

FIXED PENALTY (SMOKING OFFENCES) ORDINANCE

CONTENTS

Section Page

PART 1

PRELIMINARY

- | | | |
|----|------------------------------------|-------|
| 1. | Short title and commencement | A1099 |
| 2. | Interpretation | A1099 |

PART 2

FIXED PENALTY

- | | | |
|-----|--|-------|
| 3. | Fixed penalty notice given by public officer | A1101 |
| 4. | Power of inspecting proof of identity | A1101 |
| 5. | Supply of false information | A1103 |
| 6. | Further fixed penalty notice served by Authority | A1103 |
| 7. | Withdrawal of notice of fixed penalty | A1105 |
| 8. | Recovery of fixed penalty | A1105 |
| 9. | Proof produced for application under section 8 | A1107 |
| 10. | Review of order | A1109 |
| 11. | Service of summons of proceedings | A1111 |
| 12. | Additional penalty imposed in proceedings on liability | A1111 |
| 13. | Payment of fixed penalty after issue of summons | A1111 |

PART 3

MISCELLANEOUS

- | | | |
|-----|---|-------|
| 14. | Protection for public officers acting in good faith | A1113 |
| 15. | Obstruction of public officers | A1113 |
| 16. | Power to make regulation | A1113 |

Section	Page
17. Specification of Authority and public officer	A1115
18. Revision of fixed penalty	A1115
19. Consequential amendments	A1115
Schedule Scheduled offence	A1115

HONG KONG SPECIAL ADMINISTRATIVE REGION

ORDINANCE NO. 26 OF 2008

L.S.

Donald TSANG
Chief Executive
10 July 2008

An Ordinance to provide for a fixed penalty to be payable for certain offences in contravention of the Smoking (Public Health) Ordinance; for the recovery of the fixed penalty; and for related matters.

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Enacted by the Legislative Council.

PART 1

PRELIMINARY

1. Short title and commencement

(1) This Ordinance may be cited as the Fixed Penalty (Smoking Offences) Ordinance.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Food and Health by notice published in the Gazette.

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires—
“fixed penalty” (定額罰款), in relation to a scheduled offence, means the fixed penalty set out in column 4 of the Schedule opposite to the offence;
“proceedings” (法律程序) means proceedings before a magistrate in respect of a scheduled offence;
“scheduled offence” (表列罪行) means an offence prescribed by a provision of the Smoking (Public Health) Ordinance (Cap. 371) specified in column 2 of the Schedule.

(2) A description in column 3 of the Schedule indicates for convenience of reference only the general nature of the offence under the provision specified in column 2 of the Schedule opposite to that description.

(3) In applying a provision of this Ordinance in relation to a scheduled offence—

- (a) a reference to “Authority” in that provision shall be construed as a reference to a person specified by the Secretary for Food and Health as the Authority by notice under section 17(1)(a); and
- (b) a reference to “public officer” in that provision shall be construed as a reference to a public officer or a member of a class of public officers specified by the Secretary for Food and Health by notice under section 17(1)(b).

PART 2

FIXED PENALTY

3. Fixed penalty notice given by public officer

(1) If a public officer has reason to believe that a person is committing or has committed a scheduled offence, he may give the person a notice in the prescribed form offering him an opportunity to discharge his liability to conviction for the offence by payment of the fixed penalty for the offence within 21 days from the date of the giving of the notice.

(2) A notice under subsection (1) shall be given by the public officer personally to the person.

(3) Subject to section 7, where a person has received a notice under subsection (1) and has paid the full amount of the fixed penalty shown in the notice within the period referred to in that subsection, he shall not be liable to be prosecuted or convicted for the scheduled offence specified in the notice.

4. Power of inspecting proof of identity

(1) If a public officer has reason to believe that a person is committing or has committed a scheduled offence, he may, for the purposes of—

- (a) serving any document under this Ordinance on the person; or
- (b) issuing a summons in respect of the offence,

require the person to supply his name, address and contact telephone number (if any) and produce proof of identity for inspection.

(2) A person who, without reasonable excuse, fails to comply with a requirement made under subsection (1) commits an offence and is liable on conviction to a fine at level 3.

(3) A public officer may arrest a person who, without reasonable excuse, fails to comply with a requirement made under subsection (1).

(4) Without prejudice to the generality of section 51 of the Police Force Ordinance (Cap. 232), a public officer who arrests any person under subsection (3) shall forthwith take him to the nearest police station or deliver him into the custody of a police officer.

(5) In this section, “proof of identity” (身分證明文件), in relation to the person as referred to in subsection (1), has the same meaning as in section 17B of the Immigration Ordinance (Cap. 115).

5. Supply of false information

A person who, in purported compliance with a requirement made under section 4(1), supplies any particular of his name, address or contact telephone number which he knows to be false or misleading commits an offence and is liable on conviction to a fine at level 3.

6. Further fixed penalty notice served by Authority

- (1) This section applies where a person—
 - (a) having been given a notice under section 3(1) has not paid the fixed penalty for the scheduled offence specified in the notice within the period referred to in that section; or
 - (b) refuses to accept a notice intended to be given to him under section 3(1) in respect of a scheduled offence.
- (2) Where this section applies, the Authority shall serve on the person a notice in the prescribed form—
 - (a) demanding payment of the fixed penalty for the scheduled offence;
 - (b) informing the person that if he wishes to dispute liability for the offence he should notify the Authority in writing; and
 - (c) stating that the payment or notification (as the case may be) shall be made within 10 days from the date of the notice so served.
- (3) A notice under subsection (2) shall be served—
 - (a) where subsection (1)(a) applies, within 6 months from the date of the notice given under section 3(1); and
 - (b) where subsection (1)(b) applies, within 6 months from the date on which the person refuses to accept the notice.
- (4) A notice under subsection (2) may be served on the person by sending it by post to his address.

(5) Subject to section 7, where a person has received a notice under subsection (2) and has paid the full amount of the fixed penalty shown in the notice within the period referred to in subsection (2)(c), he shall not be liable to be prosecuted or convicted for the scheduled offence specified in the notice.

7. Withdrawal of notice of fixed penalty

(1) Where a notice under section 3(1) has been given to a person, the Authority may, at any time before the commencement of any proceedings against the person in respect of the scheduled offence specified in the notice—

- (a) withdraw that notice; and
- (b) serve on that person another notice in writing informing him that the notice under section 3(1) has been withdrawn.

(2) Where a notice under section 6(2) has been served on a person, the Authority may, at any time before the commencement of any proceedings against the person in respect of the scheduled offence specified in the notice or, where an order under section 8(1) has been applied for, before such order is made—

- (a) withdraw that notice; and
- (b) serve on that person another notice in writing informing him that the notice under section 6(2) has been withdrawn.

(3) Where a notice under section 3(1) or 6(2) is withdrawn under this section and any sum of money has been paid pursuant to the notice, the Director of Accounting Services shall, on demand by the person to or on whom the notice was given or served, repay him the sum so paid.

(4) Where a notice under section 3(1) or 6(2) is withdrawn under this section, proceedings in respect of the scheduled offence specified in the notice may only be commenced if—

- (a) the ground, or one of the grounds, on which the notice is withdrawn is that it contains incorrect information; and
- (b) the incorrect information was supplied by the person to or on whom the notice was given or served.

8. Recovery of fixed penalty

(1) If a person served with a notice under section 6(2) has not paid the fixed penalty for the scheduled offence specified in the notice or notified the Authority that he wishes to dispute liability for the offence in accordance with the notice, a magistrate shall, upon an application made in the name of the Secretary for Justice, order him to pay within 14 days from the date of service of notice of the order—

- (a) the fixed penalty;

(b) an additional penalty equal to the amount of the fixed penalty;
and

(c) the sum of \$300 by way of costs.

(2) An application under subsection (1) may be made in the absence of the person on whom the notice under section 6(2) has been served and the Secretary for Justice may appoint any person or class of persons to make the application.

(3) Where an order is made under subsection (1) against a person, the magistrate shall cause notice of the order to be served on the person.

(4) A notice under subsection (3) may be served on the person by sending it by post to his address.

(5) Where a person against whom an order under subsection (1) has been made fails to comply with the order, he shall, for the purposes of section 68 of the Magistrates Ordinance (Cap. 227), be deemed to have failed to pay the sum adjudged to be paid by a conviction and shall be liable to be imprisoned under that section.

(6) Where a person against whom an order under subsection (1) has been made has complied with the order, he shall not be liable to be prosecuted or convicted for the scheduled offence to which the order relates.

9. Proof produced for application under section 8

(1) Notwithstanding any provisions of the Magistrates Ordinance (Cap. 227), in an application under section 8(1), an order under that section shall be made upon the production by the applicant to the magistrate of—

(a) a copy of the notice served under section 6(2) together with a certificate of posting of that notice under section 29 of the Evidence Ordinance (Cap. 8); and

(b) a certificate referred to in subsection (2).

(2) In an application under section 8(1), a certificate in the prescribed form stating the matters specified in subsection (3) and purporting to be signed by or for the Authority shall be admitted in evidence without further proof upon its production to the magistrate.

(3) The certificate referred to in subsection (2) shall state that—

(a) payment of the fixed penalty for the scheduled offence specified in a notice under section 6(2) was not made before the date of the certificate;

(b) the person specified in the certificate had not, before the date of the certificate, notified the Authority that he wished to dispute liability for the scheduled offence; and

(c) the address specified in the certificate was, at the date specified in the certificate in relation to the address, the address of the person.

- (4) Unless there is evidence to the contrary—
 - (a) it shall be presumed that the certificate referred to in subsection (2) is signed by or for the Authority; and
 - (b) the certificate shall be evidence of the facts stated in it.

10. Review of order

(1) Where a magistrate is satisfied that a notice served under section 6(2) has not come to the personal notice of the person to whom it relates without any neglect by that person, the magistrate may, upon an application by that person, rescind the order made under section 8(1) in respect of the notice.

(2) A person who makes an application under subsection (1) shall give reasonable notice of the application to the Authority who served the notice under section 6(2) in respect of which the order was made.

(3) Upon rescinding the order under subsection (1), the magistrate may—

- (a) if the person wishes to dispute liability for the scheduled offence to which the order relates, give leave to that effect; or
- (b) if the person does not wish to dispute liability for the scheduled offence—
 - (i) order him to pay the fixed penalty concerned within a period of 10 days; and
 - (ii) order that, if he fails to pay the fixed penalty within that period, he shall pay immediately the fixed penalty, an additional penalty equal to the amount of the fixed penalty and the sum of \$300 by way of costs.

(4) An application under subsection (1) may be made in person or by counsel or solicitor on behalf of the applicant, and the magistrate, for the purpose of securing the attendance of witnesses and generally for conducting the proceedings, shall have all the powers of a magistrate hearing a complaint under the Magistrates Ordinance (Cap. 227).

(5) An application under subsection (1) shall be made within 14 days from the date that the magistrate is satisfied to be the earliest date on which the order made under section 8(1) came to the personal notice of the person to whom that order relates.

(6) Where a magistrate gives leave under subsection (3)(a), proceedings may be taken, notwithstanding section 26 of the Magistrates Ordinance (Cap. 227), within 6 months from the date on which the magistrate gives the leave.

(7) A magistrate may for good cause, upon an application by the Authority at any time, rescind any order for the payment of a fixed penalty and any other order made in the same proceedings.

(8) Where a person against whom an order under subsection (3)(b) has been made fails to comply with the order under subsection (3)(b)(ii), he shall, for the purposes of section 68 of the Magistrates Ordinance (Cap. 227), be deemed to have failed to pay the sum adjudged to be paid by a conviction and shall be liable to be imprisoned under that section.

(9) Where a person against whom an order under subsection (3)(b) has been made has complied with the order, he shall not be liable to be prosecuted or convicted for the scheduled offence to which the order relates.

11. Service of summons of proceedings

Where a person—

- (a) has notified the Authority, in accordance with a notice under section 6(2), that he wishes to dispute liability for a scheduled offence; or
- (b) has been given leave to dispute liability for the offence under section 10(3)(a),

then a summons issued in any proceedings against him in respect of the offence may be served on him in accordance with section 8 of the Magistrates Ordinance (Cap. 227).

12. Additional penalty imposed in proceedings on liability

(1) This section applies where a person—

- (a) has notified the Authority, in accordance with a notice under section 6(2), that he wishes to dispute liability for a scheduled offence; or
- (b) has been given leave to dispute liability for the offence under section 10(3)(a),

and in consequence of the notification or leave, appears in any proceedings in answer to a summons.

(2) Where this section applies, if the person is convicted of the scheduled offence after having offered no defence or a defence which is frivolous or vexatious, the magistrate before whom the proceedings are heard shall, in addition to any other penalty and costs, impose an additional penalty equal to the amount of the fixed penalty for the offence.

13. Payment of fixed penalty after issue of summons

(1) Notwithstanding that proceedings have been taken against a person who has notified the Authority in accordance with a notice under section 6(2) that he wishes to dispute liability for a scheduled offence, if the person pays the

full amount of the fixed penalty for the offence together with an additional penalty equal to the amount of the fixed penalty and the sum of \$500 by way of costs in accordance with subsection (2), the proceedings shall then terminate.

(2) Payment under subsection (1) shall be made at any magistracy not less than 2 days before the day specified in the summons for the person's appearance, and the summons shall be produced at the time of payment.

(3) No public holiday shall be included in the computation of the 2 days' period mentioned in subsection (2).

PART 3

MISCELLANEOUS

14. Protection for public officers acting in good faith

(1) A public officer shall not be personally liable in respect of any act done by him while exercising any of his powers under this Ordinance and within the scope of his employment, if he did that act in the honest belief that he was entitled to do it.

(2) Nothing in this section shall be construed as relieving the Government from liability in respect of the acts of public officers.

(3) In this section, "public officer" (公職人員) includes a person specified as the Authority under section 17(1)(a).

15. Obstruction of public officers

A person who resists or wilfully obstructs a public officer exercising his powers under this Ordinance commits an offence and is liable on conviction to a fine at level 4 and to imprisonment for 6 months.

16. Power to make regulation

The Secretary for Food and Health may by regulation—

- (a) prescribe any notice or certificate which under this Ordinance is to be or may be prescribed;
- (b) specify the persons to whom and the places at which a fixed penalty, an additional penalty or any other sums payable under this Ordinance may be paid;
- (c) specify the manner of payment of a fixed penalty, an additional penalty or any other sums payable under this Ordinance; and
- (d) provide for the better carrying out of the provisions of this Ordinance.

17. Specification of Authority and public officer

(1) The Secretary for Food and Health may, for the purposes of this Ordinance and in relation to a scheduled offence, specify by notice published in the Gazette—

- (a) the Authority; and
 - (b) a public officer or a class of public officers.
- (2) A notice under subsection (1) is subsidiary legislation.

18. Revision of fixed penalty

The Legislative Council may by resolution vary the fixed penalty in relation to a scheduled offence.

19. Consequential amendments

(1) Section 113C(1)(c) of the Criminal Procedure Ordinance (Cap. 221) is amended by repealing “or the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570)” and substituting “, the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570) or the Fixed Penalty (Smoking Offences) Ordinance (26 of 2008)”.

(2) Section 2(1B) and (3) of the Rehabilitation of Offenders Ordinance (Cap. 297) is amended by repealing “or the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570)” and substituting “, the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570) or the Fixed Penalty (Smoking Offences) Ordinance (26 of 2008)”.

SCHEDULE

[s. 2]

SCHEDULED OFFENCE

Item	Provision of the Smoking (Public Health) Ordinance	Description	Fixed Penalty
1.	Section 7(1)	Smoking in areas designated as no smoking areas or in public transport carriers	\$1,500