

**UNDESIRABLE MEDICAL ADVERTISEMENTS
(AMENDMENT) BILL 2004**

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A BILL

To

Amend the Undesirable Medical Advertisements Ordinance.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Undesirable Medical Advertisements (Amendment) Ordinance 2004.

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

2. Long title amended

The long title to the Undesirable Medical Advertisements Ordinance (Cap. 231) is amended by adding “and health” after “medical”.

3. Short title amended

Section 1 is amended by repealing “醫藥廣告” and substituting “廣告 (醫藥)”.

4. Interpretation

Section 2(1) is amended—

(a) in the definition of “medicine” by repealing the full stop at the end and substituting a semicolon;

(b) by adding—

“ “orally consumed product” (口服產品) means a product for human consumption which is intended to be taken orally, but does not include a product which is customarily consumed only as food or drink (that is to say, to provide energy, nourishment or hydration) or to satisfy a desire for taste, texture or flavour.”.

5. Section added

The following is added—

“3B. Prohibition of advertisements relating to certain orally consumed products; exceptions therefrom

(1) No person shall publish, or cause to be published, an advertisement for an orally consumed product which makes for the product a claim specified in column 1 of Schedule 4, or any similar claim, except as specified in column 2 of that Schedule, and any Note to that Schedule, in relation to that claim.

(2) For the purposes of this section—

- (a) the sale or supply, or offer or exposure for sale or supply, of an orally consumed product in a labelled container or package shall constitute the publication of an advertisement;
- (b) the supply, inside any container or package containing any orally consumed product, of information relating to that or any other product shall not constitute the publication of an advertisement;
- (c) “any similar claim” (任何類似的聲稱) means a claim that can reasonably be understood to be to the like effect as the specified claim, by reference to all the relevant circumstances.

(3) Where, in an advertisement for an orally consumed product published in contravention of subsection (1), a person named in that advertisement is held out as being a manufacturer or supplier of the product, that person is presumed, until the contrary is proved, to have caused the advertisement to be published.

(4) Where an advertisement for an orally consumed product published in contravention of subsection (1) gives the name, address or telephone number of, or indicates some other means of contacting, a person, and that person manufactures or supplies the product, that person is presumed, until the contrary is proved, to have caused the advertisement to be published.”.

6. Certain defences; provision as to Chinese medicine practitioners

Section 5(1) is amended—

- (a) by adding “, 3B” after “section 3”;
- (b) by repealing paragraph (c) and substituting—
 - “(c) the medical and para-medical staff of—
 - (i) any hospital or maternity home to which the Hospitals, Nursing Homes and Maternity Homes Registration Ordinance (Cap. 165) applies;
 - (ii) any clinic to which the Medical Clinics Ordinance (Cap. 343) applies;
 - (iii) any hospital, maternity home or clinic maintained by the Government, the Chinese University of Hong Kong or the University of Hong Kong;
 - (iv) any hospital, maternity home or clinic managed or controlled by the Hospital Authority established under the Hospital Authority Ordinance (Cap. 113);”.

7. Penalty

Section 6 is amended—

- (a) by adding “, 3B” after “section 3”;
- (b) by repealing “of \$10,000” and substituting “at level 5 and imprisonment for 6 months”;
- (c) by repealing “of \$25,000” and substituting “at level 6”.

8. Section added

The following is added—

“8. Enforcement provisions

(1) The Director of Health may in writing authorize any public officer to be an inspector for the purposes of this Ordinance.

(2) For the purpose of ascertaining whether the provisions of this Ordinance are being complied with, an inspector may—

- (a) at any reasonable time enter—
 - (i) any premises at which any medicine, surgical appliance or orally consumed product is manufactured, stored or sold;
 - (ii) any premises at which any treatment is provided;

- (b) require any person found in or on the premises and whom the inspector reasonably suspects to have committed an offence under section 3, 3B or 4, to give to the inspector the person's name and address and evidence of identity;
 - (c) in the premises make such examination and inquiry and do such other things, including the taking of samples of packaging and labels and copies of advertisements, as are reasonably necessary for the purposes of the inspection.
- (3) If a magistrate is satisfied by information upon oath that there are reasonable grounds for believing that—
 - (a) an offence against section 3, 3B or 4 is being or has been committed in any premises; or
 - (b) there is or may be in any premises anything which is or contains, or which is likely to be or to contain, evidence of the commission of an offence against any of those sections,the magistrate may issue a warrant authorizing any inspector to enter and search the premises.
- (4) If a warrant has been issued under subsection (3) in respect of any premises, an inspector may—
 - (a) at any time, using such force as is necessary, enter and search the premises;
 - (b) remove anything which obstructs such entry and search;
 - (c) detain any person found in the premises, for such period as is reasonably required to permit the search to be carried out, if the person might prejudice the search if not so detained; and
 - (d) inspect, seize and detain anything which is or contains, or which appears to the inspector to be or to contain, evidence of the commission of an offence against section 3, 3B or 4.
- (5) An inspector may in relation to premises other than domestic premises exercise any of the powers mentioned in subsection (4), without a warrant having been issued under subsection (3), if—
 - (a) the inspector has reason to believe that—
 - (i) an offence against section 3, 3B or 4 is being or has been committed in the premises; or
 - (ii) there is or may be in the premises anything which is or contains, or which is likely to be or to contain, evidence of the commission of an offence against any of those sections; and

- (b) it is not reasonably practicable to obtain a warrant in respect of the premises before exercising those powers.
- (6) When exercising any of the powers conferred by subsection (2) or (4), an inspector must, if so requested by any person, produce for inspection by that person written evidence of the inspector's authority.
- (7) A person who—
- (a) wilfully delays or obstructs an inspector in the exercise of the powers conferred by subsection (2) or (4); or
 - (b) fails without reasonable excuse to give any information which the inspector reasonably requires the person to give under subsection (2),
- commits an offence and is liable on conviction to a fine at level 3.”

9. Diseases and conditions in respect of which advertisements are prohibited or restricted

Schedule 1 is amended—

- (a) in item 2, in column 2, by adding at the end—
“Prevention of common colds.”;
- (b) in item 3, in column 2, by repealing everything after “roundworm” and substituting a full stop;
- (c) in item 5, in column 2, by repealing “Temporary relief” and substituting “Relief”;
- (d) in item 12, in column 2, by repealing “Provision of dietary supplements” and substituting “None”;
- (e) in item 14, in column 2, by repealing the second sentence and substituting—
“Prevention of pimples.

Relief of symptoms of eczema and allergies by oral antihistamine preparations.

Treatment, where applied to an external surface of the body, of pimples, eczema, skin allergies, athlete's foot and fungal nail infection.”.

10. Schedule 4 added

The following is added—

“SCHEDULE 4

[s. 3B]

CLAIMS FOR ORALLY CONSUMED PRODUCTS IN RESPECT OF WHICH
ADVERTISEMENTS ARE PROHIBITED OR RESTRICTED

Column 1 Claim	Column 2 Exemption
1. Prevention, elimination or treatment of breast lumps, including eliminating the blockage of milk ducts of the breast, helping to eliminate disease-causing factors or lumps, relieving the associated discomfort symptoms, helping to improve the metabolism of breast tissue, effectively disintegrating and eliminating abnormal cell tissues and lumps.	None.
2. Regulation of the function of the genitourinary system and/or improvement of symptoms of genitourinary problems such as frequent urination, urgent urination, dripping urination, poor stream, difficulty in urination, urination at night, impeded prostatic function and uncontrollable urinary discharge or incontinence.	None.
3. Regulation of the endocrine system and/or maintenance or alteration of hormonal secretions, including helping to maintain hormones at optimal level, stimulating the hypothalamus, increasing secretion of oestrogen, promoting normal secretion of the female hormone, regulating the female endocrine function, improving imbalance of male hormone secretion, helping to maintain balance of hormonal secretions in men and women, stimulating hormonal secretions, regulating endocrine secretion, balancing endocrine secretion, increasing secretion of growth hormone, stimulating the thyroid gland.	None.
4. Regulation of body sugar or glucose and/or alteration of the function of the pancreas, including regulating blood sugar, suppressing or reducing the absorption of glucose, reducing the blood sugar level, increasing the metabolism of body sugar, being suitable for diabetic	The claims “Suitable for people concerned about blood sugar. 適合對血糖關注的人士服用。” and “May assist in stabilizing blood sugar. 或有助於穩定血糖。” are allowed, provided that if the product is not registered under either the Pharmacy and Poisons Ordinance (Cap. 138) or the Chinese Medicine Ordinance (Cap. 549),

Column 1
Claim

Column 2
Exemption

patients, being against blood sugar, being suitable for people with high blood sugar, improving the function of the pancreas, stimulating the secretion of insulin.

both the product label and the advertisement clearly include the disclaimer:

“This is not a registered pharmaceutical product or a registered proprietary Chinese medicine. Any claim made for it has therefore not been subject to evaluation. 此產品並非註冊藥劑製品或註冊中成藥。為此產品作出的任何聲稱因而未經評核。”

(See Note)

5. Regulation of blood pressure, including regulating blood pressure, controlling blood pressure, reducing blood pressure, being suitable for people with high blood pressure.

The claims “Suitable for people concerned about blood pressure. 適合對血壓關注的人士服用。” and “May assist in stabilizing blood pressure. 或有助於穩定血壓。” are allowed, provided that if the product is not registered under either the Pharmacy and Poisons Ordinance (Cap. 138) or the Chinese Medicine Ordinance (Cap. 549), both the product label and the advertisement clearly include the disclaimer:

“This is not a registered pharmaceutical product or a registered proprietary Chinese medicine. Any claim made for it has therefore not been subject to evaluation. 此產品並非註冊藥劑製品或註冊中成藥。為此產品作出的任何聲稱因而未經評核。”

(See Note)

6. Regulation of blood lipids or cholesterol, including preventing high blood lipids, helping to maintain normal blood lipids, lowering blood lipids, reducing or regulating cholesterol, balancing blood cholesterol, excreting cholesterol in the blood vessel outside the body, being suitable for people with high blood lipids or high cholesterol.

The claims “Suitable for people concerned about blood lipids/cholesterol. 適合對血脂／膽固醇關注的人士服用。” and “May assist in stabilizing blood lipids/cholesterol. 或有助於穩定血脂／膽固醇。” are allowed, provided that if the product is not registered under either the Pharmacy and Poisons Ordinance (Cap. 138) or the Chinese Medicine Ordinance (Cap. 549), both the product label and the advertisement clearly include the disclaimer:

“This is not a registered pharmaceutical product or a registered proprietary Chinese medicine. Any claim made for it has therefore not been subject to evaluation. 此產品並非註冊藥劑製品或註冊中成藥。為此產品作出的任何聲稱因而未經評核。”

(See Note)

Note: If both the product label and the advertisement are wholly or mainly in the English or Chinese language, any claim or disclaimer may be limited to that language.”

11. Minor amendments

The provisions of the Ordinance specified in column 2 of the Schedule to this Ordinance are amended in the manner specified in column 3 of that Schedule.

Consequential Amendments

Specification of Public Offices

12. Schedule amended

The Specification of Public Offices (Cap. 1 sub. leg. C) is amended in the entry relating to “衛生署署長”, by repealing “醫藥廣告” and substituting “廣告(醫藥)”.

SCHEDULE

[s. 11]

MINOR AMENDMENTS TO UNDESIRABLE MEDICAL ADVERTISEMENTS ORDINANCE (CAP. 231)

Item	Provision	Amendment
1.	Section 2(1)	In the definition of “藥物”, repeal “專有” and substitute “專賣”.
2.	Schedule 1	<p>(a) In the heading, repeal “病或” and substitute “病及”.</p> <p>(b) In item 2, in column 2—</p> <p>(i) repeal “外用”;</p> <p>(ii) in the Chinese text, repeal the third sentence and substitute— “減輕以下症狀：傷風、咳嗽、一般稱為流行性感冒的情況及類似的上呼吸道感染。”</p> <p>(c) In item 4, in column 1, repeal “愛滋病” and substitute “後天免疫力缺陷綜合症(愛滋病)”.</p>

must be included with the advertisement and on the product. Claims and disclaimers must be in both English and Chinese unless the advertisement and the product label are in only one language.

3. The existing presumptions and defences relating to medical advertisements are retained in respect of the new offence, but the opportunity is taken to clarify the meaning of “professional staff” (clause 6). In addition, the Bill provides that the Director of Health may appoint inspectors to enforce both the existing and the new prohibition (clause 8). Under proposed new section 8, inspectors will have powers of investigation and, on obtaining a magistrate’s warrant, will be able to enter and search premises and take possession of property for purposes of a prosecution.

4. The Director of Health will have power to amend the new Schedule 4, under existing section 7 of the Ordinance. The Director also has power to amend Schedule 1, but the opportunity is taken in the Bill to amend Schedule 1 by varying in a number of respects the purposes for which advertising is permitted (clause 9).

5. Clause 7 increases the maximum penalties for a contravention of the Ordinance from \$10,000 to level 5 (\$50,000) and 6 months imprisonment for a first conviction and from \$25,000 and 12 months imprisonment to level 6 (\$100,000) and 12 months imprisonment for a second or subsequent conviction.

6. Clause 2 amends the long title to the Ordinance to reflect its wider scope. Clause 3 amends the short title in the Chinese text to better reflect the purpose of the Ordinance. Clause 12 makes a consequential amendment.

7. The Bill if enacted will come into operation on a day to be appointed by the Secretary for Health, Welfare and Food (clause 1(2)). This will enable the Secretary to defer the commencement of the Bill when enacted so as to allow a grace period for manufacturers and advertisers to comply with the new requirements relating to orally consumed products.