

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

**Administration's response to issues raised
at the Bills Committee meetings
on 17 February and 20 February 2006**

PURPOSE

This paper sets out the Administration's response to issues raised by the Bills Committee at its meeting on 17 February 2006 and 20 February 2006.

BACKGROUND

2. At the above meeting, Members raised the following issues and requested the Administration to provide a response in writing -

(a) To make clear whether the proposed smoking ban would include service apartments;

ADMINISTRATION'S RESPONSE

3. Clause 5 of the Smoking (Public Health) (Amendment) Bill 2005 ("the Bill") proposes that smoking is to be prohibited in indoor areas of a workplace or public place. The Bill further proposes that such prohibition does not apply to "domestic premises" under new section 3(5)(a), nor sleeping accommodation in hotel or guesthouse as provided in new section 3(5)(d).

4. We understand that "service apartment" is a type of accommodation offered for renting as a private dwelling for a relatively long period of time, during which housekeeping services would be provided by the operator, akin to services provided for hotel guests. As such, service apartments should also be excluded from the smoking ban.

5. For service apartments that are offered for letting within a hotel or guesthouse licensed or exempted under the Hotel and Guesthouse Accommodation Ordinance (Cap. 349), they will be excluded from the smoking ban under the new section 3(5)(d). For service apartments that are available in domestic premises, they will be excluded from the smoking ban under the new section 3(5)(a).

(b) to consider whether premises provided as sleeping accommodation by any employer to his employees should become a no smoking area, if the premises were shared by two employee or above;

6. The Bill further proposes that the new section 3(1AA) does not apply to -

- *any premises used for the provision of sleeping accommodation by any employer to his employees and their families, whether or not any monetary consideration is received by the employer for so providing the sleeping accommodation.*

7. In Hong Kong, sleeping accommodation provided by employers for his employees and their families come in different forms, whether or not money consideration is received by the employer for so providing the sleeping accommodation. The employer may, for example, provide separate and independent sleeping accommodation for each employee and his/her family (family-type accommodation) or the employer may provide shared accommodation for his employees (communal accommodation).

8. In both cases, we consider that the sleeping accommodation so provided is the same in nature as any other domestic premises. Although in the latter case (i.e. communal accommodation), the premises are shared between employees which are persons that may not have family ties, the sleeping place of the employees together with other common areas such as living room, kitchen and toilet are domestic in nature. The only difference is that employees may use communal accommodation only as their temporary dwelling for the purpose of their employment.

9. We believe that there should be a balance between protecting an individual's freedom to engage in lawful pursuits in his private space and protecting the health of workers in their course of work. Prohibiting smoking in such communal accommodation will be seen as treating smokers in this particular type of accommodation differently from smokers in family-type accommodation where the premises in both cases are for domestic purpose. Indeed, family-type accommodation may also be within premises which comprise of individual rooms occupied by different families with communal facilities like kitchens and toilets being shared between occupants of different rooms. To prohibit smoking in a communal accommodation would also entail the employer having to put up signs indicating that the premises are statutory no-smoking areas and entering the premises regularly to ensure that the signs are maintained in a legible condition and in good order. We believe that all these would mean an intrusion into privacy, which might not be accepted by those concerned.

10. We recognize the need to protect non-smokers from the harmful effects of second-hand smoke in a domestic environment in which he is compelled to live because of his work. However, in view of the controversy of the matter as outlined above, we propose to raise this issue for the detailed discussion of the Labour Advisory Board.

(c) to make clear whether sleeping accommodation provided by employers for their employees that are located at the back or in the attic of the workplace should be subject to the smoking ban;

11. Under the Bill, “workplace” is interpreted as a place -

*(a) that is occupied for conducting a business (whether for profit or not);
and*

*(b) in which natural persons work in the course of any self-employment,
employment or engagement (whether for income or not),*

including any part of the place that is set aside for use by those persons during any interval for taking a meal or rest.

12. If the sleeping accommodation provided by the employer to the employee is clearly segregated from the working area, the premises are not a workplace and thus be exempted under the new section 3(5)(b). The smoking ban is thus inapplicable to such an accommodation. However, if the sleeping accommodation is located within the workplace, e.g. temporary beds unfolded in a retail shop at night, we would consider that the place is used predominantly as a workplace and smoking should not be allowed therein.

13. We understand that with present drafting of the Bill, if a workplace is used partially, for example only at night, as sleeping accommodation for employees, it can arguably attract the application of new section 3(5)(b) and thus be exempted from the smoking ban. Since our policy intent is to ban smoking in premises that are used predominantly as workplaces, we would clarify this position with a Committee Stage Amendment.

(d) to ascertain whether premises used for habitation, but sometimes used as workplace, and involving non-inhabitants of that premises, such as running a private kitchen, fall under the definition of “domestic premises” in clause 4(h); and

14. As a matter of principle, the legislative intent of the Bill is to exempt domestic premises from the smoking ban having regard to privacy considerations. We note that in other jurisdictions, private dwellings are also exempted from the smoking ban.

15. Where domestic premises also function as a workplace at certain hours of the day and are visited by patrons or clients, such as a self-employed person providing private tuition to his/her students, we note that the premises remain in every way domestic premises for the person who works therein. His everyday domestic activities still take place in the premises. This is different from the case

where a retail shop houses one member of the staff at night using foldable beds. Also, while an occupant may use part of the premises as his/her workplace for entertaining outsiders, other occupants, such as his/her family members, continue to reside there and the premises are private dwellings in its true sense. We therefore believe that the premises should be considered “domestic premises” and be exempted from the smoking ban.

16. With regard to private kitchens, although presently they are not regulated by the Food Business Regulation (Cap. 132X), they will fall within the new definition of “restaurant premises” in the Bill, which covers -

“any other trade or business for the purpose of which meals...are sold or intended to be sold for human consumption on the premises”.

It should be noted that “restaurant premises” are listed in the new Schedule 2 and a “no smoking area” specified in Schedule 2 will not enjoy any exemption under the new section 3(5). An indoor restaurant therefore will not be excluded from the smoking ban even if it is operated within domestic premises.

(e) whether the Administration would consider extending the smoking ban to certain outdoor areas including (i) escalators; (ii) queues; and (iii) country parks.

17. When the Government consulted the community on extension of the smoking ban in 2001, the proposal was to extend the ban to indoor public venues and indoor workplaces. In the present Bill, prohibition of smoking in outdoor areas was only proposed for institutions where minors received care and / or education. We believe that the question of extending the smoking ban to outdoor areas should be deliberated by the community before a final decision is taken. However, we also recognize that there is a gradual trend of including some outdoor areas where there is limited space between individuals in the smoking ban overseas. After careful consideration, we note that “escalators” which convey people between different floors / levels is an example in which people have to stay in close proximity, their room to maneuver is limited due to safety or other reasons and that non-smokers will suffer from secondhand smoke if riding with smokers who are smoking at the time even if these escalators are located in outdoor areas. We therefore propose to start with including these outdoor escalators in the smoking ban. The factors we have taken into consideration include -

- the space between individuals on escalators is limited;
- in order to complete the escalator ride, there is little alternative space for non-smokers to go so as not to inhale secondhand smoke if there is a smoker nearby;
- in some cases, apart from escalators, there is little alternative for some

people, especially the elderly, young children, the frail and the handicapped;

- “escalators” are easily understood by the general public, uncontroversial and easy to define in the technical drafting of the law.

18. For “queues”, we have found it difficult to technically define what a “queue” is under different circumstances. Questions that need careful thinking include whether the smoking ban should only apply to a single line of people or should include those surrounding the line, e.g. someone not in the line but accompanying another person who is in the line. Also, at bus stops or mini-bus stops, people sometimes do not queue up but nonetheless stand in close proximity with each other. Should the whole of bus stops, mini-bus stops and the like be designated as no smoking areas? If yes, how large an area surrounding the stop should the no smoking area cover? Furthermore, should the area be smoke free at all times or should it be smoke free only when a queue is formed? We will have to consider these questions carefully, take into consideration public views and discuss with the public transport operators before making a decision.

19. In order not to delay the enactment of the present Bill, we propose to deal with these questions in the next stage. Before the next legislative amendment exercise, if there is general consensus on imposing a smoking ban on queues and on the extent of further extending the smoking ban (whether applying only to the line of people queuing up or to a defined area in the place where queuing usually takes place), we will explore with public transport operators and managers of other venues where queuing is likely to occur (e.g. theme parks) whether at least some of these areas (e.g. public transport terminus) can be designated as no smoking areas administratively, e.g. as “house-rule” of the venue management.

20. For country parks, we acknowledge that visitors expect to experience fresh air there. However, it should be noted that precisely because of the nature of country parks, smoke from tobacco products or any pollution can be much better diluted there than in densely populated areas and individuals in country parks rarely need to stay in close proximity of each other. Furthermore, enforcement is likely to be a problem given the vast space in country parks. We would therefore recommend that the question of whether extending the smoking ban to country parks be put to public consultation before a decision is made. Because of the long lead time needed for public consultation, we propose to deal with this question after the Bill has been enacted and the extended smoking ban implemented.