

立法會
Legislative Council

LC Paper No. LS48/18-19

**Paper for the House Committee Meeting
on 1 March 2019**

**Legal Service Division Report on
Smoking (Public Health) (Amendment) Bill 2019**

I. SUMMARY

- 1. The Bill**

The Bill seeks to amend the Smoking (Public Health) Ordinance (Cap. 371), two items of its subsidiary legislation and the Dutiable Commodities Ordinance (Cap. 109) to:

 - (a) prohibit the import, manufacture or sale and restrict the giving, possession or promotion of prescribed alternative smoking products ("ASPs");
 - (b) extend the current prohibitions on the use of cigarettes, cigars or pipes in specified places to the use of ASPs;
 - (c) extend the current restrictions on tobacco advertising to the advertising of ASPs; and
 - (d) make related, textual and consequential amendments.
- 2. Public Consultation**

It is not mentioned in the LegCo Brief that the Administration has conducted public consultation.
- 3. Consultation with LegCo Panel**

The Panel on Health Services ("Panel") was first consulted on the proposal on 18 May 2015, and received views of depositions on the proposal on 6 July 2015. The Panel was briefed on the refined and further refined proposals on 19 June 2018 and 15 October 2018 respectively. Various concerns were expressed by members.
- 4. Conclusion**

The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In view of the concerns of members of the Panel, Members may wish to form a Bills Committee to study the Bill in detail.

II. REPORT

The date of First Reading of the Bill is 20 February 2019. Members may refer to the Legislative Council ("LegCo") Brief (File Ref: FH CR 1/3231/19) issued by the Food and Health Bureau and the Department of Health on 13 February 2019 for further details.

Object of the Bill

2. The Bill seeks to amend the Smoking (Public Health) Ordinance (Cap. 371), two items of its subsidiary legislation and the Dutiable Commodities Ordinance (Cap. 109) to:

- (a) prohibit the import, manufacture or sale and restrict the giving, possession or promotion of prescribed alternative smoking products ("ASPs");
- (b) extend the current prohibitions on the use of cigarettes, cigars or pipes in specified places to the use of ASPs;
- (c) extend the current restrictions on tobacco advertising to the advertising of ASPs; and
- (d) make related, textual and consequential amendments.

Background

3. Section 3 of Cap. 371, subject to certain exemptions, prohibits the smoking or carrying of lighted cigarettes, cigars or pipes in designated no smoking areas. Section 4 of Cap. 371, on the other hand, prohibits the smoking or carrying of lighted cigarettes, cigars or pipes in prescribed public transport carriers. Sections 11 to 15 (i.e. Part 4) of Cap. 371 set out the current regime on restricting tobacco advertising. This includes the restriction of printing or publishing a tobacco advertisement in a local newspaper. A contravention of any of the prohibitions or restrictions is an offence under Cap. 371.

4. As stated in paragraph 10 of the LegCo Brief, with a view to ensuring that the Administration's achievements in tobacco control over the years would not be undermined and preventing the harm of new products from taking root, the Chief Executive ("CE") announced in the Policy Address 2018 the proposal to ban the import, manufacture, sale, distribution and advertisement of ASPs.

Provisions of the Bill

Prohibitions on the import, manufacture or sale, and the restrictions on the giving, possessing or promoting of ASPs (clauses 4, 23 and 29 of the Bill)

5. The Bill proposes to add a new definition of ASP and a new Part 4AB (i.e. proposed new sections 15DA to 15DH) to Cap. 371 to provide for the new regime on the prohibitions and restrictions of ASPs.

Meaning of ASP

6. Under the proposed section 2 of, and Part 2 of the proposed new Schedule 7 to, Cap. 371, the following products would fall within the definition of ASP:

- (a) Category 1 ASP refers to a device (other than a waterpipe) that is capable of generating an aerosol from a substance not being tobacco or a dangerous drug (as defined in section 2(1) of the Dangerous Drugs Ordinance (Cap. 134)) other than by means of lighting the substance directly and use for imitating the smoking of a cigarette, cigar or pipe ("conventional smoking"), its component or accessory, or that substance;
- (b) Category 2 ASP refers to a device (other than a waterpipe) that is capable of generating an aerosol from tobacco other than by means of lighting the tobacco directly and use for smoking, its component or accessory, or that tobacco; and
- (c) Category 3 ASP refers to specified plant material, not being tobacco or a dangerous drug, rolled up in any material in a form that is capable of immediate use for imitating conventional smoking.

7. Pursuant to section 16A of Cap. 371, the Secretary for Food and Health ("Secretary") may by order published in the Gazette amend the proposed new Schedule 7 to Cap. 371, and such order would be subsidiary legislation subject to negative vetting by LegCo.

Prohibitions and restrictions

8. Under the proposed new section 15DA of Cap. 371, the import, manufacture, sale or offer for sale, of ASPs would be prohibited. In addition, the giving, possession or promotion of ASPs under certain circumstances would be restricted. A sale of ASP with a view to exporting ASP would, however, not be regarded as a sale of ASP. A contravention of any of these prohibitions or restrictions would be an offence under the proposed new section 15DA(4) punishable by a fine at level 5 (currently \$50,000) and an imprisonment for six months. If the offence is committed by a body corporate, the proposed new

section 15DB of Cap. 371 provides that an officer of the body corporate would also commit the offence if the offence was committed with the officer's consent or connivance or is attributable to the officer's neglect.

Exemptions

9. Under the proposed new sections 15DC, 15DD and 15DE of Cap. 371, the prohibition on the import of ASPs under the proposed new section 15DA of Cap. 371 would not apply to persons in transit at the Hong Kong International Airport, ASPs in transit or air transshipment cargos, and the performance of relevant functions by the Government Chemists respectively.

10. The proposed new section 15DF of Cap. 371 exempts the application of the proposed prohibitions or restrictions of ASPs to ASPs which are registered as pharmaceutical products under regulation 36 of the Pharmacy and Poisons Regulations (Cap. 138A).

Enforcement powers

11. The proposed new sections 15DG and 15DH of Cap. 371 seek to confer certain enforcement powers on inspectors appointed by the Secretary under Cap. 371 ("Inspectors") and Customs and Excise Service officers ("C&E Officers") in relation to specified offences under the proposed new section 15DA(4) of Cap. 371. These include the power of Inspectors to seize, remove or detain ASP, and in relation to an import offence, the power of C&E officers to stop and search a person arriving in Hong Kong.

Extending the current prohibitions on the use of cigarettes, etc. in specified places to the use of ASPs (clauses 5 and 6 of the Bill)

12. Clauses 5 and 6 of the Bill propose to amend sections 3 and 4 of Cap. 371 to extend the present prohibitions under those sections to the smoking or carrying of activated ASPs. However, the current exemptions applicable to the smoking or carrying a lighted cigarette, cigar or pipe in designated no smoking areas, such as smoking a lighted cigarette as part of a live performance, would not apply to activated ASPs. By virtue of section 7(1) of Cap. 371, a person who smokes or carries an activated ASP in a designated no smoking area or prescribed public transport carrier would commit an offence and is liable to a fine of \$5,000 (i.e. level 2).

Extending the current restrictions on tobacco advertising to the advertising of ASPs (clauses 12 to 19 and 29 of the Bill)

13. The Bill seeks to amend Part 4 of Cap. 371 to extend the current restrictions on tobacco advertising to the advertising of ASPs. Under the proposed section 14 of Cap. 371, an advertisement or object that includes certain

names such as a company name associated with the marketing of tobacco products or ASPs would be subject to the advertising restrictions. However, if the advertisement or object does not mention certain words or phrases (such as "cigarette"), and meets certain other conditions, it would be exempted from those restrictions. The Bill proposes to add a new Schedule 8 to Cap. 371 to set out those words or phrases, which include words or phrases related to tobacco products and ASPs. Under section 16A of Cap. 371, the Secretary may amend the proposed new Schedule 8 by order published in the Gazette, and such order would be subsidiary legislation subject to negative vetting by LegCo. By virtue of section 15(1) of Cap. 371, a person who contravenes a relevant requirement relating to the advertising of ASPs would commit an offence, punishable by a fine at level 5 (currently \$50,000) and, in the case of a continuing offence, a further daily penalty of \$1,500.

Other amendments

14. Other amendments include:

- (a) extending the scope of section 15H of Cap. 371 regarding the disposal of property seized by Inspectors pursuant to Cap. 371 to cover ASPs which are seized by C&E Officers and transferred to Inspectors as mentioned in the proposed new section 15DH(4) of Cap. 371 (clause 24 of the Bill);
- (b) adding Government laboratories to Part 2 of Schedule 2 to Cap. 371 to exclude such laboratories from being designated no smoking areas (clause 26(6) of the Bill);
- (c) amending section 3(1) of Cap. 109 to exclude ASPs from being dutiable commodities (clause 30 of the Bill); and
- (d) making consequential amendments to Cap. 371, the Smoking (Public Health) Regulations (Cap. 371A) and the Smoking (Public Health) (Prescribed Information) Order (Cap. 371B) (for example, clauses 20 to 22 of the Bill).

Commencement

15. The Bill, if passed, would come into operation on the expiry of six months after the day on which it is published in the Gazette as an Ordinance.

Public Consultation

16. It is not mentioned in the LegCo Brief that the Administration has conducted public consultation.

Consultation with LegCo Panel

17. As advised by the Clerk to the Panel on Health Services ("Panel"), the Administration briefed the Panel on 18 May 2015 on its plan to impose a ban on the import, manufacture, sale, distribution, and advertising ("total ban") of electronic cigarettes ("e-cigarettes"). The Panel received views from deputations on the proposal on 6 July 2015. On 19 June 2018, the Panel was briefed on the refined proposal that e-cigarettes and other new smoking products, namely heat-not-burn products and herbal cigarettes, would be regulated in a way similar to conventional cigarettes and tobacco products. The latest proposal in CE's Policy Address 2018 to impose a total ban on e-cigarettes and other new smoking products was discussed at the Panel meeting on 15 October 2018 when the Secretary briefed the Panel on the Policy Address. At the above meetings of the Panel, while some members were supportive of the total ban proposal in order to safeguard public health, some other members were concerned about the rationale for subjecting e-cigarettes and other new smoking products to a regulatory framework entirely different from that of conventional cigarettes, and the absence of public consultation in the course of formulating the proposal. Other issues of concern raised by Panel members included the types of tobacco products to be covered under the total ban and to be classified as dutiable commodities; the implications of the proposal on black market trade, smokers' right to consume the products concerned, and Hong Kong's obligations under international trade agreements; as well as the enforceability of the proposal.

Conclusion

18. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In view of the concerns of members of the Panel, Members may wish to form a Bills Committee to study the Bill in detail.

Prepared by

KAN Wan-ye, Wendy
Assistant Legal Adviser
Legislative Council Secretariat
28 February 2019