

To: Clerk to the Panel on Health Services  
Legislative Council of Hong Kong Special Administration Region

Monday, 6 July, 2015

Dear Sir,

I wish to register my concerns over the proposed measures on tobacco control. Please find the  
enclose my written submission to supplement my representation at the panel meeting.

Yours Sincerely,

Simon Lee

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1. Graphic Warnings are ineffective, counterfactual and a violation of free speech.

- 1.1. While the ban on tobacco advertising has been established globally, the policy of mandatory graphic warning has been challenged. In the United States, the Federal Appeal Court ruled mandatory Graphic Warnings violates the Constitution and failed to pass the Central Hudson Test.

*FDA has not provided a shred of evidence – much less the “substantial evidence” required by the APA – showing that the graphic warnings will “directly advance” its interest in reducing the number of Americans who smoke. FDA makes much of the “international consensus” surrounding the effectiveness of large graphic warnings, but offers no evidence showing that such warnings have directly caused a material decrease in smoking rates in any of the countries that now require them. ... FDA’s Regulatory Impact Analysis (RIA) essentially concedes the agency lacks any evidence showing that the graphic warnings are likely to reduce smoking rates. ... The Rule thus cannot pass muster under Central Hudson.<sup>1</sup>*

- 1.2. The Central Hudson Test was developed in 1980 from *Central Hudson Gas & Electric Corp. v. Public Service Commission*. The United States Supreme Court established a four-part balancing test for commercial speech regulation:

*At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interests.<sup>2</sup>*

- 1.3. The court made a distinction between limiting the tobacco advertising and requiring the tobacco companies to disclose the facts on the risk about smoking. The court made it clear that the mandatory graphic warnings were not factual in nature hence the authority has no power whatsoever to compel a free commercial entity to make untruthful statements.

- 1.4. From a political and moral perspective, not only it is wrong for the authority to force any members of society to make untruthful statements, such “terror management health model” is also questioned by scientific studies. Researchers at Maastricht University studied the available evidence and concluded that:

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<sup>1</sup> The United States Court of Appeals No. 11-5332 (2012) RJR Tobacco Company et al v. Food & Drug Administration et al,

<sup>2</sup> 447 U.S. 557 (1980) Central Hudson Gas & Electric Corp. v. Public Service Commission,

*A somewhat worrying finding... was that under low efficacy, the effect of threat was negative and almost significant. This is in line with the terror management health model... which suggests that threatening information can cause people to engage in health-defeating behaviour.*

*In conclusion, warning labels on packs of cigarettes seem ill-advised. They may in fact increase smoking among smokers who derive self-esteem from their identity as a smoker.<sup>3</sup>*

1.5. Chapter three of the Basic Law of the Hone Kong Special Administrative Region of the People's Republic of China guarantees that:

*Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.<sup>4</sup>*

*The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences.<sup>5</sup>*

1.6. Although the definition for the term “freedom of speech” is normally understood in a very narrow sense to mean only political speech, legal scholar such as Martin Redish suggests the interpretation should cover all forms of speech. In *The Value of Free Speech*, Redish writes:

*Even though this analysis may justify many forms of government regulation of false and misleading advertising, it does not support attempts to draw additional distinctions between commercial and other forms of expression.<sup>6</sup>*

1.7. Product packaging is a form of communication between the producers, distributors, retailers and consumers about the products. Such communication may not constitute any promotional effect which is the primary objects to be prohibited by the tobacco control measures. It is therefore doubtful if the graphic warning that violate the privacy of the communication between the different parties in the market is justified, legally and morally.

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<sup>3</sup> Peters, G.-J. Y., Ruiter, R. A. C. and Kok, G. (2014), Threatening communication: A qualitative study of fear appeal effectiveness beliefs among intervention developers, policymakers, politicians, scientists, and advertising professionals. *International Journal of Psych*, 49: 71–79. doi: 10.1002/ijop.12000

<sup>4</sup> Article 27, the Basic Law of the Hone Kong Special Administrative Region of the People's Republic of China

<sup>5</sup> Article 30, the Basic Law of the Hone Kong Special Administrative Region of the People's Republic of China

<sup>6</sup> Redish, Martin. (1982) *The Value of Free Speech*. University of Pennsylvania Law Review, Vol 130:591.

- 1.8. It is not a valid reason to push the policy to an unreasonable limit simply because there are more countries adopting the policy. As stated in the above, various studies revealed such approach might create an unintended health effect by encouraging defiant risk taking effect. The Administration has a duty to present clear and solid evidence on the efficacy of graphic warnings over its costs and potential negative consequences.
- 1.9. The most importantly, after more than two decades of public policy education, there is no reason to believe that users of tobacco products are not aware of the fact that their habit of smoking render certain health risks. It is therefore doubtful if the graphic warnings add to the common knowledge on the health risks of smoking or simply adopted as a political appeasement to the anti-smoking organizations.

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2. Extension of the No Smoking Zone is not the only solution and it is based on a wrong policy proposition

- 2.1. It is the stated policy of the Administration and government funded anti-tobacco organizations the only objective in the tobacco control policy is to eradicate smoking. In section three of the *Hong Kong Council on Smoking and Health Ordinance*, it is stated:

*The purposes of the Council are to*

*(a) protect and to improve the health of the community by acquiring and disseminating, and assisting others to acquire and to disseminate, information concerning the causes, prevention and cure of tobacco dependence in human beings and its adverse effects and related diseases;*

*(b) engage in research into the causes, prevention and cure of tobacco dependence in human beings and its adverse effects and related diseases and to promote and to assist such research by other individuals and organizations and to publish the results of such research;*

*(c) advance the education of the public concerning the effects of the smoking of tobacco and other forms of usage of tobacco and its effects on the health of the community and the individual;*

*(d) take such action as it thinks justified by information in its possession including giving advice to the Government, to any public body, to any public officer, to community health organizations, or to the public on the causes, prevention and cure of tobacco dependence in human beings and its adverse.*

- 2.2. While the Administration and government funded anti-smoking organizations insist on the unrealistic goal by disregarding the reality, there is a lack of solutions and innovations in their approach to tobacco control. All the tobacco control policies advocated and supported by the Administration and government funded anti-smoking organizations are simply borrowed from transnational bureaucracies without any regards of the local specificity.
- 2.3. For instance the indoor smoking ban imposed in 2007 has largely ignored the fact that Hong Kong is a densely populated city. Since the indoor smoking ban, it is obvious that smokers have no choice but to smoke at public open area, thus creating more disturbances to the non-smokers.
- 2.4. Although the proposal to extend the no smoking area at transportation exchange seems a just and fair approach to minimize the disturbances to the non-smokers, it should be pointed out that it is not the only ways to reduce the negative externality.

- 2.5. For instance in Japan there are designated smoking pods equipped with filters so the risk and externality from smoking to non-smokers are reduced to an acceptable level. This idea was rejected by the Administration and government funded anti-smoking organization on an unreasonable ground that certain risks still remained. In fact it is never possible to eliminate all risks under any circumstances. It is a perfect case how the Administration and government funded anti-smoking organizations advocate for unrealistic policy while they themselves were unable to propose any positive and construction solutions to protect the non-smokers.
- 2.6. As a matter of principle, unless there is a clearly effect way to make smokers quit permanently and immediately, at a social cost reasonable, tobacco control measures should put the welfare of non-smokers at the top of priority.
- 2.7. Despite the fact the extending the no smoking area at transportation exchanges will reduce the disturbances to non-smokers, it is only a localized measure. Logically, no smoking areas can gradually extend to more places hence eventually all public open areas will be designated as no smoking areas. It is effective a complete ban on smoking and the social and political consequences will be enormous and nearly impossible to conduct law enforcement. Therefore, the only solution is to adopt relevant technology so that non-smokers are not affected by smoking even in public common areas.

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3. The ban on electronic cigarettes is based on flawed assumptions and political hysteria.

- 3.1. There are ample of evidence showing that electronic cigarettes impose a much lower health risks to smokers and non-smokers alike. If the policy principle of tobacco control is to reduce health risks to smokers and non-smokers, electronic cigarettes should be allowed instead of being prohibited.
- 3.2. The proposed ban is not based on evidence other than the claim that more consumers are using them as substitute to smoking. It should be note that the claim made by government funded anti-smoking organization on the possibility that electronic cigarettes emit also harmful hazardous chemical were based on questionable study under dispute in the scientific community.
- 3.3. The original plan to pass the ban on electronically cigarettes by negative vetting process is a gross violation of the due process. Currently the law allows only the Administration to impose regulation on Electronic Nicotine Delivery Systems (ENDS). Although certain electronic cigarettes deliver nicotine to users, it is not always the case. Therefore, it is questionable if electronic cigarettes should be regulated by the same ordinance that empower the Administration to impose the ban.
- 3.4. Electronic cigarettes are relatively new inventions and their design and mechanisms are still in the process of evolution. More public deliberation is needed before a consensus can be reached on how electronic cigarettes are best controlled and allowed. The Administration proposal on a total ban should be seen as a political appeasement to the government funded anti-smoking organizations rather than a sound evidence based policy.