

Executive Summary

Direct Investigation into the Mechanism of the Food and Health Bureau and the Department of Health for Handling Smoking Offences

Foreword

The Office of the Ombudsman receives from time to time public complaints against the Government's ineffectiveness in combating illegal smoking, resulting in some no-smoking areas being existent in name only. As a result, the public continue to suffer from the nuisance of second-hand smoke.

2. This direct investigation aims to examine the effectiveness of the enforcement mechanism of the Food and Health Bureau ("FHB") and the Tobacco Control Office ("TCO") under the Department of Health ("DH") for handling smoking offences, and whether their coordination with other statutory authorities in tobacco control has been adequate, as well as to identify areas for improvement.

Our Findings

3. This Office considers that FHB and the TCO, being the principal authorities for implementing the Government tobacco control policy, have nine inadequacies in three areas in the enforcement against smoking offences.

(I) Inadequacies in Enforcement Mechanism

(A) Insufficient Inspections at Night

4. In each of the past four years, the number of fixed penalty tickets issued by the TCO during night shifts was only about one-fourth to one-third of those issued during daytime. However, illegal smoking in bars and restaurants was most prevalent during the night peak hours. We have scrutinised TCO's duty roster records and found that in December 2016, no officers had been deployed to perform night shift duty (after 6:30 pm) on all public holidays and Sundays and on several non-public holidays. As for November that year, officers had been deployed to perform night shift duty on only four Thursdays or Fridays (days on which places of entertainment should usually be packed with patrons). Such arrangements suggested that the TCO had not deployed any officers to conduct inspections during certain peak time of smoking offences, thus missing the opportune time for enforcement.

5. We are of the view that DH should consider strengthening its enforcement actions at night, particularly on the more "high-risk" days.

(B) Insufficient Manpower and High Turnover Rate

6. The TCO has an establishment of 89 law enforcement officers, with an actual strength at 79. Over the last five years, the TCO received around 18,000 to 22,000 complaints (with a rising trend) and conducted about 27,000 to 30,000 surprise inspections on average every year. Though not insignificant, the number of enforcement actions had hardly been enough given the enormous number of statutory no-smoking areas in the territory.

7. More worrying is the persistently high turnover rate of Tobacco Control Inspectors (“TCIs”), which stood at 16.3% in 2015-16. If DH could not find ways to reduce their turnover rate, the effectiveness of enforcement actions would inevitably suffer in the long run.

(C) Antiquated Guidelines on Complaints Follow-Up

8. The TCO’s internal guidelines stipulate that TCIs should conduct the first inspection within 21 days of receipt of complaint. This timeframe falls short of the expectation of most complainants. The TCO should actively seek to shorten the time needed to conduct the first inspection and consider setting priorities for different spots. For instance, the timeframe for conducting the first inspection should be shorter for spots that had repeatedly attracted simultaneous complaints, or where multiple offenders had been found, or the persons-in-charge of the venue had been uncooperative. This can better meet the public’s expectation as well as demonstrating the TCO’s determination on enforcement.

9. In addition, the TCO should enhance communication with complainants in order to understand whether the smoking offences at the spots concerned occurred only at a specific time or throughout the day, and conduct inspections at a time taking into account the information collected from the complainant. Otherwise, the inspections may bear limited results, wasting its already strained manpower resources.

(D) Cooperation with Prime Witnesses (other than TCIs) Should Be Strengthened

10. Smoking is a short-lived behaviour, making it difficult to catch offenders red-handed. Nevertheless, if members of the public are willing to provide statements and testify at court, the chance of successful prosecution would greatly increase. We consider that DH can step up publicity so that more people are willing to come forward and testify against smoking offenders in order to enhance the deterrent effects.

(E) Enhance Enforcement Actions by Plain-Clothes Officers

11. In the process of handling complaints, a number of complainants indicated that smoking offenders would just throw away their cigarettes the moment they see TCIs entering the premises. The effectiveness of enforcement actions was thus severely

weakened. They suggested that enforcement actions be taken by plain-clothes officers. However, the TCO explained that TCIs must wear their uniform while on duty for better protection of their own safety and control of the situation on the scene. This can also prevent impersonation and scams by criminals.

12. While we appreciate the TCO's concerns, we are of the view that TCO can enhance the role of plain-clothes TCIs in enforcement, especially in the provision of evidence. For instance, they can act as eye-witnesses, survey the site, or even take video footage of the smoking offences on the scene. Their efforts can complement those of uniformed officers to achieve more effective enforcement.

(II) Inadequacies in Coordination Mechanism

(F) FHB and DH Failing to Properly Coordinate Enforcement of Tobacco Control

13. Since 2009, the Food and Environmental Hygiene Department ("FEHD"), the Leisure and Cultural Services Department ("LCSD"), and the Housing Department have been included as the statutory authorities responsible for enforcement of tobacco control, empowered to institute prosecutions against smoking offenders and directly handle smoking offences within the venues under their management. Nevertheless, in the past four years, the venues under the management of FEHD and LCSD accounted for about a fifth of the list of locations "requiring intensive inspections" as identified by the TCO. During the same period, these two departments merely brought several dozen prosecutions every year. The numbers are far too low.

14. While tobacco control is the Government's overall policy, without an effective coordination, each department will just follow its own way and priorities. We consider it imperative for the Government to maintain a higher level of coordination in the efforts of tobacco control, so as to provide all relevant enforcement departments with clearer directions and objectives. FHB, as the bureau responsible for tobacco control policy, should play a more active role. Instead of passively relying on individual departments to take enforcement actions within their own ambit, FHB should proactively coordinate and support the tobacco control measures of all enforcement departments, and discuss with them how to effectively allocate resources for combating smoking offences.

(G) Government Departments Failing to Set Examples in Performing Duties of Venue Managers

15. There are cases cited in the investigation report showing that some Government departments could not even properly handle the illegal smoking problems in their own offices. We consider that Government departments and public bodies should set a good example and diligently perform their duties as venue managers.

(III) Inadequacies in Legislation

(H) No Penalty for Venue Managers Who Fail to Comply with Tobacco Control Provisions

16. The laws of many developed countries (such as the UK, Canada, Australia, New Zealand and Singapore) contain relevant provisions imposing penalties on venue managers who allow offenders to smoke in no-smoking areas. However, there is no such provision in the current legislation in Hong Kong.

17. In fact, from the complaints handled by this Office, we note that the smokers in many cases were employees of an organisation. Those employees, who stay at the workplaces for prolonged hours, pose more serious hazards to the health of their colleagues. Being their employers or supervisors, the venue managers surely have the ability and responsibility to prevent illegal smoking of their own employees and protect the other staff from exposure to second-hand smoke. In our view, the Government should actively consider amending the legislation to compel adherence to tobacco control provisions on the part of venue managers.

(I) Imposing Anti-smoking Licensing Conditions on Places of Entertainment

18. Many places of entertainment, including billiard saloons, mahjong-tin kau premises and amusement game centres, are prone to more serious problems of illegal smoking. We consider that the Government should study whether the licensing authorities and departments concerned can be authorised to introduce tobacco control requirements in the licensing conditions of such places.

Recommendations

19. In the light of the above, The Ombudsman makes 11 improvement recommendations to the Government:

Improving Enforcement Efficiency

- (1) **DH** should step up night-time enforcement actions (especially before, after and during public holidays), focusing on those areas persistently listed as “requiring intensive inspections”;
- (2) **DH** should review its need to beef up the existing manpower of the TCO, and examine the reasons behind the high turnover rate of the TCIs (such as remuneration package and nature of work);
- (3) **DH** should strengthen communication with complainants to ascertain whether the smoking offences at the locations concerned occur within a

certain time slot or around the clock, so as to avoid wasting human resources;

- (4) **DH** should review its current performance pledge and tighten up the timeframe for conducting the first inspections;
- (5) **DH** should consider setting priorities for different locations (such as spots that have attracted multiple complaints simultaneously, where a number of smokers have been found, or where the persons-in-charge of the venue have been uncooperative);
- (6) **DH** should strengthen publicity and encourage eye-witnesses to step forward and testify against the smoking offenders;
- (7) **DH** should consider enhancing the role of plain-clothes officers in taking enforcement actions to improve enforcement effectiveness;

Establishing an Effective Coordination Mechanism

- (8) **FHB** should seek to establish an effective mechanism for coordinating at a higher level tobacco control measures of different departments and policy bureaux so as to ensure proper performance of duties by departments as venue managers;
- (9) **FHB**, jointly with **DH**, should formulate strategies for monitoring and encouraging venue managers (especially for those venues “requiring intensive inspections”) to perform their duties;

Remedying Inadequate Legislation

- (10) **FHB** should take reference from overseas experience and consider reviewing the existing legislation, thereby imposing criminal liabilities on those venue managers who acquiesce to or condone illegal smoking on their premises (especially regarding cases of illegal smoking by employees); and
- (11) **FHB** and **DH** should discuss with various licensing authorities and the Department of Justice how to introduce licensing conditions under different legislation to mandate performance of tobacco control duties by venue managers.