

Legislative Council Panel on Transport

Measures to Deal with Reckless and Careless Driving

PURPOSE

This paper reviews the existing provision in the Road Traffic Ordinance (RTO) (Cap. 374) dealing with reckless and careless driving and seeks Members' advice on the proposed amendments to improve the existing legislation.

BACKGROUND

2. A spate of serious traffic accidents involving a large number of fatalities last year has led to public outcry against perceived inadequacies in the Road Traffic Ordinance (RTO) (Cap.374). In many accident cases, the defendants were only found guilty of the lesser offence of careless driving rather than the more serious offences of reckless driving or reckless driving causing death. As a result, the defendants were only fined a few thousand dollars. Generally, members of the public felt that penalties imposed in these cases were unfairly low. There were also criticisms that the sentences were not commensurate with the seriousness of the consequence (e.g. fatalities caused) or the driving behaviour.

3. A joint departmental review involving TB, TD, Police and D of J was carried out to assess the effectiveness of the provisions in the RTO on the various reckless and careless driving behaviour. This paper sets out the recommendations of the Administration to improve the existing legislative framework.

PROBLEMS IDENTIFIED BY THE REVIEW

4. Three problems were identified by the joint departmental review:

- (i) the present definition of reckless driving offences in the laws makes it difficult to prosecute successfully in the more serious offences of reckless driving causing death and reckless driving,

resulting in successful conviction only of the less serious offence of careless driving in most cases;

(ii) the level of penalties has become out of date; and

(iii) driving disqualification arrangements are not adequate to meet present day needs.

(i) **Definitional Problem**

5. The existing legislative provisions in respect of reckless driving causing death, reckless driving and careless driving are stipulated in sections 36, 37 and 38 of the RTO (see **Annex 1**). What constitutes reckless driving is not defined in the RTO. The court has to refer to precedent cases. Based on *R v Lawrence*, there are two elements that must be satisfied in the test of recklessness. Firstly, the defendant was in fact **driving the vehicle in such a manner as to create an obvious and serious risk**. Secondly, in driving in that manner, the defendant did so **without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had nevertheless gone on to take it**.

6. Prosecution statistics showed that, of the three offences covering reckless and careless driving, overwhelmingly more cases were pressed against careless driving (21,835 in 1997) than reckless driving (313 in 1997) or reckless driving causing death (26 in 1997).

7. The test of recklessness requires proof of the driver's subjective mental state (*mens rea*) which in practice is not easy to achieve. Prosecution therefore recommends charges for reckless driving only when there are obvious facts to support the case. If the court acquits the defendant of reckless driving causing death or reckless driving, the only alternative verdict is careless driving. In 1997, there were 36 cases where charges for reckless driving ended up in convictions for careless driving because of the difficulties in proving the mental state. The seeming injustice is aggravated by the common law principle that a person ought not to be held accountable for carelessness. This is reflected in *R v Downing [1996]* where it was held that judgment on careless driving should have no regard of the tragic death which ensued. Hence the court cannot impose higher penalties on persons convicted of

careless driving in those cases where the prosecution has failed to prove reckless driving causing death.

8. The high degree of mens rea required under the test of recklessness combined with the inability of the courts to take into account deaths caused by careless driving have led in many cases to charges and conviction of the lesser offence of careless driving with much lower penalties. This can create a situation in which the public's expectation may deviate significantly from what is in the law. To address this "gap" problem, we would need to consider whether a legal formulation can be found which (i) would make the tests for the higher offences more objective and (ii) allow more serious penalties for careless driving behaviour which has caused deaths.

9. We have made reference to practices adopted by other countries in tackling the same problem. In 1991, the UK legislature replaced reckless driving with dangerous driving (see **Annex 2**). The test for dangerous driving was made more objective by benchmarking the behaviour against the driving standard expected of a "competent and careful driver". We understand from UK Police authorities that the new legal definition is only a mixed success. It was pointed out that it could be equally difficult to establish that some driving behaviour fell far below the standard which could be expected of a competent and careful driver.

10. Accordingly, D of J has undertaken a review on various overseas definitions on dangerous driving and an attempt was made to refine the UK's definition of dangerous driving to instill more objectivity in establishing dangerous driving behaviour (see **Annex 3**). The UK idea that the test for dangerous driving should be based on a standard expected of "competent and careful driver" was adopted but modified to require the courts to have regard to the Road Users' Code and other relevant circumstances involved to determine what would constitute the standards expected of a "competent and careful driver".

11. To consider whether the proposed definition can help address the definitional problem in Hong Kong, an attempt was made by D of J to apply the proposed definition to eight selected Hong Kong cases previously prosecuted for reckless driving causing death but ended up with a lesser verdict of careless driving. The results of the analysis show that three of the eight cases might be "upgraded" to a conviction of dangerous driving.

12. To fully deal with the “gap problem”, we still need to address the issue of allowing consequences to be taken into account for the offence of careless driving. It is considered that a new offence, “careless driving causing death”, can be introduced to enable the court to take into account the seriousness of the consequence for charges of careless driving. D of J has advised that it is possible with this amendment, a duty is imposed on the Court to take consequences into account in sentencing. The assessment of the Police is that if this new definition is applied to the traffic accidents in 1997 involving fatalities, charges of careless driving causing death could have been brought against 47 cases.

13. On the basis of the above review, it is considered that the new definition of dangerous driving and dangerous driving causing death proposed by D of J can be adopted to replace the offences of reckless driving and reckless driving causing death and a new offence of careless driving causing death be created.

Outdated Level of Penalties

14. Existing penalties under Sections 36, 37 and 38 of the RTO, ranging from \$4,000 for careless driving to \$25,000 for reckless driving causing death, have not been revised since 1982. The average fine imposed over the past three years ranged from \$1200 for careless driving to \$4,100 for reckless driving causing death. The average sentences are substantially below the maximum allowed in the law. Based on Police record, prison terms for reckless driving causing death and reckless driving were usually not more than four months. This is far below the maximum sentences for such offences which range from one to five years.

15. It is considered that the levels of pecuniary fines could be updated to restore their deterrent effect. The proposals as shown in **Annex 4** will raise the level of fines in accordance with the six levels provided under Schedule 8 of the Criminal Procedures Ordinance (Cap. 221).

Inadequate Driving Disqualification Arrangements

16. Disqualification from holding a driving licence for not less than two years is provided under Sections 36 and 37 of the RTO only for a **second and subsequent conviction** of reckless driving causing death or reckless driving within five years. It is believed that the courts should be given the discretion to cancel the

licence of a reckless driver on first conviction when the offence was committed with blatant disregard to safety of other road users. Disqualification is an effective measure to discourage offenders and should be included to promote safe driving practices. It is considered that:

- (i) the law should be amended to enable the courts to disqualify a first time convict of sections 36 and 37 offences. The proposal does not affect the discretion of the courts to impose a shorter disqualification period or not to disqualify at all for first time convicts of dangerous driving and careless driving causing death if there are other mitigating factors.
- (ii) disqualification should be made mandatory for second time convicts of dangerous driving and all convicts of dangerous driving causing death; and
- (iii) the disqualification period for the second time conviction of dangerous driving causing death be increased from no less than two years to no less than three years. This is to reflect the gravity of the second time conviction over the first time conviction which will be punishable by mandatory disqualification for no less than two years.

ADVICE SOUGHT

17. Members are requested to offer their views and advice on the following recommendations:

- (i) replace “reckless driving” and “reckless driving causing death” with “dangerous driving” and “dangerous driving causing death” by the definition as set out in **Annex 3** (para 10);
- (ii) introduce a new offence of “careless driving causing death” to allow the court to take the consequences of careless driving behaviour into account (para 12);
- (iii) update the level of penalties to restore their deterrent effects (para 14); and

(iv) enable the courts to disqualify a first time convict of dangerous driving and dangerous driving causing death from holding driving licences (para 16).

Transport Bureau
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Road Traffic Ordinance

PART V

Traffic Offences

36. Causing death by reckless driving

(1) A person who causes the death of another person by driving a motor vehicle on a road recklessly commits an offence and is liable--

- (a) on conviction on indictment to a fine of \$25,000 and to imprisonment for 5 years; and
- (b) on summary conviction to a fine of \$12,500 and to imprisonment for 2 years.

(2) A person convicted of an offence under this section shall be disqualified for a period of not less than 2 years in the case of a second or subsequent conviction or of a conviction subsequent to a conviction under section 11(3) of the repealed Ordinance unless the court or magistrate for special reasons order that he be disqualified for a shorter period or that he not be disqualified.

Provided that when a period of not less than 5 years has elapsed since his last previous conviction of an offence under this section or under section 11(3) of the repealed Ordinance, the court or magistrate may deal with the offence as a first offence.

(3) If on the trial of any person for an offence under subsection (1) the prosecution proves that he drove recklessly but not that he thereby caused the death of another person he shall be acquitted of the offence under subsection (1) and be found guilty of an offence under section 37.

(4) On the trial of any person for an offence under subsection (1) he may be acquitted of that offence and be found guilty of an offence under section 38.

37. Reckless driving

(1) A person who drives a motor vehicle on a road recklessly commits an offence and is liable--

- (a) on conviction on indictment to a fine of \$20,000 and to imprisonment for 3 years;
- (b) on summary conviction to a fine of \$10,000 and to imprisonment for 12 months.

(2) A person convicted of an offence under this section shall be disqualified for a period of not less than 18 months in the case of a second or subsequent conviction or of a conviction subsequent to a conviction under section 11(1) of the repealed Ordinance unless the court or magistrate for special reasons orders that he be disqualified for a shorter period or that he not be disqualified.

Provided that when a period of not less than 5 years has elapsed since the last previous conviction for an offence under this section or under section 11(1) of the repealed Ordinance, the court or magistrate may deal with the offence as a first offence.

(3) On the trial of any person for an offence under subsection (1) he may be acquitted of that offence be found guilty of an offence under section 38.

38. Careless driving

(1) A person who drives a motor vehicle on a road carelessly commits an offence and is liable to a fine of \$4,000 and to imprisonment for 6 months.

(2) A person drives carelessly within the meaning of this section if on a road he drives a vehicle without due care and attention or without reasonable consideration for other persons using the road.

UK
Road Traffic Act 1991

Causing death by dangerous driving

1. A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.

Dangerous driving

2. A person who drives a mechanically propelled vehicles dangerously on a road or other public place is guilty of an offence.
- 2A. (1) For the purposes of sections 1 and 2 above a person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if)---
 - (a) the way he drives falls far below what would be expected of a competent and careful driver, and
 - (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.
- (2) A person is also to be regarded as driving dangerously for the purposes of sections 1 and 2 above if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.
- (3) In subsections (1) and (2) above “dangerous” refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of those subsections what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances which the accused could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.
- (4) In determining for the purposes of subsection (2) above the state of a vehicle, regard may be had to anything attached to or carried on or in it and to the manner in which it is attached or carried.

Careless, and inconsiderate, driving

3. If a person drives a mechanically propelled vehicles on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, he is guilty of an offence.

Proposed Definition of Dangerous Driving

The refined definition of dangerous driving (which is subject to further refinement by the Law Draftsman) is provided by DJ as follows:

- (1) A person drives a motor vehicle on a road in a manner which is dangerous shall be guilty of an offence and is liable to [penalty].
- (2) A person is to be regarded as driving dangerously if:-
 - (a) the way he drives falls far below what would be expected of a competent and careful driver; and
 - (b) It would be obvious to a competent and careful driver that driving in that way would be dangerous.
- (3) In determining whether the manner of driving falls below the standard of a competent and careful driver, the court shall have regard to the standard as set out in the Road Users' Code issued under s.109.
- (4) In determining for the purpose of subsection (2)(b) above, the court shall have regard to all the circumstances of the case including:-
 - (a) the nature, condition and use of the road;
 - (b) the amount of traffic which is actually at the time or which might reasonably be expected to be on the road;
 - (c) the state of the vehicle including anything attached to or carried on or in it and to the manner in which it is attached or carried.”

Existing and Proposed Penalty Provisions

Offence		Maximum Fine	Maximum Imprisonment	Disqualification
Careless Driving		\$4,000 <i>(Level 2 - \$5,000)</i>	6 months (no change)	No disqualification provision.
Careless Driving Causing Death	for summary conviction:	<i>Level 3 - \$10,000</i>	<i>12 months</i>	Not applicable - new offence.
	for conviction on indictment:	<i>Level 4 - \$25,000</i>	<i>3 years</i>	<i>May be disqualified for not less than 6 months for the first conviction and mandatory disqualification for the second or subsequent conviction.</i>
Reckless Driving <i>(Dangerous Driving)</i>	for summary conviction:	\$10,000 <i>(Level 3 - \$10,000)</i>	12 months (no change)	May be disqualified for not less than 18 months in the case of the second or subsequent conviction.
	for conviction on indictment:	\$20,000 <i>(Level 4 - 25,000)</i>	3 years (no change)	<i>May be disqualified for not less than 6 months for the first conviction and mandatory disqualification for the second and subsequent conviction.</i>

* Regular font denotes present arrangements. Proposed changes in *italic and bold*.

Offence		Maximum Fine	Maximum Imprisonment	Disqualification
Reckless Driving Causing Death	for summary conviction:	\$12,500 <i>(Level 4 - \$25,000)</i>	2 years (no change)	May be disqualified for not less than 2 years in the case of the second or subsequent conviction.
<i>(Dangerous Driving Causing Death)</i>	for conviction on indictment:	\$25,000 <i>(Level 5 - \$50,000)</i>	5 year (no change)	<i>Mandatory disqualification for not less than 2 years for the first conviction and not less than three years for the second conviction.</i>