



中華人民共和國香港特別行政區  
Hong Kong Special Administrative Region of the People's Republic of China



立法會秘書處 法律事務部  
LEGISLATIVE COUNCIL SECRETARIAT  
LEGAL SERVICE DIVISION

來函編號 YOUR REF :  
本函編號 OUR REF : LS/B/13/09-10  
電話 TELEPHONE : 2869 9457  
圖文傳真 FACSIMILE : 2877 5029

By Fax (2572 0306)

27 October 2010

Mr Mok Wai Chuen  
Assistant Director (Air Policy)  
Environmental Protection Department  
46/F, Revenue Tower  
5 Gloucester Road  
Wan Chai  
Hong Kong

Dear Mr Mok,

**Motor Vehicle Idling (Fixed Penalty) Bill**

I refer to the legal and drafting aspects of the Motor Vehicle Idling (Fixed Penalty) Bill and would be most grateful if you could let me have your advice on the questions enclosed before 1 November 2010.

Yours sincerely,

Kitty Cheng  
Assistant Legal Adviser

Encl

c.c. LA  
CCS(1)2

## Motor Vehicle Idling (Fixed Penalty) Bill

### Clause 2 (Interpretation)

#### *"Authority" and "Director"*

1. Under clause 2(1), "Authority" means a person specified in column 1 of Schedule 2, i.e. Director Environmental Protection ("DEP"), whereas "Director" also means DEP. Please explain why two references are made to the same government officer.

#### *"Driver"*

2. Under clause 2(1), "driver", in relation to a motor vehicle, means any person who is in charge of, or assisting in the control of, the vehicle. Firstly, for the purpose of the Bill, is it possible to have more than one driver in a vehicle at the same time? Secondly, must the person who is assisting in the control of the vehicle a person a licensed driver?

#### *"Complainant"*

3. Although the Secretary for Justice may appoint any person to make a complaint under clause 16(3) of Division 4 of Part 3 of the Bill, the definition of "judgment amount" in clauses 2(1), 19, 21 and 22, makes reference to a "complainant". Should there be a definition given to "complainant" in clause 2(1), or a cross reference be made between the definition of "complain" and "complainant" in the Bill?

#### *"Motor vehicle"*

4. In the Bill, "motor vehicle" means "any mechanically propelled vehicle that is constructed or adapted for use on a road" whereas it means "any mechanically propelled vehicle" under section 2 of the Road Traffic Ordinance (Cap. 374). What is the difference between the two definitions and what is the reason for the difference?

#### *"Passenger"*

5. In the Bill, "passenger", in relation to a motor vehicle, means a person carried in or on the vehicle other than the driver. Under Cap. 374, "passenger", in relation to a vehicle, means any person carried in or on it other than any driver or conductor of it (section 2). What is the reason for deleting "conductor" from the definition of "passenger" in the Bill?

### Clause 8 (Authorized officer may give penalty notice)

6. Is the "prescribed form" given by an authorized officer to the person contravening the idling prohibition requiring him to pay the fixed penalty to be

prescribed by subsidiary legislation? If so, is this piece of subsidiary legislation subject to LegCo's scrutiny under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1)?

Clause 11 (Demand notice)

7. Is the "prescribed form" of demand notice issued by the Authority under clause 11(2) for the payment of the fixed penalty to be prescribed by subsidiary legislation? If so, is this piece of subsidiary legislation subject to LegCo's scrutiny under section 34 of Cap. 1?

Clause 19 (Hearing of complaint)

8. Clause 19(3) seeks to provide that if the defendant does not "at that time" expressly put in issue any allegation of fact stated in a certificate under clause 24 (evidentiary certificate) that has been produced by the complainant, "the defendant *cannot* at any later time dispute or adduce evidence to contradict that fact". Does the phrase "cannot ... dispute ..." mean "not permitted to ... dispute ..."? Furthermore, what time or stage does the phrase "at that time" refer to?

9. If there is a change of circumstance or a piece of evidence is not previously available, does the Bill absolutely prevent the defendant from disputing or adducing that piece of evidence regarding a fact stated in an evidentiary certificate at a later stage (e.g. on appeal, re-trial, or the Authority's application for rescission of order under clause 26)?

Clause 22 (Discontinuance of complaint)

10. A complainant may discontinue the complaint at any stage before the magistrate has commenced to hear it. Is the complainant required to inform the magistrate or the defendant the reason for discontinuance?

11. Would the defendant be entitled to apply for any legal costs which he has incurred for preparing his defence, particularly if the notice of discontinuance is given shortly before the hearing date?

Clause 24 (Evidentiary certificate)

12. Please explain the legal effect of clause 24(3) which provides that unless there is evidence to the contrary, it *must be presumed that* the certificate stating matters set out in clause 24(2) was signed by or for the Authority.

13. Again, is the "prescribed form" which contains the certificate referred to in clause 24(1) to be prescribed by subsidiary legislation? If so, is this piece of subsidiary legislation subject to LegCo's scrutiny under section 34 of Cap. 1?

Clause 26 (Power to rescind order on application by the Authority)

14. A magistrate may for good cause, on an application made by the Authority, rescind any order for the payment of a fixed penalty, an additional penalty or costs and any other order made under the Bill. Is the defendant entitled to make a similar application?

15. Please also explain the defendant's right of appeal or review in relation to the penalty and costs order under the proposed fixed penalty system.

Clause 27 – Powers and functions of authorized officers

16. The meaning of "road" under clause 2(1) includes a private road within the meaning of Cap. 374. What is reason for stating that the powers and functions of authorized officers under the Bill may be exercised or performed "on all roads including private roads"?

Clauses 31 and 32 – Regulations and amendment of Schedules

17. Please advise that whether the regulations made by the Secretary for Environment under clause 31 and his amendment to Schedules under clause 32 are subsidiary legislation and subject to LegCo's scrutiny procedure under section 34 of Cap. 1?

Schedule 1 (Drivers to whom idling prohibition does not apply)

18. Which section or sections of Schedule 1 do "Examples" at p. C337-338 of the Gazette version of the Bill seek to illustrate?

19. Are these "Examples" part of the legislation?

20. The five items listed under "Examples" seem to show that idling of a certain vehicle is necessary because of a certain use of that vehicle (e.g. a refrigerator truck for the carrying of perishable freight, a tipper lorry for the operation of a tipping system for loading and unloading refuse, etc), whilst section 7 of Schedule 1 provides for exemption to a driver of a vehicle with specific design and idling that particular vehicle is necessary for the purpose for which that particular vehicle is primarily designed (and not a use of the vehicle). Please explain how the "Examples" illustrate the exemption requirements under section 7 of Schedule 1.

21. Individual paragraphs under Schedule 1 are now referred to as "section" (e.g. "In this *section* ...") in the Bill. After the Bill is passed, individual clauses of the Bill will be referred to as "section \_\_\_ (of the Ordinance)". For the sake of clarity, please review the reference of individual paragraphs under Schedule 1.