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**By email and fax**

January 7, 2017

Dear Chairperson,

**Ref: Proposal to amend the health warnings on packets and retail containers of tobacco products**

Following my previous submission on Legislative proposals to strengthen tobacco control in 2015 and oral presentation on 6 July 2015, I am now making an oral submission to express my views on amendment of health warnings of tobacco products and would like to join oral presentation on 17 January 2017.

I have pointed out in my previous submission in 2015 that in making future legislative proposals to strengthen tobacco, one must seriously take into account of strong evidence of detrimental effect of tobacco on society, legislative measures as effective public interventions on tobacco control, and the civil justice in safeguarding the health and well-being for an equitable society.

In the Legco paper (LC Paper No. CB(2)386/16-17(05)) and Government presentation on 23 November 2016, the evidence of harmful effect of tobacco on our citizens is plain as well as effectiveness of pictorial warning on tobacco products. The paper by Dr. David Hammond (Dept of Health Studies, University of Waterloo, Canada, 2008) "*Health warnings on tobacco package: Summary of evidence and legal challenges*", has stated that the evidence on effective packaging and labelling practices has grown rapidly over the past decade to keep pace with these regulatory developments. The paper highlighted the consistent pattern of findings emerged from this body of research:

- Package health warnings are among the most prominent and cost-effective health communications available

- Health warnings have high awareness and visibility among non-smokers and youth
- Obscure text warnings have little impact
- Large, pictorial warnings can increase health knowledge, motivation to quit, and cessation behaviour
- Pictorial warnings are especially important for reaching low-literacy smokers and children
- Messages that depict health risks in a vivid and emotionally arousing manner most effective
- Graphic” information should be accompanied by supportive cessation information.
- There are no adverse effects in response to pictorial warnings.
- Large pictorial warnings are credible and have high levels of public support.

I have also highlighted the importance of public health protection of citizens as fundamental human rights with reference to International Covenant of Civil and Political Rights (ICCPR) in my previous submission. The article 18 of ICCPR has highlighted the importance of protection of health equivocal to freedom of religions and beliefs. The article 19 paragraph 3 (b) again highlights the importance of restricting the receipt and imparting information for protection of national security, public order, or **public health** or morale. The importance and significance of public health is at the same level as national security and public order.

**Article 18**

*Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to **protect public safety, order, health, or morals or the fundamental rights and freedoms of others.***

**Article 19**

*2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, the form of art, or through any other media of his choice.*

*3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

*(a) For respect of the rights or reputations of others;*

*(b) For the **protection of national security or of public order, or of public health or morals.***

Breathing Environmental Tobacco Smoke (ETS) (i.e. side-stream and exhaled smoke from cigarettes, cigars and pipes) causes serious health problems. ETS can aggravate allergies and increase the severity of symptoms in children and adolescents with asthma and heart disease; it is also associated with lung cancer because ETS contains essentially the same cancer-causing substances and toxic agents that are inhaled by the smoker. The international human rights conventions and treaties (United Nations 2014) can be platforms to emphasize a child’s right to health, safety and security as an obligation of the government to support children (“*Convention on the rights of the child*” OHCHR, Geneva, Switzerland, 2014)

It is understandable the importance of balancing the rights and interests to all parties concerned. The tobacco manufacturers would argue for the infringement of their intellectual property rights and rights of freedom of expression by imposing controls on the packaging and presentation of tobacco products. They raised issue whether the legislature would have gone beyond its power, acting ‘*ultra vires*’. The

Australian case, '*JT International SA v. Commonwealth of Australia* [HCA 43, 2012]', the tobacco companies argued unsuccessfully that the Government had acquired a benefit because it had acquired the use of space on the pack dedicated to public health warnings; or, alternatively, that it had acquired the control of the pack.

*"The majority of the Court (French CJ, Gummow, Hayne, Bell, Crennan and Kiefel JJ) held that, although the Government had "taken" the property of the tobacco companies, there had been no "acquisition" because neither the Government nor any third party acquired any benefit as a result'*

The majority of the High Court upheld the constitutional validity of the Australian Commonwealth's **Tobacco Plain Packaging Act**. A case was brought to Norwegian Court in 2010 challenging legislation banning display of tobacco products in stores. The Court upheld the Article 13 of Framework Convention on Tobacco Control.

In 2002, three major Canadian tobacco manufacturers took the federal government to court challenging the federal Tobacco Act, which included comprehensive health warning regulations (*Rothmans, Benson & Hedges, Inc., JTI-MacDonald Inc, Imperial Tobacco Limited v. AG of Canada* [Canada Montreal Sup. Ct]). The Court dismissed the application by the applicants for a suspension of the Tobacco Act and upheld the health warning regulations. The three major Canadian tobacco manufacturers brought their challenge to the Quebec Court of Appeal in 2005. They complained that health warning regulation was "*ultra vires*" beyond the power of the Canadian Parliament, and unjustified infringements on freedom of expression as guaranteed in the Canadian Charter of Rights and Freedoms. The Quebec Court of Appeal found the infringement of freedom of expression groundless, and the text and photographs of the warnings required by the regulations not disproportionately harsh with respect to the legislative objective.

*"...even if all smokers and potential smokers were very well aware of the risks associated with tobacco use, Parliament would still be justified in insisting that they be reminded once again of the harmful health consequences of smoking each time they take a cigarette from their packs."*

The manufacturers appealed to the Supreme Court of Canada (2007 SCC 30). The Supreme Court ruled that the Act was a **justified** infringement of the Canadian Charter of Rights and Freedoms the risks and the suffering associated with tobacco addiction were found to be pressing and substantial. It met the requirement of proportionality of effects, as the prohibition of speech was of relatively low value compared to the beneficial effects and importance of the provisions to the public.

*"The evidence as to the importance and effectiveness of such warnings establishes a rational connection between Parliament's requirement for warnings and its objectives of reducing the incidence of smoking and of the disease and death it causes. ....this Court unanimously held that "both parties agree that past studies have shown that health earnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society" ...A mass of evidence in the intervening years supports this conclusion."*

British American Tobacco, Imperial Tobacco and Japan Tobacco International challenged EU legislation (Directive 2001/37/EC) to increase the size of warnings and stipulate in very precise terms colours of the warnings to be printed in the European Court of Justice in 2002 (Case number T-311/00 <http://curia.europa.eu/juris/liste.jsf?language=en&num=T-311/00> Last accessed Jan 7, 2017) Manufacturers challenged the validity of the directive on “*by reason of infringement of the principle of proportionality*”. Under this rule, the European Communities involvement must be limited to what is necessary to achieve the objectives of the Treaties.

The complainants also challenged the validity of the Directive as it would have infringed the fundamental right to property (Article 295 EC) and/or Article 20 of the Agreement on the Trade-related Aspects of Intellectual Property Rights (‘the TRIPs Agreement’) as set out in Annex 1 C of the WTO Agreement.

The European Court of Justice ruled that the Directive was valid. The 2014 Tobacco Product Directive (TPD) has replaced and repealed the 2001 TPD (2001/37/EC) and has significantly advanced public health in Europe by including a ban on ‘*characterising*’ flavours and an increase of graphic health warnings.

The common law works by balancing two competing ideas that people have freedom to act and also people having certain rights and interests to be protected from interference. In defining rule of law, the lecture by late Lord Bingham discussed eight ‘sub-rules’ with “*The Law must afford adequate protection of fundamental rights*” (‘*The Rule of the Law*’, London, Allen Lane, 2000). Hong Kong being an equitable society must uphold the rule of law to safeguard civil justice and rights. The scientific and legal evidence has clearly supported that it is fair, reasonable and justifiable for increasing health warnings of tobacco products and listing the contents. This amended legislative proposal on tobacco control is within ‘*the principle of proportionality*’ to protect health and safety of our citizens. How would Hong Kong claim to be world first class city if she would not even safeguard the key fundamental rights of citizens such as legislative protection of exposure to hazard? Our Honorable Members of Legislative Council should not hesitate to pass the amended proposal without further delay for the health and safety of our citizens whom they own duty of care.

Thanks you for your kindest attention and consideration!

Yours sincerely,



Professor Albert Lee  
(Clinical Professor of Public Health and Primary Care and Arbitrator)