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Background paper prepared by Legislative Council Secretariat for the Bills Committee on the Undesirable Medical Advertisements (Amendment) (No.2) Bill 2004

Purpose

This paper provides an account of the past discussions by the Panel on Health Services (the Panel) on the Administration's proposal to introduce a new schedule of prohibited claims under the Undesirable Medical Advertisements Ordinance (UMAO) (Cap. 231).

Background

2. An increasing number of so-called "health food" products claiming beneficial health effects are found in the local market in recent years. There have been complaints from consumers against misleading or exaggerated claims of these products, which may result in improper self-medication, thereby causing harm as a result of either the improper self-medication itself, or the delayed proper treatment the consumer should receive.

3. An Expert Committee consisting of representatives from the Consumer Council, Chinese medicine practitioners, medical practitioners, pharmacists and a nutritionist was set up at the end of 2002 to study and recommend a list of health claims to be prohibited in orally consumed products. The Expert Committee adopted a risk assessment approach in considering the health claims to be prohibited. It generally agreed that claims which might affect the health of the public should be prohibited, while claims with less risk could be allowed.

4. The Expert Committee reviewed 13 groups of claims and recommended that the following nine groups of health claims should be prohibited -

(i) regulation of body sugar or glucose including alteration of functions of the pancreas;

(ii) regulation of blood pressure;

(iii) regulation of blood lipid or cholesterol;

(iv) prevention, elimination or treatment of breast lumps;

(v) regulation of function of the genitourinary system, including improvement of symptoms of genitourinary problems;

(vi) regulation of the endocrine system including maintenance or alteration of hormonal secretions;

(vii) claims relating to slimming or fat reduction of the body including fat burning, eliminating fat, controlling appetite, absorbing fat and eliminating fluid retention;

(viii) regulation of body immune system against diseases including cancers, chronic diseases and infection; or alteration of the effects of treatment e.g. chemotherapy and radiotherapy, etc; and

(ix) promotion of detoxification.

5. The Expert Committee agreed not to prohibit the following four groups of claims -

(i) correction or alleviation of symptoms relating to menopause;

(ii) stimulation of hair growth or prevention of hair loss;

(iii) promotion of enlargement or firmness of the breast; and

(iv) regulation or alteration of structure of the genitourinary system.

6. Based on the Expert Committee's recommendations, the Administration proposed to include a list of prohibited claims in the UMAO as a new schedule. The Director of Health (D of H) would have the empower to amend the new schedule.

7. The Administration issued a consultation document in September 2003. Having regard to the views of the trade during the public consultation period, the Administration revised the scope of regulation as follows -

(a) the definition of orally consumed products used in the new Schedule will be restricted, so that a product which is customarily consumed only as food or drink to provide energy, nourishment or hydration, or to satisfy a desire for taste, texture or flavour will be outside the scope of regulation; and

(b) three categories of restriction, based on a risk assessment approach, would be adopted as follows -

(i) the first level of restriction would apply to the most risky claims, namely, claims relating to the prevention, elimination or treatment of breast lumps, regulation of the endocrine system and regulation of the function of the genitourinary system. The making of such claims would not be allowed under any circumstances;

(ii) for the second level of restriction relating to the regulation of blood sugar, blood pressure, blood lipids or cholesterol and alteration of the functions of the pancreas, manufacturers or traders could make only the permissible claims as directed by D of H. For instance, the claim "Suitable for people concerned about blood sugar" would be allowed, provided that the product is not registered under the Pharmacy and Poisons Ordinance (Cap. 138) or the Chinese Medicine Ordinance (Cap. 549), and that both the product label and the advertisement clearly include a disclaimer that "This is not a registered pharmaceutical product or a registered proprietary Chinese medicine"; and

(iii) for claims subject to the third level of restriction, namely, those related to the regulation of immune system, detoxification and slimming, they could be allowed if made in a very general sense without reference to improvements to any specific body functions and that both the product label and the advertisement clearly include a disclaimer identical to that required under the second level of restriction.

Deliberations of the Panel

8. The Administration consulted the Panel on 8 December 2003 on the revised proposal to regulate health claims. A member was of the view that using the UMAO to regulate the claims of products generally described as "health food" was

patently wrong, as these products did not contain any medicine. In his view, the Administration should introduce a new legislation to regulate misleading or exaggerated claims, as had been done in some other jurisdictions, and that all health food should be required to undergo testing to substantiate their claims before they could be offered for sale in Hong Kong. These suggestions were opposed by another member who was of the view that they would inhibit investment and dampen the development of the health food industry, not to mention undermining freedom of choice of consumers. The member was also of the view that the law should not prohibit exaggerated claims so long as the claims were not completely unfounded, as exaggeration was a special characteristic of advertisement.

9. A member pointed out that there were numerous deficiencies in the Administration's revised proposal on regulation of health claims. For instance, allowing a product to make claims such as "eliminates toxins" or "cleanses toxic elements in the body" would mislead people to believe that it could treat food/heavy metal poisoning and remove toxins from the body due to renal failure, etc. Another example was the ambiguous meaning of the claim "Suitable for people concerned about blood sugar", as it was unclear whether this meant that it was safe for people suffering from diabetes to consume the food product making such a claim or that it would be beneficial for this group of people. The member was of the view that regulation of health claims should best be carried out after the completion of registration of proprietary Chinese medicine in several years' time. By then, the extent of orally consumed products which needed to be regulated would be made clear, as all orally consumed products containing pharmaceutical or medicinal ingredients would then be registered either under the Pharmacy and Poisons Ordinance (Cap. 138) or the Chinese Medicine Ordinance (Cap. 549).

10. Another member expressed concern that the revised proposal still had too many grey areas. For instance, it was unclear whether "lingzhi" should be regulated as medicine or health food. Another example was that it would be hard for the general public to comprehend why the claim "Suitable for people concerned with blood sugar" would be allowed, while the claim on prevention and cure of blood sugar would be prohibited.

11. In view of the reservations expressed by members, the Chairman of the Panel urged the Administration to withhold introducing the proposed amendment bill into the Council in early 2004.

Recent development

12. The Administration introduced the Undesirable Medical Advertisements

(Amendment) Bill 2004 into the Council on 11 February 2004. The Administration pointed out in the LegCo Brief on the Bill that to address Members' concern, the proposed third level of restriction, as set out in paragraph 7(b)(iii) above, has been excluded from the Bill since these claims pose relatively lesser risk to public health and views on their regulation are divided.

13. A Bills Committee was formed by the House Committee on 13 February 2004 to scrutinise the Bill. As a vacant slot was not available to activate the Bills Committee before the end of the second term, the Bill lapsed without having been scrutinised by the Bills Committee concerned.

14. The Bill was re-introduced into the Council on 13 October 2004 under the name of the Undesirable Medical Advertisements (Amendment) (No.2) Bill 2004. Apart from some minor drafting changes, the Bill is the same in substance as the previous one introduced into the Council on 11 February 2004.

Relevant papers

15. Members are invited to access the LegCo website (http://www.legco.gov.hk) to view the minutes of meeting of the Panel held on 8 December 2003 and the LegCo Brief on the Bill.

Council Business Division 2
Legislative Council Secretariat
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