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

Background brief

Purpose

This paper gives a brief account of the discussion by the Bills Committee on Road Traffic (Amendment) Bill 2011 (the Bills Committee) regarding the Impairment Test (IT) and the commencement date of the Road Traffic (Amendment) Ordinance 2011 (the Amendment Ordinance).

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. 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. 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 formed to scrutinize the Bill. Members may 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 relevant deliberations. A

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

gist of the major legislative proposals contained in the Bill is also provided at **Appendix I** for Members' easy reference.

4. The Amendment Ordinance was enacted by the Legislative Council (LegCo) on 14 December 2011.

Impairment Test under the Road Traffic (Amendment) Ordinance 2011

5. IT is defined in section 3(2) of the Amendment Ordinance, which means a combination of any or all of the tests specified by the Commissioner of Police under section 39T(1), carried out by an authorized police officer on a person, so as to assist the police officer to form an opinion as to whether or not the person's ability to drive properly is impaired by the consumption or use of drugs.

6. According to the new section 39T(1) of the Road Traffic Ordinance (RTO) as added, the Commissioner of Police will 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. Accordingly, the Commissioner of Police has made the Road Traffic (Impairment Test) Notice (L.N.1) in January 2012 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.

Commencement date of the Amendment Ordinance

7. Section 1(2) of the Amendment Ordinance provides that the Amendment Ordinance comes into operation on a day to be appointed by the Secretary for Transport and Housing (the Secretary) by notice published in the Gazette. In this connection, the Road traffic (Amendment) Ordinance 2011 (Commencement) Notice 2012 (L.N. 2) has been made by the Secretary in January 2012 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 empowers a police officer to require a driver to undergo a Rapid Oral Fluid Test (ROFT)² (see paragraphs 12 and 13 below for further details of ROFT).

Deliberations of the Bills Committee

Safeguards on the enforcement procedures

9. In the course of scrutiny of the Bill, the Bills Committee expressed concerns about the safeguards to be taken on the drug driving enforcement procedures and to prevent abuse of power by the Police in conducting IT. The Administration advised that the following safeguards would be adopted –

- (a) under normal circumstances, police officers would only conduct IT when they had a reasonable cause to suspect that a person was influenced by drugs through Drug Influence Recognition Observation (DIRO) or ROFT (if the latter was available);
- (b) the preliminary tests including IT would only be deployed to screen out the drivers who were suspected of driving under the influence of a drug and hence should be required to

² 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.

undergo the next step of testing, i.e. provision of blood and/or urine specimens for detailed drug testing. A charge might only be laid if the presence of drugs was confirmed by the detailed laboratory analysis that followed;

- (c) only police officers who were properly trained to conduct the preliminary drug tests and authorized by the Commissioner of Police would be tasked to enforce drug driving duties. If after the screening process, the police officer established reasonable suspicion that the driver was under the influence of drug, the driver would be brought back to a police station where he would be required to perform an IT by another officer who was usually more senior in rank than the officer conducting DIRO;
- (d) all ITs would be performed in an indoor environment, such as police stations, and would be videotaped; and
- (e) detailed procedures and special instructions would be drawn up and provided in the police orders.

10. The Administration also arranged a video presentation of the operational procedures of IT at a meeting of the Bills Committee. General guidelines for police officers on how reasonable suspicion of drug driving would be established before the driver concerned would be taken to the police station for conducting IT were provided to the Bills Committee, a copy of which is at **Appendix II** for Members' easy reference.

11. In response the Bills Committee's enquiry about the overseas experience of application of IT, the Administration advised that as a screening test, IT had 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 had not learnt of any major problems encountered by these jurisdictions in enforcing drug driving offences.

Availability of ROFT devices

12. The Bills Committee noted that the Bill would empower the Police to carry out random drug tests. It was 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 might be later than the commencement date for the other provisions of the Bill. Nevertheless, the Bills Committee supported the early implementation of the Amendment Ordinance.

13. The Administration advised that as the technology involved in ROFT was still maturing and as there was a need to search for and develop a ROFT device suitable for use in Hong Kong, initially, IT would be deployed as the main, detailed preliminary drug test for drug driving offences. ROFT would be introduced when a suitable device was found and validated for use in Hong Kong. The Bills Committee urged the Administration to make available reliable ROFT devices as early as possible to enable the Police to conduct random drug tests which would be an effective tool to deter drug driving. Bills Committee members considered that ROFT devices would provide objective standards for drug driving cases and avoid controversy in implementation. The Administration explained that ROFT was a newly developed technology, and its accuracy varied 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 reliability shortly, which was estimated to take about half a year to complete.

Recent developments

14. L.N.1 and L.N.2 were tabled before LegCo on 11 January 2012. At the meeting of the House Committee on 13 January 2012, Members decided to form a subcommittee to examine the two notices.

Relevant paper

Report of the Bills Committee on Road Traffic (Amendment) Bill 2011 to the Council meeting on 14 December 2011

<http://www.legco.gov.hk/yr10-11/english/bc/bc08/reports/bc08cb1-579-e.pdf>

Council Business Division 1
Legislative Council Secretariat
18 January 2012

**Major legislative proposals contained in the Road Traffic
(Amendment) Bill 2011**

‘Zero-tolerance Offence’

The Bill provides for 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 offence. Under this newly created offence, "specified illicit drug" are six common drugs of abuse (e.g. heroin) which are either narcotics or psychotropic substances that could have serious adverse effects on a person's ability to drive.

‘General Drug Driving Offence’

2. The Bill also proposes to create a new self-contained provision in the RTO to provide for the offence of driving under the influence of any drug, to such an extent as to be incapable of having proper control of the motor vehicle (referred to as ‘general drug driving offence’). It is proposed to provide that a person will commit the general drug driving 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.

3. The penalties for this offence will be aligned with tier one drink driving offence, if the drug involved is not a ‘specified illicit drug’. If the drug involved is a ‘specified illicit drug’, the person will be subjected to much more severe penalties with minimum disqualification periods for a first and subsequent convictions being set at 5 years and 10 years respectively. In addition, in order to maximize the deterrent effect for driving under the influence of specified illicit drugs, the Bill stipulates that if the person has previously been convicted of the same offence and the court is of the opinion, having regard to the circumstances under which the offence is committed and the behaviour of the offender, it is undesirable for him or her to continue to be allowed to drive a motor vehicle, in addition to imposing the penalties provided for the offence, the

court may make an order disqualifying the person from holding or obtaining a driving licence for life.

Preliminary Drug Tests

4. The Bill includes 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). The preliminary drug tests introduced under the Bill, namely Drug Influence Recognition Observation (DIRO)¹, Rapid Oral Fluid Test (ROFT)² and IT³, are drawn up with reference to the practices of overseas jurisdictions that are experienced in combating drug driving.

5. 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 advised 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

¹ 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.

² 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.

³ 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.

device is found and validated for use in Hong Kong.

6. 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.

7. 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.

Council Business Division 1
Legislative Council Secretariat
18 January 2012

**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.