

**Bills Committee on  
Smoking (Public Health) (Amendment) Bill 2005**

**Administration's response to the meaning of "indoor"**

**Purpose**

This paper sets out an alternative approach that can be adopted in defining "indoor" under the Smoking (Public Health) (Amendment) Bill 2005 (the Bill).

**Background**

2. One of the main objectives of the Bill is to provide for protection against secondhand smoking in **indoor** workplace and public place. Under Clause 5 of the Bill, "*an indoor area in a workplace or public place is ...designated as a no smoking area.*" The meaning of "indoor" is further set out in Clause 4(h) of the Bill –

- (a) having a ceiling or roof, or a cover that functions (whether temporarily or permanently) as a ceiling or roof; and
- (b) completely or substantially enclosed (whether temporarily or permanently), except for any window or door, or any closeable opening that functions as a window or door.

3. At the Bills Committee meeting on 4 January 2006, Members opined that the current meaning of "indoor" and in particular the term "substantially enclosed" lacked clarity and precision. They asked the Administration to consider whether a more specific description should be used for the meaning of "indoor". The Administration undertook to revert.

**The legislative and drafting Intent**

4. The formulation used in the Bill was modeled on overseas legislation. In Australia for example, the Occupational Safety and Health Regulations 1996 of Western Australia defines "enclosed workplace" to mean -

*"a workplace that has, whether permanently or temporarily (a) a ceiling or roof; and (b) walls, sides or vertical coverings, so that when the workplace's existing closeable openings are closed, the workplace is completely or substantially enclosed".*

In the Public Health Amendment (Smoke-free Areas) Act of Tasmania, Australia, "enclosed" is being stipulated as-

*" (a) having a ceiling or roof; and*

*(b) being completely or substantially enclosed by walls or windows, except for doors and passageways”.*

In both cases, there is no further elaboration on what the term “substantially” encompasses.

5. In the case of Hong Kong, the expression "substantially" also appears in a plethora of other Hong Kong laws, such as -

- "complete or substantially complete" in section 1A of Animals and Plants (Protection of Endangered Species) (Exemption) Order (Cap 187A);
- "new or substantially improved" in section 2 of Census and Statistics (Survey of Innovation Activities) Order (Cap 316T);
- "wholly or substantially completed" in regulation 2B of Electricity Supply Regulations (Cap 406A);
- "completed or substantially altered" in regulation 12(5) of Electricity (Wiring) Regulations (Cap 406E);
- "reconstructed or substantially altered" in section 3 of Merchant Shipping (Seafarers) (Crew Accommodation) Regulation (Cap 478I); and
- "same or substantially the same" in section 51(7A) of Rules of Procedure of the Legislative Council.

It is noted that all the above laws are silent on the scope and extent of coverage for the term “substantially”.

6. It is our original policy intent that the two terms "completely" and "substantially" as appeared in the relevant provisions of the Bill are to be understood by their ordinary meanings. We believe that whether a particular area is "completely or substantially enclosed" is a question of fact, and when the enforcement authority perceives that smoking has taken place in a “substantially enclosed” area while the smoker argues otherwise, the case can be decided by the court according to the relevant factual circumstances. We believe that with such a construction of the meaning of “indoor”, the Tobacco Control Office (TCO) will exercise a reasonable and common sense approach in discharging their enforcement duty. The court will also help build up precedent cases for future reference. This approach would allow flexibility to cater for the many different kinds of premise structures and designs in Hong Kong, while for most of the premises, there should be no doubt as to whether they are “indoor” according to this definition. TCO will issue an administrative guidelines to help venue managers and the public in understanding what is meant by “indoor”.

### **Alternative approaches in other jurisdictions**

7. In the light of Members’ request for more specific definition for the meaning of “indoor”, we hereby provide some relevant examples of laws in

other jurisdiction for Members' reference. Broadly speaking, the following approaches have been adopted in defining the meaning of "indoor" or "enclosed" areas -

(A) Without any definition

8. In some jurisdictions where tobacco control laws have been put in place for "indoor" public areas, the law has been silent as to what "indoor" or "enclosed" mean. Examples of these jurisdictions include Norway, Malta, California, New York and Delaware of the United States of America, New Brunswick and Manitoba of Canada, New Zealand and Singapore.

(B) A mathematical approach

9. Legislation of Ireland and Scotland, for example, has used this approach in defining the meaning of "indoor" in their respective legislation.

10. In the case of Ireland, under its Public Health (Tobacco) Act, the smoking ban is not imposed on –

*“a place or premises, or a part of a place or premises, that is wholly uncovered by any roof, whether fixed or movable”, and  
“an outdoor part of a place or premises covered by a fixed or movable roof, provided that not more than 50 per cent of the perimeter of that part is surrounded by one or more walls or similar structures (inclusive of windows, doors, gates or other means of access to or egress from that part)”.*

11. In the case of Scotland, according to the Prohibition of Smoking in Certain Premises (Scotland) Regulations 2006 under the Smoking, Health and Social Care (Scotland) Act 2005, which is still in its draft form, "substantially enclosed" means –

*“premises having a top or roof and, except for doors, windows or exits, substantially enclosed, whether permanently or temporarily, and in determining whether premises are “substantially enclosed”, no account is to be taken of openings in which there are doors, windows or other fittings that can be opened or shut”.*

Furthermore, premises shall be taken to be “substantially enclosed” if

*“(i) the opening in the premises has an area; or  
(ii) if there is more than one, both or all those openings have an aggregate area,  
which is less than half of the area of the walls, including any other structures serving the purpose of walls, which constitute the*

*perimeter of the premises;*

*Where an opening is in, or consists of the absence of, such walls or other structures or a part of them, their area shall be measured for the purposes of the above paragraph as if it included the area of the opening”.*

(C) Other descriptive approach

12. In Rules and Regulations Pertaining to Smokefree Public Places and Workplaces of Rhode Island, “enclosed area” means all space between a floor and ceiling that is enclosed on all sides by solid walls or windows (exclusive of doorways), which extend from the floor to the ceiling.

13. In Oregon’s Smokefree Workplace Law (Oregon Indoor Air Act), “enclosed area” means “all space between a floor and a ceiling that is enclosed on all sides by solid walls or windows, exclusive of doors or passageways, that extend from the floor to the ceiling, including all space therein screened by partitions that do not extend to the ceiling”.

14. According to Toronto Municipal Code Chapter 709 Smoking, “enclosed” means closed by a roof or ceiling and walls with an appropriate opening or openings for ingress or egress, which openings are equipped with doors which are kept closed except when actually in use for ingress or egress.

**Possible alternatives for Hong Kong**

15. We do not recommend directly adopting the Irish or Scottish formulation or any of the descriptive approaches we quoted in the above paragraphs. The Irish approach and the descriptive approaches appear not to have stated clearly how to deal with (i) walls with non-closeable openings on them; and (ii) walls the height of which do not measure up to the ceiling or roof. As we understand it, the draft regulation under the Scottish approach discounts all “closeable openings”, including gates or doors which are of the same height or even the same area of a whole wall. In Hong Kong, a lot of shops are fitted with roller-shutter gates that are of the same area as a wall. These roller-shutter gates are opened fully during the business hours. To deal with the “openings” created by rolling up these roller-shutter gates in the same way as openings created by other doors and windows may not suit the local scene. However, learning from the Irish and Scottish mathematical approach, we believe that if we have to be more specific in the definition of “indoor”, the law has to state clearly how different kinds of openings in the wall and the total or partial absence of walls are to be dealt with.

16. In response to Members’ suggestion for a clearer meaning for “indoor”, we may consider adopting a refined mathematical approach by

adding two “deeming provisions”, in addition to the existing meaning of “indoor” in the Bill, to cover the most common types of indoor areas.

Deeming Provision One – Meaning of “completely enclosed”

17. An area can be taken to be “completely enclosed” at the sides if its perimeter is completely constituted by walls; and there is no “non-closeable opening” or “opening at the perimeter” on the walls.

18. “Non-closeable opening” refers to any opening that cannot be closed such as an opening in a perforated wall and the space between two railings of a fence.

19. An “opening at the perimeter” means a non-closeable opening that is formed by the absence of wall at any part of the perimeter or a closeable opening at any part of the perimeter that extends from the ceiling to the floor, and that which is usually/ordinarily opened during the hours in which the area is opened to the public or functions as a workplace. Examples of “openings at the perimeter” include an opening made by a sliding door that is of the full height of the wall and that which is usually opened during the business hours of a shop and an opening made by a roller-shutter gate that constitutes the full area of a wall and that which is usually opened during the business hours of a shop.

Deeming Provision Two – Meaning of “substantially enclosed”

20. An area can be taken to be “substantially enclosed” at the sides if –

- (a) its perimeter is completely or partly constituted by walls;
- (b) there is one or more “non-closeable openings” or “openings at the perimeter” on the walls; and
- (c) the percentage calculated by using the following formula exceeds a certain level –

$A/(A+B) \times 100\%$  where –

A = total internal surface area of the walls, including the total internal surface area of all “closeable openings” except “openings at the perimeter”

B = total internal surface area of the “non-closeable openings” or “openings at the perimeter”.

21. In treating all “closeable openings” except “openings at the perimeter” as part of the walls no matter whether they are opened or closed, we are following the approach found in the legislation of Tasmania, Ireland, Oregon and Rhode Island. For calculating “B”, we propose that it should be

the total area of all “non-closeable openings” and all “openings at the perimeter because these two types of openings allow for unobstructed flow of air hence dilution of smoke by the atmosphere.

22. In the case of Hong Kong, if this approach is adopted, we propose that an area should be taken as “substantially enclosed” at the sides if the percentage obtained by using the above formula exceeds 55. We consider that where two sides of normal four-walled premises are completely opened with possibly a column / pillar at the turning corner of the two opened sides, there will be unobstructed flow of air and therefore the premises can be reasonably regarded as not “substantially enclosed”. However, where the column or pillar at the turning corner of the two opened sides is too wide and becomes small walls in themselves (i.e. exceeds 5% of the total internal surface area of the “absent” and “solid” walls), we believe that the premises should be regarded as “substantially enclosed”.

23. In most other premises that are of irregular shape, for all non-closeable openings and openings at the perimeter to be able to make up at least 45% of the total area of “A+B”, at least two sides of walls (regardless of the number of sides or walls the premises have) or equivalent area will have to be totally opened. This means active draft of air is possible and such premises can be reasonably regarded as not “substantially enclosed”.

24. This approach, however, may be “unfair” to certain designs. For example, premises with perforated walls the non-closeable openings of which (“B” in the formula) constitute 45% of the total area of “A + B” would not be considered “substantially enclosed” while premises with large windows (“closeable openings”) which are kept fully opened would be considered “substantially enclosed” even if the windows constitute 80% of the total internal surface area of all walls.

*Alternative Approach – closeable openings counted as openings if opened at the material time*

25. We may consider the alternative approach of considering “closeable openings”, when opened, as openings on the walls in the calculation of “B” in the formula. Under this alternative approach, it is critical to take into account whether a “closeable opening” is closed or opened at the material time. In other words, instead of discounting all “closeable openings”, we would need to discern which “closeable openings” are opened at the material time, and then discount these from the internal surface area of the walls.

26. One obvious disadvantage of this approach is that it does not take into account the degree to which the “closeable openings” are opened at the material time. A window can be opened only by one centimeter and can still be regarded as an opening on the wall. Because of this disadvantage, it is

difficult to recommend the percentage to be obtained from adopting the above formula for the premises to be regarded as “substantially enclosed”. Another major drawback of this approach is that it is difficult for the manager of the premises, the people inside the premises and enforcement officers to be clear about whether smoking is prohibited in the premises since the determination is made at the material time and can be different with the closing of a window or a door.

### **Merits and drawbacks of the mathematical approach**

27. Generally speaking, the mathematical approach, no matter how the surface area of openings as a proportion of the total surface area of the premises is calculated and regardless of the percentage level that is set to determine whether the premises is “substantially enclosed”, provides clearer guidance in some otherwise doubtful cases as to whether certain premises are considered “substantially enclosed”. However, for some special architectural designs such as perforated walls, it would be difficult for both the manager of the premises and for the enforcement officers to do the measurement. For enforcement purpose, in particular, collection of sufficient evidence to launch a prosecution could be arduous if the mathematical approach is adopted. Since a specific percentage is adopted in the formulation, enforcement officers would need to obtain precise evidence to proceed with the charge and even the difference of 1% could have substantial impact.

28. Furthermore, the mathematical approach would still not be able to cover all designs and scenarios. In those circumstances, enforcement officers would have to exercise common sense and consider the case according to general principles such as whether there is unobstructed airflow and whether the societal norm would regard the premises as “substantially enclosed”. When a case is brought before the court and the defendant argues on the grounds that the premises in which he smoked was not “substantially enclosed”, the court would have to consider whether the premises concerned are “substantially enclosed” based on circumstantial facts.

29. In addition, if a mathematical approach is adopted for determining whether premises are “substantially enclosed”, we may have to consider the question of whether a mathematical approach is also needed to determine whether a structure that is on the top side of the premises is a ceiling or roof or functions as a ceiling or roof, as there are structures which are perforated or with slits or with non-closeable or closeable openings. The entire definition of “indoor” may become extremely complicated, difficult to understand for the layman and difficult to enforce for enforcement officers.

### **Advice sought**

30. Members are invited to note the different approaches adopted by other jurisdictions and the possible alternative approach for Hong Kong as set out above. Members' views on the applicability, effectiveness and desirability of the different approaches are welcomed.

### **Follow-up Action**

31. Subject to Members' consideration, appropriate Committee Stage Amendments, where necessary, will be prepared for the Committee's consideration in due course.