the person is undergoing at that expiration”

Substitute

“the person finishes serving the term of imprisonment or detention, or finishes serving any other term of imprisonment or detention which the person is undergoing at the time he or she finishes serving the first-mentioned term”.”.

16(1)

By adding “39KA,” after “39K,”.

16(2)

- (a) In the proposed section 72A(3B)(b), by deleting “3 months or more after” and substituting “after a period of 3 months or more beginning on”.
- (b) In the proposed section 72A(3C)(b)(i), by deleting “expiration of the term of imprisonment or detention the person is ordered to serve” and substituting “person finishes serving that term”.
- (c) In the proposed section 72A(3C)(b)(ii), by deleting “of expiration of” and substituting “the person finishes serving”.

16(9)

In the proposed definition of *disqualification order*, by deleting everything after “order made under” and substituting “subsection (1)

or section 36(2), 36A(2), 37(2), 39(2), 39A(2), 39B(7), 39C(16), 39J(2), 39K(2), 39KA(2), 39N(4), 39R(3), 41(3) or 55(2) that a person be disqualified;”.

17 By adding “39KA,” after “39K,”.

18 By adding “39KA,” after “39K,”.

20 By adding “39KA,” after “39K,”.

21 By adding “39KA,” after “39K,”.

22 By adding “39KA,” after “39K,”.

23 By adding “39KA,” after “39K,”.

24 By adding “39KA,” after “39K,”.

25 By adding “39KA,” after “39K,”.

26(3) (a) In the proposed item 4D, by adding “specified illicit” after “influence of a”.

(b) By adding—

“4EA	Section 39KA(1)	Driving, attempting to drive or being in charge of a motor vehicle under the influence of a drug other than a specified illicit drug	10”.
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