

President's ruling on the Smoking (Public Health) (Amendment) Bill 2009 proposed by Hon Albert CHAN Wai-yip

Hon Albert CHAN Wai-yip submitted to me on 6 April 2009 the Smoking (Public Health) (Amendment) Bill 2009 ("the Bill") which he intends to introduce into the Legislative Council.

2. Rule 51(3) of the Rules of Procedure ("RoP") provides that Members may not either individually or jointly introduce a bill which, in the opinion of the President, relates to public expenditure or political structure or the operation of the Government. RoP 51(4) provides that in the case of a bill which, in the opinion of the President, relates to Government policies, the written consent of the Chief Executive ("CE") is required for its introduction. RoP 51(3) and (4) are made for implementing Article 74 of the Basic Law ("BL 74").

3. In considering whether Mr CHAN's Bill relates to the restrictions prescribed in RoP 51(3) and (4), I have invited the Administration to comment on the Bill and Mr CHAN to respond to the Administration's comments. The Administration's comments and Mr CHAN's response are summarized in the **Appendix**.

Background

4. The Smoking (Public Health) Ordinance (Cap. 371) ("SPHO") was last amended by the Smoking (Public Health) (Amendment) Bill 2005 ("the Amendment Bill") which was passed on 19 October 2006. According to the Legislative Council Brief issued by the former Health, Welfare and Food Bureau in April 2005, the Amendment Bill sought to extend the statutory smoking ban to cover the indoor areas of all restaurants, regardless of their size and seating capacity; indoor areas of bars, karaoke establishments, mahjong premises, commercial bathhouses and other hospitality premises; as well as indoor areas of educational and welfare institutions. The Bill also proposed that apart from these premises, the indoor areas of workplaces and public places be statutory smokefree areas.

5. The Amendment Bill proposed a 90-day adaptation period to enable the establishments affected by the smoking ban to make transitional arrangements to facilitate compliance with the proposed statutory requirements. During the Committee stage of the Amendment Bill, the Administration moved amendments to extend the adaptation period to 1 July 2009 for the following establishments, which are referred to as "listed establishments" in Part 2 (in relation to deferment of smoking ban) of Schedule 6 to SPHO:

- (a) a designated mahjong room in a qualified club or any other listed establishment;
- (b) a qualified bar¹;
- (c) a qualified club²;
- (d) a qualified nightclub³;
- (e) a bathhouse;
- (f) a massage establishment; and
- (g) mahjong-tin kau premises.

Purpose of Hon Albert CHAN Wai-yip's proposed Bill

6. Mr CHAN has provided a submission to me detailing the contents and purpose of his Bill. According to his submission, the purpose of his Bill is to defer the implementation date of the smoking ban in the listed establishments referred to in Part 2 of Schedule 6 by two years, i.e. from 1 July 2009 to 1 July 2011. Mr CHAN has explained that the deferment is to help these establishments "to tide over the current economic winter".

7. To assist me in studying Mr CHAN's Bill, I have sought the advice of Counsel to the Legislature on the legal effect of the amendments proposed in Mr CHAN's Bill. According to Counsel's analysis:

- (a) section 2 of Part 2 of Schedule 6 to SPHO provides, among other things, that a designation of no smoking area does not have effect before 1 July 2009 in relation to an indoor area if the area is a designated mahjong room in a listed establishment that is a qualified club or is in any other listed establishment. Clause 2(1) of Mr CHAN's Bill amends section 2 of Part 2 of Schedule 6 by substituting the date "1 July 2009" with "1 July 2011";
- (b) section 8(2)(c)(i) of Part 2 of Schedule 6 requires a listed establishment that is a qualified club to display a prescribed sign containing information, among other things, that the smoking ban will apply to a designated mahjong room in the club with effect from 1 July 2009⁴. Section 8(2)(c)(ii) of Part 2 of Schedule 6 requires any other listed establishment to

¹ An establishment is a qualified bar if the requirements in section 4 of Part 2 of Schedule 6 to SPHO are complied with.

² An establishment is a qualified club if the requirements in section 5(1) of Part 2 of Schedule 6 to SPHO are complied with.

³ An establishment is a qualified nightclub if the requirements in section 6 of Part 2 of Schedule 6 to SPHO are complied with.

⁴ Under section 8(2)(c)(i) of Part 2 of Schedule 6, the prescribed sign is to be displayed in a prominent position at the exclusive entrance of each designated mahjong room in a qualified club and the information contained therein is to be in Chinese and English.

display a prescribed sign containing information, among other things, that the smoking ban will apply to an indoor area in that establishment with effect from 1 July 2009⁵. Subclauses (2) to (5) of clause 2 of the Bill amend section 8(2)(c)(i) and (ii) by substituting the date “1 July 2009” (Chinese and English) with “1 July 2011” (Chinese and English) in the sign; and

- (c) section 16 of Part 2 of Schedule 6 is a sunset clause providing that Part 2 of Schedule 6 shall expire on 1 July 2009. Clause 2(6) of the Bill amends section 16 by substituting the date “1 July 2009” with “1 July 2011”.

The Administration’s views

Government policies

8. The Administration submits that it is the policy of the Government to seek, through a step-by-step approach, to discourage smoking, contain the proliferation of tobacco use and protect the public from passive smoking to the maximum extent possible. This policy is publicly announced and also reported to the World Health Organization’s secretariat for the Framework Convention of Tobacco Control. This policy is also reflected in SPHO enacted in 1982 and various amendments introduced to it over the years. The last exercise was the introduction of the Amendment Bill to provide for, inter alia, the expansion of the scope of statutory no smoking areas to all indoor workplaces and public places, except for the transitional deferment of the smoking ban in the listed establishments until 1 July 2009 as provided in Part 2 of Schedule 6 to SPHO. It was made clear to the Bills Committee formed to scrutinize the Amendment Bill (“the Bills Committee”) that the deferment was only a transitional arrangement to help certain industries to tide over the regulatory changes, transform their mode of operation, as well as to facilitate their smoker-customers to gradually adjust to the legislative requirements.

9. The Administration further submits that it is Government policy to apply the smoking ban to all the listed establishments from 1 July 2009 after the adaptation period and deferment of the smoking ban have expired. This policy is reflected in sections 2, 8(2)(c)(i), 8(2)(c)(ii) and 16 of Part 2 of Schedule 6 to SPHO. Mr CHAN’s Bill, if passed, will have the effect of substantially prolonging the deferment of the aforesaid effective date and go against the policy intent of applying the smoking ban to listed establishments after the adaptation period. The Administration therefore considers that the Bill relates to the well-established Government policy of extending the smoking ban to all indoor workplaces for the purposes of BL 74 and RoP 51(4).

⁵ Under section 8(2)(c)(ii) of Part 2 of Schedule 6, the prescribed sign is to be displayed in a prominent position at each exclusive entrance of a listed establishment other than a qualified club and the information contained therein is to be in Chinese and English.

Operation of the Government

10. The Administration also argues that the Bill, if enacted, would substantially extend the transitional provisions, albeit the extension is for a fixed period. It would have an obvious or substantive impact on the procedure of the Government in that during the whole period of the extension proposed by Mr CHAN's Bill, it cannot enforce the smoking ban in the listed establishments as provided in SPHO, which is an important part of the Government's current tobacco control policy. The Administration is of the view that Mr CHAN's Bill relates to the operation of the Government for the purposes of BL 74 and RoP 51(4).

Hon Albert CHAN Wai-yip's views

11. Mr CHAN does not agree to the Administration's comment that his Bill relates to Government policy and the operation of the Government. He argues that his Bill only seeks to extend the deferment of the implementation of the no smoking ban in the listed establishments. It does not seek to change the Government's tobacco control policy. The expiry date of 1 July 2009 of the deferment in the Amendment Bill, which was enacted by the Council, was agreed between the Administration and the Bills Committee. It would therefore be within the power of the Council to amend this expiry date and the Council should not give up its power to make this amendment.

My opinion

12. The Administration submits that Mr CHAN's proposed Bill relates to Government policy and also to operation of the Government. As Members may not introduce a bill which relates to the operation of the Government under BL 74 and in accordance with RoP 51(3), I will first give my opinion in this respect.

Operation of the Government

13. It has been established through rulings of my predecessor that in order for a bill not to be caught by RoP 51(3), the bill must not have substantive effect on one or more than one of the areas prescribed in this sub-rule. In order for me to decide that a proposed bill relates to the operation of the Government, I have to be satisfied by the Administration that the implementation of the proposed bill would have an obvious effect on the structure or procedure of the executive authorities, and that the effect would not be of a temporary nature.

14. The Administration's submission as set out in paragraph 10 is not substantiated by any information on what procedure of the Government, and exactly how that procedure would be affected by the extension of the transitional provisions. In the absence of such information, I am not satisfied

that Mr CHAN's Bill relates to the operation of the Government for the purpose of RoP 51(3).

Government policy

15. It has been established by my predecessor's rulings that in order for a bill not to be caught by RoP 51(4), the bill must not have substantive effect on Government policies which include policies reflected in legislation.

16. Mr CHAN has argued that because the date of 1 July 2009 was agreed between the Administration and the Bills Committee and approved by the Council, it would be within the power of the Council to amend it. My view is that upon the enactment of the Amendment Bill, that date becomes an essential element of the Government policy to implement the smoking ban in the listed establishments.

17. As regards Mr CHAN's explanation that the purpose of the proposed deferment is to help the establishments concerned "to tide over the current economic winter", this is a point of merit which I should not deal with in making a ruling under RoP.

18. I am of the opinion that the current Government policy on implementing the smoking ban in the listed establishments with effect from 1 July 2009 is clearly reflected in the relevant provisions, i.e. sections 2, 8(2)(c)(i), 8(2)(c)(ii) and 16 of Part 2 of Schedule 6 to SHPO. The amendments to be effected by Mr CHAN's Bill would defer the implementation of the smoking ban in such establishments by a period of two years. As such, Mr CHAN's Bill clearly impacts upon Government policy and the effect cannot be said to be negligible or minimal.

My ruling

19. I rule that Mr CHAN's Bill relates to Government policies for the purpose of RoP 51(4). The Bill may not be introduced without the written consent of CE.

(Jasper TSANG Yok-sing)
President
Legislative Council

11 May 2009

Smoking (Public Health) (Amendment) Bill 2009

**Summary of the Administration's comments on the Bill
proposed by Hon Albert CHAN Wai-yip and Mr CHAN's response to such comments**

Purpose of Hon Albert CHAN's Bill	The Administration's comments	Hon Albert CHAN's response
<p>The Bill seeks to amend SPHO to defer the implementation date of the smoking ban in the listed establishments referred to in Part 2 of Schedule 6 by two years, i.e. from 1 July 2009 to 1 July 2011.</p>	<p><u>Government policies</u></p> <p>The Administration is of the view that the Bill relates to Government policies as referred to in BL 74 and RoP 51(4). In particular, the Bill relates to the established Government policy of restricting the use of tobacco products for the protection of public health as clearly reflected in SPHO last amended in October 2006.</p> <p>It is the Government's well-established policy to seek, through a step-by-step approach, to discourage smoking, contain the proliferation of tobacco use and protect the public from passive smoking to the maximum extent possible. This policy is publicly announced and also reported to the World Health Organization's secretariat for the Framework Convention of Tobacco Control. A multi-pronged approach, comprising legislation, taxation, publicity, education, enforcement and smoking cessation, has been adopted to achieve the above policy objectives. The Administration's policy on smoking prevention and tobacco control has been gradually strengthened over the years in line with public expectations.</p>	<p>Mr CHAN does not agree to the Administration's comments.</p> <p>Mr CHAN is of the view that the Bill only relates to an extension of the deferment of the smoking ban. The expiry date of the deferment in the Amendment Bill was determined after discussion between the Bills Committee and the Government and approved by LegCo. It would therefore be within the power of LegCo to amend the expiry date of the deferment. Mr CHAN argues that the Bill does not seek to change the policy on tobacco control. It only proposes to slightly defer the implementation date of the smoking ban in certain industries. If LegCo allows the Government to deprive it of its power to amend this date, it is giving up a right it is entitled to, and the executive authorities can in future more autocratically introduce policies which are contrary to public views and public interests.</p>

Purpose of Hon Albert CHAN's Bill	The Administration's comments	Hon Albert CHAN's response
	<p>SPHO was first enacted in 1982 as part of the Administration's tobacco control efforts for restricting the use, sale and promotion of tobacco products for the protection of public health. In line with the overall tobacco control policy, the Administration has introduced various amendments to the Ordinance over the years to further protect the public from the harm of smoking and second-hand smoke. The last major amendment exercise was the introduction of the Amendment Bill to LegCo to provide for, inter alia, the expansion of the scope of statutory no smoking areas to all indoor workplaces and public places.</p> <p>With the passage of the amendments to SPHO in LegCo in October 2006, the scope of statutory no smoking areas has been expanded to cover all indoor workplaces and public places, except for:</p> <ul style="list-style-type: none"> (a) exempt areas from the smoking ban as provided for in Part 2 of Schedule 2 to SPHO; and (b) transitional deferment of the smoking ban in the listed establishments (comprising six types of qualified establishments) until 1 July 2009 as provided for in Part 2 of Schedule 6 to SPHO. <p>The Administration made clear to the Bills Committee formed to scrutinize the Amendment Bill that the deferment referred to above was only a transitional arrangement under the established tobacco policy of</p>	

Purpose of Hon Albert CHAN's Bill	The Administration's comments	Hon Albert CHAN's response
	<p>applying a comprehensive ban on all indoor workplaces based on the following considerations, as recorded in paragraphs 29 and 30 of the Report of the Bills Committee on the Amendment Bill to LegCo dated 13 October 2006 (LC Paper No. CB(2) 35/06-07).</p> <p>It is thus amply clear that the Government policy is to apply the smoking ban to all the listed establishments from 1 July 2009 after the adaptation period and deferment of the smoking ban have expired. This Government policy is reflected in sections 2, 8(2)(c)(i), 8(2)(c)(ii) and 16 of Part 2 of Schedule 6 to SPHO, all of which show that the smoking ban in the listed establishments shall be effective as from 1 July 2009. The Bill, if passed, will have the effect of substantially prolonging the deferment of the said effective date and go against the policy intent of applying the smoking ban to the listed establishments after the adaptation period.</p> <p><u>Operation of the Government</u></p> <p>The Administration considers that the Bill relates to the operation of the Government for the purposes of BL 74 and RoP 51(3).</p> <p>Under SPHO, following the expiry of the transitional provisions in Part 2 of Schedule 6 on 1 July 2009, the smoking ban in the listed establishments shall immediately come into effect, and the Government shall enforce such ban accordingly (for example, section 3 (prohibition on smoking in certain designated areas), section 7 (offence under, inter alia, section 3), and</p>	

Purpose of Hon Albert CHAN's Bill	The Administration's comments	Hon Albert CHAN's response
	<p>Part IVB (provisions relating to, inter alia, the powers and duties of inspectors appointed by the Secretary for Food and Health)). The Bill, if enacted, would substantially extend the transitional provisions, albeit the extension is for a fixed period. The Administration considers that it would have an obvious or substantive impact on the procedure of the Government in that during the whole period of the said extension, it cannot enforce the smoking ban in the listed establishments as provided in SPHO, which as shown above is an important part of the Government's current tobacco control policy.</p>	

Abbreviations

BL 74	Article 74 of the Basic Law
LegCo	Legislative Council
RoP	Rules of Procedure of the Legislative Council
SPHO	Smoking (Public Health) Ordinance (Cap. 371)
the Amendment Bill	Smoking (Public Health) (Amendment) Bill 2005
the Bill	Smoking (Public Health) (Amendment) Bill 2009 proposed by Hon Albert CHAN