

Hong Kong Council on Smoking and Health
COSH's Submission to the LegCo Panel on Health Services
Enforcement of the Smoking (Public Health)(Amendment) Ordinance

INTRODUCTION

Under the Smoking (Public Health)(Amendment) Ordinance 1997, various legislative measures to tighten tobacco control in the following areas have been implemented by stages since April 1998:-

- (i) smoking in public places
- (ii) sale of tobacco products
- (iii) tobacco advertising

2. In the absence of a dedicated government department/bureau which is tasked with the enforcement of the ordinance, the Council on Smoking and Health (COSH) has since then become the focal point for the implementation of the ordinance. Members of the public will address all enquiries and complaints to COSH on related issues and the media will also approach COSH for progress and details.

3. To be more effective in getting feedbacks from the public on the implementation of the legislation, COSH started to operate a telephone hotline in July 1998 to receive enquiries, suggestions and complaints from members of the public. A summary of the enquiries and complaints received by COSH through the hotline in the past 18 months is attached at Annex A.

4. This paper presents COSH's views on the general problems encountered in the enforcement of the new legislation and suggest ways and means to overcome the problems

ENFORCEMENT OF NO-SMOKING REQUIREMENT IN PUBLIC PLACES

5. Since 1 July 1998, enclosed public places in shopping malls, department stores, banks and supermarkets have been designated statutory no-smoking areas. Subsequently, COSH received over 200 calls from the public, complaining the law was ineffective in protecting non-smokers from exposure to passive smoking in the designated no-smoking public places, in particular the shopping malls. The shortcomings being reported on and identified include:

- inadequate no-smoking signage displayed at the no-smoking area
- many people were still seen to be smoking in the shopping malls

- the management have not taken (or unwilling to take) prompt and satisfactory action on the smokers when they were alerted of the offence
- offenders should have been prosecuted and fined in accordance with the law but so far no prosecution has ever taken place
- the management are not aware of the detailed requirements of the law

6. As far as smoking in public places is concerned, there are two tiers of enforcement process under the legislation:

- (i) The management are obliged to display a sufficient number of “no-smoking” signs in the area, and to take initial action to stop smoking activities in the non-smoking area.
- (ii) To take legal action to prosecute the offenders.

7. Through COSH’s contact with the management of the shopping malls concerned, we knew that they were co-operative in the signage display but they were often found unable to take the initial enforcement action as the law would have intended. This might be due to the management’s ignorance of the obligation, but very often it was because the management staff on the spot would not like to antagonize the smoking customers. They might also feel handicapped to pursue more vigorous action to prosecute the offenders in the final course as they do not know exactly how to deal with the offenders who insist on smoking in the no-smoking area. Another important point is that the management concerned need not be liable, legally, to any sort of punishment by not taking action on the offenders.

8. At present, the only authority that can take legal action to prosecute the offenders is the Police. It is acknowledged, however, that because of resource constraints, such smoking offences may not merit high priority in the Force’s enforcement responsibilities. A shopping mall in Kwai Chung, for example, experienced difficulties in curbing the serious smoking offences therein and has sought help from the Police. Police officers visited the mall but no follow-up action was taken. The problem still remains unsolved.

9. COSH considers it essential to bring about a few successful prosecution cases which may have great deterring effects on the offenders. Accordingly, COSH suggests the Administration to consider:

- (a) forming a dedicated inspection team to visit the black spots on a regular basis;
- (b) empowering the inspection team to initiate prosecution action;
- (c) pending formation of the proposed inspection team, involving the Police more closely in the enforcement of the legislation (e.g. serving warning to

- offenders, bringing the offenders to court); and
- (d) if necessary, streamlining the reporting/legal procedures which will be spelt out clearly to all parties concerned.

ENFORCEMENT OF NO-SMOKING REQUIREMENT IN PUBLIC PLACES (RESTAURANTS)

10. Restriction of smoking in public places was further extended to restaurants in July 1999 when restaurants providing indoor seating accommodation for more than 200 persons were required by the law to designate not less than one-third of the area as a no-smoking area. Shortly after the commencement of this new legislative measure, COSH received again a lot of complaints from the public which could be categorized as follow:-

- Restaurants did not designate sufficient no-smoking area as required by the law
- Not sufficient signage was posted up at the no-smoking area in the restaurants
- Smokers were still found smoking in the no-smoking area
- The management of the restaurants did not take necessary action to control smoking in the area
- Some restaurants deliberately designated the no-smoking area in VIP rooms and raised higher charges for dining there.

11. In the past few months, the Health Inspectors of the two then Regional Services Departments were helpful in taking up the responsibility of ensuring the restaurants concerned have complied with the first two requirements, i.e. designation of sufficient no-smoking area and signage display, although they were just carrying out this additional enforcement role during their routine inspections on the restaurants. Warning letters have been issued to those restaurants which had not complied with these requirements. It is hoped that the new Food and Environmental Hygiene Department will continue to assist in undertaking this part of enforcement action.

12. Similar to the case of shopping malls, there have been a significant number of cases reported on people smoking in the designated no-smoking area but then the management were not capable of taking any action to stop the offences. The situation is even worse than in the malls as non-smokers are less mobile within the restaurants and they cannot easily avoid the people smoking besides them. Disputes may therefore occur between the smokers and non-smokers at the no-smoking areas.

13. Apart from the enforcement difficulties, COSH considers that, basically the law

is not effective enough to protect non-smokers from passive smoking, for the following reasons:-

- Only one-third of no-smoking seats are not sufficient to meet the demand of the large number of non-smokers.
- That no requirement of physical boundary and separate ventilation for the non-smoking area will mean that the no-smoking area is still exposed to passive smoking
- People working and eating in restaurants with less than 200 seats are totally unprotected from passive smoking.
- While the shopping malls were all designated non-smoking area, some restaurants located within the malls would designate only one-third of their seating capacity as no-smoking area and allow the rest for smoking, disregarding of whether they have individual ventilation system or not. There may be an ambiguity between the two provisions.

14. COSH has conducted a study in 1995 which indicated that the strong support of the public (94% of the population) for the Government to enact legislation to ban smoking in half or all of the seats in restaurants in order to protect the health of the public. (COSH Report No. 3 - copy at Annex B). A similar study has been carried out in November/December 1999 to gauge the public's view on the present legislation and their need for no-smoking area in restaurants. The data are being evaluated, but initial findings show that members of the public still want more control on smoking in the restaurants. In this regard, COSH will urge the Government to take a critical review on the present legislation and impose more stringent regulation requiring for the restaurants to provide more better-ventilation no-smoking seating areas for their non-smoking customers.

Enforcement of no-smoking request in other statutory public places

15. As early as 1992, a number of public places including cinemas, games centres, public lifts and all public transports have been designated statutory no-smoking areas. COSH notes that most public transport companies have taken action to prosecute smoking offences in the transports (MTR, ferries). Occasionally, we receive complaints of smoking in these public transports. They will be referred to the companies concerned for investigation and action. We do however have special concern about the notorious situation at the Shun Tak Ferry Terminal in Central where frequent smoking offences were reported. It has also been reported that the smoking problem inside cinemas and public lifts remains to be serious. Enforcement action in these areas is also considered inadequate and the problem should be addressed to in the same manner as that in the shopping malls and restaurants.

CONTROL ON SALE OF TOBACCO PRODUCTS

Promoting of Cigarette at the points of sales

16. One of the main spirits in the 1997 amendment ordinance is to discourage tobacco promotion through eliminating materials awards to attract and induce people to buy, and ultimately to consume the tobacco products. Section 19 of the legislation described the various forms of materials awards (e.g. gifts) in promoting tobacco products that should be prohibited.

17. However, once the law was put in force, we saw a new "gift" tactics being employed by the tobacco industry to promote sale of cigarette products. They bundled a pack of cigarette with a discounted product and sold them together. At Annex C are some of the many examples that were found in the market.

18. COSH has received several complaints from members of the public, questioning the legality of this form of cigarette promotion. We consider that such a promotional tactics may have contravened the spirit of the law which stipulates, inter alia, that "No person shall give valuable consideration to any individual in order to induce them to buy a particular tobacco product or otherwise to promote to him that tobacco product." A discounted product like the lighter or lady's waist watch shown in Annex C is obviously an inducement to the consumers.

19. COSH has brought up the case, through the Health and Welfare Bureau, to the Department of Justice who stated that such form of promotion has not contravened the law, but did not provide an explanation for the ruling. We suggest therefore that the law should be critically reviewed in this area with a view to covering the loophole, if any, that may be circumvented by the tobacco industry.

Health Warnings on Tobacco Products

20. Although the requirement of bearing the necessary warnings on the tobacco products is by no means new in the legislation, the Smoking (public health) (Notices) (Amendment) Order 1999 does stipulate some changes, including addition of new health warnings, to the existing requirements. COSH notes that the tobacco industry has in general observed the requirement for health warnings on cigarette packs. However, we have discovered a number of cigar dealers in Hong Kong who have ignored such requirements. Cigar products on display, small boxes or cigars sold in sticks, were found not bearing any health warnings in most cigar shops.

21. COSH has raised this issue repeatedly with the Health and Welfare Bureau, who has now issued warning letters to the cigar dealers concerned in this regard. The

situation has improved a bit but still the cigar dealers are still infringing the ordinance with advertising displays (in the street and in the shops) and in the presentation of products. We consider it necessary for some concrete prosecution action be carried out in order to ensure the law is fully complied with by the cigar dealers. In this connection, we are informed that the sale of tobacco products is the responsibility of the Customs and Excise. However despite of detailed discussions between the Bureau, COSH, Police and Customs no action has been taken.

CONTROL ON TOBACCO ADVERTISING

22. The 1997 Amendment Ordinance stipulates a very comprehensive and progressive ban on tobacco advertisement: on the Internet, outdoor displays, and in the printed publications. By 31 December 1999, Hong Kong has virtually become a tobacco advertisement free city, and the only spot where tobacco advertisement can still be found is at the point of sale of tobacco products. This is the only exception provided by the legislation, which allows tobacco advertisement "in or upon any stall or pitch of a hawkers who is licensed pursuant to the public Health and Municipal Services Ordinance (Cap 132) to hawk commodities, including tobacco products, at that stall or pitch"; and also "in or upon any premises of a retail dealer dealing in commodities including tobacco products if the number of persons employed by the dealers does not exceed 2."

23. The tobacco industry is now maximizing the use of the hawker stalls to advertise their products. We find the following situations, whereby the premises have been manipulated for advertising the tobacco products to a great extent, unacceptable and negating the spirit of the ordinance:-

(a) Tobacco advertisement displayed at hawker stalls not selling cigarettes

At Annex D are pictures taken along the water front of Cheung Chau Island. The new Marlboro umbrellas were found quite recently set up at the hawker stalls renting out holidays bungalows to tourists. They do not sell cigarettes at all. The only supporting justification, to the tobacco industry, seems to be that it is a retail dealer employing less than 2 persons, despite of whether it is selling cigarettes or not. If this practice is considered legal and be allowed, it will mean that many newspaper stands, candy shops and hawker stalls in town will be used to put up tobacco advertisement in due course. (A further problem is that the umbrellas do not carry any health warning.)

(b) Over-sized tobacco advertisement at point of sales

At Annex E is a photograph taken at a fruit juice stall next to the Times Square at Causeway Bay. We are not sure of the number of employees

working for the fruit juice stall (another enforcement difficulty) despite its rather large size. However, the apparent over-sized KENT advertisement hanging over the shop is obviously a billboard-type of outdoor advertisement which should be banned under the law. The tobacco company has adopted this tactic because the measurements of the permitted tobacco advertisement are not specified in the law.

24. In this regard, the tobacco industry must have carefully studied details of the legislation, considered the legal aspects of putting up such advertisements to ensure that they have not violated the law. This clearly shows that there are quite a number of loopholes in the law that can easily be circumvented by the industry. A further revision of the legislation seems to be the only answer to the problem.

25. Other forms of advertising have also been seen, quite recently to promote the sale of cigars:-

- Cigars promotion and sale on the internet (see Annex F)
- Feature articles on newspapers introducing different brands of cigars, the sales prices and means of purchase (see Annex G)

COSH has taken up the above issues with the Health and Welfare Bureau who is pursuing these.

CONCLUSION

Enforcement Difficulties

26. We consider the enforcement difficulties mainly lie in the following three areas:-

(i) Means to identify the non-compliance cases

COSH has been able to identify the non-compliance cases either through the Council's members and staff own efforts (e.g. over-sized advertisement, Marlboro umbrella at Cheung Chau, feature articles on newspapers), or through complaints received from the public (e.g. smoking in no-smoking areas in shopping malls, restaurants). This is far from satisfactory. Without a systematic enforcement system, many of the non-compliance case will be unknown to the Administration and remain unchecked.

(ii) Inadequate enforcement action to be taken on non-compliance cases

The main weakness here lies on the fact that there is not a government agency tasked with the overall responsibility of enforcing the legislation. Too many departments each responsible for a small portion of the enforcement requirements will end up with no practicable means to initiate on effective prosecution on the smoking offence. The resource constraints of many enforcement departments is also an important factor to undermine

their capability to take appropriate enforcement action.

(iii) Inadequate protection of the existing legislation

There are certain grey areas and ambiguities of the existing provisions under the law, which the tobacco industry will take advantage of in promoting sale of tobacco products and continue with their aggressive advertisement tactics. There may also be a number of loopholes within the legislation which the industry can readily make use of to circumvent the law.

Proposed Causes of Action

27. To more effectively address the enforcement difficulties mentioned above, COSH suggests the Government to:-

- (i) assign a department to take up the overall responsibility of enforcing the legislation so that it will develop a systematic and workable enforcement mechanism, coordinate with the relevant disciplined forces and legal parties in carrying out the necessary prosecution and to monitor the progress of all enforcement actions;
- (ii) provide more resources to departments concerned so that more pro-active enforcement action (e.g. warning, prosecution) can be taken on the non-compliance cases;
- (iii) seek closer involvement of the Police Force and Customs and Excise Department in assisting the enforcement action. The Police is a highly efficient law enforcement agency and if their presence is seen in taking up the smoking offences, it will create a great impact to deter smokers from committing the offences; and
- (iv) amend the existing legislation in due course to avoid any misinterpretation of the law, and to cover the possible loopholes that can be manipulated by parties concerned.

Hong Kong Council on Smoking and Health
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