



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF : FH CR 1/3231/19
本函檔號 OUR REF : LS/B/11/18-19
電話 TELEPHONE : 3919 3509
圖文傳真 FACSIMILE : 2877 5029
電郵 EMAIL : wkan@legco.gov.hk

By Fax (2840 0467)

4 April 2019

Miss Carol WONG
Assistant Secretary for Food and Health (Health) 5A
Food and Health Bureau
19/F, East Wing
Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Miss WONG,

Smoking (Public Health) (Amendment) Bill 2019 ("the Bill")

We are scrutinizing the legal and drafting aspects of the Bill.

Please find attached a schedule listing our observations in relation to the English text of the Bill. We would be grateful if you could let us have your response in bilingual form as soon as possible.

Yours sincerely,

(Wendy KAN)
Assistant Legal Adviser

c.c. Department of Justice
(Attn: Mr Manuel NG, Senior Government Counsel and
Miss Celia HO, Government Counsel) (By Fax: 3918 4613)
Legal Adviser
Senior Assistant Legal Adviser 3
Clerk to Bills Committee

Schedule

Legal issues raised by Messrs Herbert Smith Freehills

1. It is noted that a letter from Messrs Herbert Smith Freehills dated 18 February 2019 was issued to Members of the Legislative Council and copied to the Secretary for Food and Health and Secretary for Justice (LC Paper No. CB(2)830/18-19(01)). Its paragraphs 12 to 20 contain the views that the Bill is unconstitutional and contravenes local and international law. Would the Administration provide response to these views for Members' consideration?

Clause 4(9) of the Bill

2. Under the proposed section 2(1) of the Smoking (Public Health) Ordinance (Cap. 371), "smoking act (吸煙行為)" means smoking or carrying a lighted cigarette, cigar or pipe, or smoking or carrying an activated alternative smoking product ("ASP"). Under the proposed section 1(1) of Schedule 5 to Cap. 371, "conventional smoking act (傳統吸煙行為)" is defined to mean smoking or carrying a lighted cigarette, cigar or pipe. It is however noted that under section 1 of the proposed new Schedule 7 to Cap. 371, "conventional smoking (傳統吸煙)" is defined to mean the smoking of a cigarette, cigar or pipe without having the word "lighted" added before the words "cigarette, cigar or pipe". Please clarify the reason(s) for not adding the word "lighted" in the proposed definition of "conventional smoking (傳統吸煙)".
3. Under the proposed sections 3(2) and 4(1) of Cap. 371, no person may do a smoking act in a no smoking area and a public transport carrier respectively. In the proposed new definition of "smoking act (吸煙行為)" which is stated in Question 2 above, reference is made to "cigarette (香煙)", "cigar (雪茄)", "pipe (煙斗)" and "ASP (另類吸煙產品)", and their respective proposed definitions are contained in the proposed section 2(1) of Cap. 371. With the proposed deletion of the current definition of "smoke (吸煙、吸用)" under section 2 of Cap. 371, please clarify whether smoking waterpipe tobacco would be a "smoking act (吸煙行為)" under the proposed regime of Cap. 371. If it is proposed that "waterpipe (水煙壺)" would be a type of "pipe (煙斗)" under the proposed regime of Cap. 371 because it, not being ASP, would be a receptacle or other device designed for use for smoking tobacco in a form other

than as a cigarette or cigar, please consider amending the proposed definition of "pipe (煙斗)" in order to ensure that the proposed definition would cover "waterpipe (水煙壺)" (such as adding an express reference to waterpipe in the proposed definition), given that Cap. 371 is proposed to contain a new definition of "waterpipe (水煙壺)" in its proposed new Schedule 7.

Clause 5 of the Bill

4. Section 3(2A) of Cap. 371 currently provides that a person is exempt from the prohibition of smoking or carrying a lighted cigarette, cigar or pipe in a no smoking area if the exemptions contained in Schedule 5 to Cap. 371 apply (i.e. the exemption for live performance and the exemption for recording for film or television programme). It is noted that the Bill does not propose to extend those exemptions to the smoking or carrying of an activated ASP in a no smoking area. Please explain the reason(s) for such proposal.

Clause 14(4) and (5) of the Bill

5. The proposed section 12(1) of Cap. 371 contains the prohibition of, among others, the display of a smoking product advertisement in writing. The meaning of smoking product advertisement is set out in the proposed section 14 of Cap. 371, which basically covers various forms of advertising in relation to a smoking product or smoking. A smoking product is defined, under the proposed section 2(1) of Cap. 371, to mean a conventional smoking product ("CSP") (i.e. cigarette, cigarette tobacco, cigar or pipe tobacco) or ASP. Under the proposed section 12(4) of Cap. 371, an exemption is provided for the display of a smoking product advertisement in or upon any premises of any manufacturer of CSPs or any wholesale dealer dealing in CSPs that are used for the manufacturing of CSPs or for the purpose of dealing by wholesale in CSPs, provided that the advertisement is not visible from outside the premises.

Please explain the reason(s) for excluding from the proposed exemption the premises of any manufacturer of ASPs or any wholesale dealer dealing in ASPs that are used for the manufacturing of ASPs or for the purpose of dealing by wholesale in ASPs. Would the reasons be that the manufacture and sale of ASPs is prohibited under the proposed new section 15DA(1) of

Cap. 371? It is however noted that with respect to the proposed prohibition of "sale" of ASPs, the sale of ASPs with a view to exporting them is not prohibited under the proposed new section 15DA(2)(b) of Cap. 371.

Clauses 18(13), (16) to (20) and 29 of the Bill

6. Under the proposed section 14 of Cap. 371, an advertisement or object that includes, among others, certain names such as a company name associated with the marketing of smoking products is subject to the restrictions on the advertising of smoking products. However, if the advertisement or object does not mention any word or phrase set out in the proposed new Schedule 8 to Cap. 371 (including any word or phrase that means the same as, or closely resembles, the word or phrase), and meets certain other conditions, it is exempted from those restrictions pursuant to the proposed section 14(4) and (4A) of Cap. 371. It is noted that some of the words or phrases listed in the proposed new Schedule 8 to Cap. 371 may mean, stand for or refer to various things including those which may not relate to smoking products or smoking. For example, the abbreviation "HTP" could mean, for example, Hilbert's tenth problem (which is a mathematical problem)¹, or refer to the name of a professional service firm ended with "Partners", instead of heated tobacco products. Please consider making amendments to the proposed section 14 of Cap. 371 so as to confine those words or phrases to be words or phrases that relate to smoking products or smoking.
7. Under the proposed section 14(6) of Cap. 371, the display of specified price marker, price board or catalogues at any premises where CSPs are offered for sale is not a smoking product advertisement. Please clarify the reason(s) for not extending the provision to any premises where ASPs are offered for sale with a view to exporting them which is not prohibited under the proposed new section 15DA(2)(b) of Cap. 371.

Clause 23 of the Bill

8. Please explain the reason(s) for setting the penalties for the offence under the proposed new section 15DA(4) of Cap. 371 (i.e. a

¹ See "HTP" in Wikipedia which is available at <https://en.wikipedia.org/wiki/HTP>.

contravention of the proposed new section 15DA(1) of Cap. 371) at a fine at level 5 and an imprisonment for six months. It is noted that no offence currently under Cap. 371 is punishable with an imprisonment.

9. The proposed new section 15DB of Cap. 371 provides that if a body corporate commits an offence under the proposed new section 15DA(4) of Cap. 371, an officer of the body corporate also commits the offence if the offence was committed with the officer's consent or connivance or is attributable to the officer's neglect. Please clarify the reason(s):
 - (a) for not making similar provision where the offence is committed by a partner in a partnership, as in other Ordinances such as section 175 of the Competition Ordinance (Cap. 619); and
 - (b) for not making similar provision to the other offences under Cap. 371, including the offence under section 15C(1) of Cap. 371 in respect of a contravention of the proposed section 15A of Cap. 371 (e.g. the prohibition to sell CSPs to any person under the age of 18 years).
10. Please clarify, with respect to the definition of "specified cargo transshipment area (指明貨物轉運區)" under the proposed new section 15DD(8) of Cap. 371, whether paragraphs (a) and (b) of the definition are to operate cumulatively so that an area would only be a specified cargo transshipment area if the conditions set out in both paragraphs are satisfied. Please see the definition of "cargo transshipment area of Hong Kong International Airport (機場貨物轉運區)" under section 2 of the Import and Export Ordinance (Cap. 60).
11. Under the proposed new section 15DF of Cap. 371, if ASP is registered as a pharmaceutical product under regulation 36 of the Pharmacy and Poisons Regulations (Cap. 138A), other provisions of the proposed new Part 4AB of Cap. 371 do not apply in relation to the product. Please clarify:
 - (a) whether only item 1.3 of Category 1, item 2.3 of Category 2 or Category 3 of ASP as set out in Part 2 of the proposed new Schedule 7 to Cap. 371 may be registered as a pharmaceutical product under Cap. 138A in view of the

definition of "pharmaceutical product" under section 2(1) of the Pharmacy and Poisons Ordinance (Cap. 138);

- (b) whether upon registration as a pharmaceutical product, the ASP concerned:
 - (i) could be sold in any retail shop;
 - (ii) could only be sold by an authorized seller of poisons on the seller's registered premises or by a listed seller of poisons; or
 - (iii) could only be sold on the registered premises of an authorized seller of poisons by a registered pharmacist or in the presence and under the supervision of a registered pharmacist; and
 - (c) whether such ASP would also contain any poisons included in Schedule 1 or Schedule 3 to Cap. 138A and accordingly be subject to further restrictions concerning its sale, supply, labelling or storage applicable to such poison.
12. Please clarify how ASP is to be dealt with after it has been removed or detained by an inspector appointed under section 15F of Cap. 371 ("Inspector") pursuant to the proposed new section 15DG(1) of Cap. 371. The proposed section 15H(1) of Cap. 371 only deals with the disposal of any property, including ASP, that is seized, but not removed or detained, by an Inspector under Cap. 371.
13. The proposed new section 15DG(2) of Cap. 371 provides that if an Inspector reasonably suspects that a person has committed or is committing an offence under the proposed new section 15DA(4) of Cap. 371, the Inspector may detain the person to facilitate the enforcement of the proposed new section 15DA of Cap. 371. Please clarify:
- (a) how long could the Inspector detain such a person. It is noted that other Ordinances, such as section 15B(2)(f) of the Waterworks Ordinance (Cap. 102), expressly provide that the power to detain a person is only for a reasonable time for a stated purpose; and

- (b) whether, and if so, the time upon which, such a person would be cautioned.
14. Please clarify how ASP is to be dealt with after it has been removed or detained by a Customs and Excise officer ("C&E Officer") pursuant to the proposed new section 15DH(3) of Cap. 371. The proposed new section 15DH(4) of Cap. 371 only deals with the seizure, but not the removal or detention, of ASP by a C&E Officer.
15. The proposed new section 15DH(5) of Cap. 371 empowers a C&E Officer to detain a person who is reasonably suspected to have committed or be committing an import offence to facilitate the enforcement of the proposed new section 15DA of Cap. 371 in relation to the offence, and to arrest the person without warrant. Please clarify:
- (a) how long could a C&E Officer detain such a person;
 - (b) whether, and if so, the time upon which, such a person would be cautioned; and
 - (c) whether, after such an arrest is made, a C&E Officer would take such a person to an office of the Customs and Excise Service for further inquiries and thereafter take such a person to a police station to be dealt with in accordance with the Police Force Ordinance (Cap. 232) pursuant to section 17C of the Customs and Excise Service Ordinance (Cap. 342).

Clause 26(1) to (5) of the Bill

16. Under the proposed item 10 of Part 2 of Schedule 2 to Cap. 371, a room which is designated for tasting or testing of smoking products (i.e. CSPs or ASPs) in the manufacturing or business premises of a business engaged in the smoking products trade is, subject to compliance with the specified conditions, an exempt area. By virtue of section 3(1AA) of Cap. 371, such an exempt area would not be regarded as a no smoking area and accordingly the relevant smoking prohibition would not apply. Given that manufacturing of ASPs is prohibited under the proposed new section 15DA(1)(b) of Cap. 371, please explain the need to include a room which is designated for tasting or testing of ASPs in the manufacturing premises of a business engaged in the ASP trade as an exempt area.