

**Executive Summary of the Investigation Report  
on the Mechanism for Enforcing the Prohibition of Smoking  
in No Smoking Areas and Public Transport Carriers**

**Background**

Community concern has been rising over the adequacy and effectiveness of Government enforcement action against illegal smoking, particularly in restaurants, under Part II of the Smoking (Public Health) Ordinance, Cap. 371 (the Ordinance). The Ombudsman decided in the public interest to conduct a direct investigation under section 7(1)(a)(ii) of The Ombudsman Ordinance, Cap. 397 in late May 2001.

**The Investigation**

2. This direct investigation examines the mechanism through which Government enforces Part II of the Ordinance, takes stock of relevant enforcement action, and evaluates the adequacy and effectiveness of such mechanism and action.

**Part II of the Ordinance**

3. Part II of the Ordinance provides for the designation of no smoking areas in public places and on public transport carriers; the prohibition of smoking therein; the display and maintenance of prescribed signs; and the penalties for non-compliance. The Ordinance has four Schedules. Schedules 1 and 2 list out respectively the public transport carriers and indoor public places, where smoking is prohibited. Schedule 3 is a list of agencies authorised to designate no smoking areas, while Schedule 4 is a list of premises whose managers may designate no smoking areas therein on a voluntary basis.

## **Enforcement Mechanism and Efforts**

4. The managers and authorised staff of no smoking areas are the primary agencies for enforcing the ban on smoking. The Ordinance empowers them to stop persons from smoking in no smoking areas; to require these persons to give their personal particulars and to leave the no smoking areas if they do not co-operate; and to remove them from the no smoking areas if they refuse to comply. The Police assists venue management in dealing with difficult offenders when necessary. The Police will also serve verbal warnings on offenders if they come across smoking offences in the course of their normal duty and take summons action if the warnings are disregarded. A number of Government departments which are usually the licensing authorities for the venues concerned, such as Transport Department, Marine Department, Television and Entertainment Licensing Authority, assist in enforcement by taking summons action against offenders upon receipt of reports from venue management. Due to resource constraints, these departments only act on reports but cannot afford to despatch their officers to patrol no smoking areas and to prosecute offenders.

5. The managers of no smoking venues are required to place and to maintain in good order no smoking signs in no smoking areas. A number of government departments, which are usually the licensing authorities for the venues concerned, assist in checking the display of these signs. They will advise venue management to put up the prescribed signs if they spot non-compliance during their routine inspection of the venues. So far, there has been no need to resort to summons action as venue management always acts promptly on the advice.

6. The managers of restaurants with over 200 seats (excluding those used exclusively for private events and separated by full-height partitions) are required to designate at least one-third of the seats as no smoking areas

and to display a sign at the entrance of the restaurant to indicate whether no smoking seating is available. The Food and Environmental Hygiene Department (FEHD), the licensing authority for restaurants, is responsible for checking compliance on behalf of Health and Welfare Bureau (HWB) during their routine inspection of restaurants. The department will serve verbal and written warnings on restaurants not complying with these provisions but has so far not prosecuted any. According to FEHD, there is no need to refer any case to HWB as all such restaurants have acted promptly on the warnings.

7. HWB, as the policy bureau on tobacco control, is responsible for collating and analysing enforcement statistics, arranging publicity and public education programmes, co-ordinating enforcement activities among Government departments and evaluating their effectiveness.

#### **Tobacco Control Office**

8. To better co-ordinate anti-smoking efforts, Government set up in February 2001 the Tobacco Control Office (TCO) under the Department of Health (DH). In June 2001, HWB published a public consultation document which outlined a series of proposals to strengthen tobacco control. The document proposes, *inter alia*, the extension of the ban on smoking to all restaurants, bars, karaokes, schools, universities, tertiary educational institutions and indoor workplaces. The long-term objective is to gradually extend the ban to other public indoor premises such as bathhouses, night-clubs and mahjong places. It also proposes that public officers, particularly staff of the TCO, be authorised to take direct prosecution action against 13 offences in the Ordinance, two of which fall under Part II.

## **Compliance**

9. HWB considers that the level of compliance with the provisions of Part II of the Ordinance is generally satisfactory in most no smoking venues, except restaurants and shopping malls. Public complaints received by the Hong Kong Council on Smoking and Health (COSH) and TCO coincide with HWB's view.

## **Observations and Opinions**

10. In this investigation, The Ombudsman has made the following observations and opinions -

### **The Law**

- (a) The Ordinance is silent on what venue management should do after obtaining the personal particulars of offenders (see para. 4). Venue management has the discretion to decide whether or not to report the offence to the authorities. There is little purpose in collecting the information if it is not to facilitate follow-up action by the authorities.
- (b) The Ordinance does not stipulate any penalty if venue management fails, deliberately or otherwise, to enforce the ban on smoking. That is, venue management may choose to ignore its enforcement duties without sanction. Venue management should at least be required to take action when an offence is drawn to its attention, e.g. complaint lodged by a customer. Such a statutory obligation, if imposed, will encourage members of the public to report smoking offences and help venue management in confronting the offenders.

- (c) As a variety of public venues are designated no smoking areas under the Ordinance, there is confusion to the public as to which Government departments should be responsible for what types of venues. The confusion has offered a convenient excuse for departments not to enforce the Ordinance.
- (d) For restaurants, which operate under licence, it is feasible through legislative amendments to make the enforcement of the ban on smoking a licensing condition.

### **Enforcement**

- (e) HWB has not provided clear guidelines and procedures to assist some venue management, notably restaurants and shopping malls, in enforcing Part II of the Ordinance.
- (f) HWB has not provided adequate publicity, education and training on the legal requirements and the enforcement duties of venue management.
- (g) HWB has adopted a tolerant approach to smoking offences, despite a large number of non-compliance cases detected by FEHD and TCO, and public complaints received by FEHD, COSH and TCO.
- (h) There are gaps and overlaps in the enforcement mechanism. An example of a gap is the absence of Government departments responsible for checking the display of no smoking signs in supermarkets, banks, department stores and shopping malls, apparently because there are no licensing authorities as such for these venues. An example of overlap is in FEHD and TCO both being

involved in checking whether restaurants with over 200 seats comply with the requirements for designation of no smoking areas and display of prescribed signs.

- (i) Better planning and co-ordination of enforcement activities among Government departments is required to rectify the situations described in (e), (f) and (h) above and a dedicated agency, ideally TCO, should be assigned to assist HWB in carrying out these functions.
- (j) There has not been a suitable forum within Government for departments concerned to exchange views directly on enforcement problems since the inter-departmental group to review enforcement strategies and modus operandi between 1983 and 1985 ceased operation.
- (k) Although FEHD is the licensing authority for restaurants, it is not responsible for taking summons action against smoking offences taking place in restaurants. This is a departure from the established practice (para. 4). This Office sees FEHD having a logical and legitimate duty, and the advantage of convenience, to assist in action against smokers in no smoking areas of restaurants.

#### **Other Measures**

- (1) There is considerable scope for Government workplaces and venues managed by Government departments and statutory organisations, which have already implemented the smoke-free policy administratively, to join the statutory ban on smoking. HWB should encourage these agencies to be put under Schedule 3 to the Ordinance (para.

3). This will demonstrate Government determination in implementing its anti-smoking policy.

- (m) HWB has proposed in its consultation document (para. 8) moving schools, universities, tertiary educational institution and restaurants (with less than 200 seats) from Schedule 4 (voluntary ban) to Schedule 2 (mandatory ban). Likewise, HWB may consider introducing a voluntary ban in target venues such as bathhouses, night-clubs and mahjong places before imposing statutory ban in the longer term.
- (n) The grace periods for enforcing amendments to the Ordinance have been lengthened considerably over the years. Unnecessarily long grace periods should be avoided, for it could be misconstrued by the public that Government is not taking the matter seriously.
- (o) Health considerations aside, TCO has stated the benefits of imposing a ban on smoking in its information pamphlets to business: lower fire risk, better occupational safety, cleaner air, improved environmental hygiene, brighter business image, reduced sick leave and lower medical expenses. These are important business considerations which, for more effective impact, should be more widely and specifically publicised to business.

## **Conclusions**

11. On the basis of our investigation, this Office has come to the following conclusions -

- (a) Government action in enforcing Part II of the Ordinance has not been positive or rigorous enough;
- (b) Deficiencies both in the enforcement mechanism and in the law should be redressed; and
- (c) The effectiveness of Government's anti-smoking policy has been undermined as a result.

### **Recommendations**

12. The Ombudsman has made 15 recommendations to Government for consideration as follows -

### **The Law**

#### *HWB*

- (a) To specify clearly in the Ordinance what to do with the personal particulars of offenders so obtained in pursuance of section 3(3)(b) or 4(2)(b);
- (b) To consider the need for an offence in the Ordinance where venue management fails to enforce the ban on smoking;
- (c) To specify clearly in the Ordinance the public agencies or officers responsible for enforcing the provisions in Part II;

#### *Environment and Food Bureau (EFB) and FEHD*

- (d) To examine the mechanism for making the enforcement of the ban on smoking a licensing condition of restaurants;

## **Enforcement**

### *HWB*

- (e) To provide clear guidelines and procedures to assist venue management in enforcing Part II of the Ordinance;
- (f) To step up publicity, education and training on the legal requirements and the enforcement duties of venue management, seeking the assistance of COSH and other departments whenever necessary;
- (g) To end the tolerant approach and to be more proactive in enforcement and more rigorous in prosecution of smoking offences in target venues attracting most complaints;
- (h) To review, in consultation with relevant bureaux and departments, the division of responsibilities in enforcing Part II of the Ordinance;
- (i) To strengthen the role of TCO / DH for co-ordination of departments in enforcing Part II of the Ordinance;
- (j) To re-constitute an inter-departmental group to review enforcement strategies and modus operandi regularly;

### *EFB and FEHD*

- (k) To examine the scope for FEHD playing a more active role in enforcing the ban on smoking in restaurants;

**Other Measures**

*HWB*

- (l) To step up efforts to encourage voluntary participation of agencies and premises to join the statutory ban on smoking;
- (m) To consider introducing voluntary ban in target venues before imposing statutory ban;
- (n) To avoid unnecessarily long grace periods for effecting amendments to the Ordinance; and
- (o) To publicise more widely and target-based the benefits of imposing the ban on smoking.

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