

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

**Administration's response to issues raised
at the Bills Committee meeting on 6 March 2006**

PURPOSE

This paper sets out the Administration's response to issues raised by the Bills Committee at its meeting on 6 March 2006.

BACKGROUND

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

(a) whether, and if so, which existing legislation has provision similar to new section 15F and the rationale for such provision in the Smoking (Public Health) (Amendment) Bill 2005;

ADMINISTRATION'S RESPONSE

3. The new section 15F of the Smoking (Public Health) (Amendment) Bill 2005 (the Bill) provides that the Secretary for Health, Welfare and Food (the Secretary) may appoint in writing "any public officer" to be an inspector to perform certain statutory functions set out in the Bill. It basically follows the current position under the existing section 14A of the Smoking (Public Health) Ordinance (Cap. 371), which allows "any public officer" authorized by the Secretary to remove tobacco advertisements or advertising structures in respect of suspected offences.

4. Many Ordinances contain similar provisions empowering a Bureau Secretary or a head of Department to delegate to any public officer a whole range of statutory functions (including the power to enter premises for law enforcement purposes). Some examples are provided as follows –

- section 25 of the Town Planning Ordinance (Cap. 131);
 - section 18 of the Hotel and Guesthouse Accommodation Ordinance (Cap. 349);
 - section 23A of the Waste Disposal Ordinance (Cap. 354);
 - section 18 of the Clubs (Safety of Premises) Ordinance (Cap. 376);
 - section 23 of the Film Censorship Ordinance (Cap. 392);
 - section 9 of the Ozone Layer Protection Ordinance (Cap. 403);
 - section 32 of the Prevention of Copyright Piracy Ordinance (Cap. 544)
- and

- section 2(2) of the Karaoke Establishments Ordinance (Cap. 573).

5. For Members' reference, there are some other Ordinances that restrict such delegation to public officers of specified ranks or grades in particular departments. See for example -

- section 29 of the Mass Transit Railway (Land Resumption and Related Provisions) Ordinance (Cap. 276);
- section 3 of the Weapons of Mass Destruction (Control of Provision of Services) Ordinance (Cap. 526);
- sections 3 and 4 of the Chemical Weapons (Convention) Ordinance (Cap. 578) and
- Schedule 2 to the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570).

6. We believe that the present drafting of the new section 15F in the Bill would allow flexibility for the Secretary to review the enforcement plan from time to time and where necessary and appropriate, to appoint more public officers as inspectors. This would be beneficial in securing and strengthening our enforcement powers under the law. According to our present thinking, only officers of the Tobacco Control Office (TCO) under the Department of Health would be appointed as inspectors.

(b) whether, and if so, which existing legislation allowed an authorised public officer to enter any place at any time in which the officer concerned reasonably suspected that a relevant offence was likely to be committed as in new section 15G(1)(a);

7. The new section 15G(1)(a) proposes to empower an inspector to enter a place in which he reasonably suspects that an offence "has been, is being or is likely to be committed". Similar provisions to confer on a police officer or other authorized officer the power to stop, search or detain if he has reasonable grounds or good cause to suspect that a person "has committed, is about to commit or intends to commit" an offence could be found in the following -

- section 17(1) of the Forests and Countryside Ordinance (Cap. 96);
- section 56 of the Offences Against the Person Ordinance (Cap. 212);
- section 54(2) of the Police Force Ordinance (Cap. 232) and
- section 25(1) of the Marine Parks Ordinance (Cap. 476).

8. There are also similar provisions in some tunnel regulations to empower a tunnel officer to stop and search a vehicle and to require the driver to produce his driving licence and give his address if the officer has reasonable grounds to believe that the driver "is likely to contravene or has

contravened" the relevant tunnel by-laws. See for example -

- regulations 6 and 7 of the Eastern Harbour Crossing Road Tunnel Regulations (Cap. 215 sub. leg. D);
- regulations 6 and 7 of the Tate's Cairn Tunnel Regulations (Cap. 393 sub. leg. A);
- sections 5 and 6 of the Western Harbour Crossing Regulation (Cap. 436 sub. leg. C) and
- sections 5 and 6 of the Tai Lam Tunnel and Yuen Long Approach Road Regulation (Cap. 474 sub. leg. B).

9. For the enforcement of smoking offences, we render it necessary to retain the reference to "likely to be committed" in the new section 15G. Under the new law, it is envisaged that the general public can report violations of the Ordinance such as the sighting of smoking acts in statutory smokefree areas to TCO for follow-up actions. However, for best utilization of resources, TCO would also need to conduct spot checks on certain premises where offences are frequently reported to ensure compliance with the new legislative requirements. To enable TCO to pay surprise visits to "black spots" of smoking offences, especially those that have an opaque outer surface which do not allow inspectors to discern if smoking is taking place therein, it is necessary to keep the new section 15G(1)(a) as currently drawn.

(c) whether, and if so, which existing legislation did not hold an authorised public officer personally liable for certain acts and omissions if the officer concerned did the act or omitted to do the act in the honest belief and the penalties for willfully obstructed the officer concerned in exercising his duties; and

10. Similar provisions that protect public officers from personal liability and penalize the act of obstructing an officer in executing his duties could be found in numerous other laws of Hong Kong, including the followings:

- sections 138 and 139 of the Public Health and Municipal Services Ordinance (Cap. 132);
- sections 17 and 20 of the Fire Safety (Commercial Premises) Ordinance (Cap. 502);
- sections 15 and 16 of the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570); and
- sections 18 and 21 of the Fire Safety (Buildings) Ordinance (Cap. 572).

(d) to consider adding "reasonable" to "the honest belief" in new section 15H(1).

11. There are many other similar provisions in existing legislation to protect public officers from incurring personal liability so long as they are acting in "good faith" or "honest belief". None of them imposes a further requirement that the officer in question must act reasonably. While ensuring that individual law enforcers not acting maliciously or dishonestly would not need to worry about being held personally liable for an act done or omission made in the course of performing their statutory duties, such provisions also preserve the general position in respect of the Government's liability in that the Government may be held vicariously liable in respect of torts committed by its servants or agents. Members can thus be rest assured that the Government's civil liability will not be affected by the statutory exemption afforded to individual public officers under the new section 15H(1). This is reflected by the new section 15H(2) of the Bill, which stipulates that "subsection (1) does not affect any liability that the Government may have because an inspector has done an act or omitted to do an act to which that subsection applies". In other words, because of the employer-employee relationship between the Government and public officers, the Government as a whole would be held ultimately responsible for any wrongdoing done on the part of individual public officers in the course of performing statutory duties. We therefore do not think it desirable to add in the concept of reasonableness to the new section 15H(1) of the Bill.

12. We note the proposal to add the requirement of reasonableness in the new section 29A(1) of the Building Management (Amendment) Bill 2005 regarding the exemption of members of a management committee from personal liability. We think that the context and considerations there are distinguishable from the Bill in that there is no employer-employee relationship between members of a management committee and the owners or the owners' corporation of the building under the Building Management Ordinance (Cap. 344) and thus the building owners are not vicariously liable to the wrongful acts committed by the management committee members which are beyond proper authority.