

A Review of Current Legislation on Milk Formula Advertising for Infants and Young Children in Hong Kong

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The World Health Organization published an International Code of Marketing of Breast-milk Substitutes in 1981 to emphasise the merits of exclusive breastfeeding. As Hong Kong has joined the code on a voluntary basis, this Code of practice is not backed up by formal legislation and is thus not legally binding. Over the past decades, milk formula advertising has been so successful that acceptance of formula milk prevail from hospital to home. Pro-breastfeeding advocates generally argue that milk formula advertising has become a major obstacle in boosting breastfeeding rates. This article reviews the current legislation on milk formula advertising for infants and young children in Hong Kong, and the attempts of the government to enhance such legislation.
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Introduction

Use of formula milk for infant feeding is commonplace among mothers in Hong Kong. Although the rates of initiation and duration of breastfeeding have increased over the past two to three decades, a significant proportion of Hong Kong mothers continue to use formula milk as the main food for babies from birth, and the majority as the main food or in addition to breast milk by around 2 months. By 6 months most babies are fully formula fed¹. The World Health Organization (WHO) published an International Code of Marketing of Breast-milk Substitutes² in 1981 to emphasise the merits of exclusive breastfeeding; it not only recommends mothers to exclusively breastfeed for 26 weeks, but also provides a set of marketing rules that aim to ensure that all parents are protected from commercial exploitation and receive unbiased and appropriate information³. More than 80 nations have adopted the 34-year-old WHO Code (Hong Kong has joined the Code voluntarily)⁴ that calls for education about “the benefits and superiority of breastfeeding” and adequate product labelling, and advises that “manufacturers and distributors should not provide, directly or indirectly, to pregnant women, mothers or members of their families, samples of products within the scope of this Code”. Local surveys have sought specifically to assess the incidence of this practice, and a consistent finding is that breaches to these policy recommendations in Hong Kong are banal^{1,5}. At present, there is a voluntary consensus among all local publishers and media not to advertise infant formulae (for babies from birth to 6 months), while the Department of

Health will routinely issue a written warning to advertisers or suppliers who violate this consensus. It must be recognised nonetheless that there is no formal legislation banning advertising of infant formulae. It is also clear that no such agreement can be made for products targeted at children over 6 months of age.

The promotion of breast milk substitutes in commercial advertisements has long been recognised to place commercial pressure on baby feeding decisions and undermine breastfeeding. Advocates for breastfeeding have argued for restrictions on the advertising of formula milk or follow-up preparations and in some cases for a complete and effective ban in Hong Kong. The logic used is that whereas information informs, advertising is not neutral information, as it solely tries to persuade one to buy a product. Despite the Department of Health’s consistent and strong support for the Code, given the lack of legislation in Hong Kong, implementation of this code has so far been largely ineffective and controversial.

Undoubtedly, the Department of Health has been a strong advocate for breastfeeding in the past, with campaigns being launched through the Family Health Service of the Department of Health. Public hospitals under the Hospital Authority are pledging to be baby-

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friendly hospitals^{3,6}, and this requires adherence to a set of strict protocols dictated by the WHO. Despite all these efforts, breastfeeding rates have remained low compared with many other western countries. It can be argued that there are many contributing factors associated with this low breastfeeding rate in Hong Kong, including labour laws that allow only 10 weeks of maternity leave compared with much more liberal peripartum leave in certain European jurisdictions, as well as widely quoted studies that show an association of failure to breastfeed with poor health, work pressure, lack of breastfeeding facilities, and sometimes a lack of support from partners. Nevertheless, the insufficient laws to restrict advertising of infant formula milk and associated products have become one of the most critical issues believed to curtail the promotion of breastfeeding. This article serves to review the existing laws in Hong Kong that can be applied to restrict excessive and inappropriate advertising of these products, and the new developments in this area.

Current Legislation in Hong Kong

The legislative ordinances in Hong Kong normally refer to formula products and foods intended for infants and young children (IYC) under the age of 36 months. The formula products may be subdivided into infant formula (for use from birth up to the introduction of appropriate complementary feeding, usually around 6 months) and follow-on formula (beyond 6 months)⁷. Food intended for IYC include processed cereal-based food and baby food. It is obvious that most of the discussion relating to the impact on breastfeeding refers to infant formula for use from birth and follow-on formula for use beyond 6 months, as these will have the greatest impact on breastfeeding rates in Hong Kong mothers.

Section 54 of the Public Health and Municipal Services Ordinance (Cap. 132) stipulates that all food for sale must be fit for human consumption. This ordinance applies to all food products including formula products and foods intended for IYC under the age of 36 months. Nonetheless, there are no specific provisions in Cap. 132 governing the requirements and standards for nutritional composition of these formula products and foods intended for IYC under the age of 36 months. Section 61 of the same Ordinance also offers broad protection against misleading nutritional claims, as it stipulates that any person who sells or displays any food for sale that is presented with a label that falsely describes the food, or is calculated to mislead as to its nature, substance or quality, shall be guilty of an offence. Regrettably the threshold for prosecution under this section is in general high, and unless the products are

counterfeit or fraud and directly harmful to health, there is a need for the prosecution to prove that the label in question is intentionally misleading or false.

The Food and Drugs (Composition and Labelling) Regulations (Cap. 132W) require prepackaged foods for people aged 36 months or above to provide nutritional information on their labels (“general prepackaged foods”), but do not cover formula products and foods intended for IYC under the age of 36 months. Thus, nutrition and health claims made on formula and IYC products are outside the scope of the Nutrition Labelling Scheme⁸. In addition, even when many of these IYC products sold in Hong Kong carry nutrition labels, the information presented and the formats used are not consistent.

The Food and Drugs (Composition and Labelling) [Amendment] (No. 2) Regulation 2014 was published in the Gazette on 13 June 2014 with a view to better regulating the nutritional composition of infant formula, as well as nutrition labelling of formula products and IYC foods⁹. On 22 October 2014, the Legislative Council completed its vetting of this amendment that came into force on 13 December 2015 (after a grace period of 18 months) for infant formula and on 13 June 2016 (after a grace period of 24 months) for follow-on formula and IYC foods. This regulation amends Cap. 132 sub. leg. W (“the principal Regulations”) to provide for: (a) the standards of composition of infant formulae; (b) the nutrition labelling requirements of infant formulae, follow-on formulae, and prepackaged food for IYC; (c) the items that are exempt from the standards or requirements; and (d) the offences and penalties for non-compliance with the standards and requirements. In this amendment, definitions of many technical terms are updated, including nutrient, vitamins A, C, E and K, folic acid, niacin, information about formula for special medical purposes for IYC, infant formula, and prepackaged food for IYC. Nonetheless, because of the complexity and controversies involved, the regulation of nutrition and health claims for these products has not been included in this legislative amendment.

The Undesirable Medical Advertisements Ordinance (Cap. 231) under the purview of the Department of Health prohibits any person from publishing or causing to be published any advertisements likely to lead to the use of, inter alia, any medicine for the purpose of treating human beings for, or preventing them from contracting specified diseases or conditions. It also regulates the advertising of specified claims for orally consumed products (OCP). Nonetheless, OCP usually include oral medicines such as

pills, capsules, tablets, granules, powder, semi-solid or in liquor, but do not normally include products that are customarily consumed only as food or drink. Therefore, nutrition and health claims on formula products and IYC foods are generally not covered by Cap. 231 as these products do not fall within the definition of medicine or that of OCP under Cap. 231. Specifically, whether an infant formula product and IYC food is considered a medicine or OCP would have to be decided on a case-by-case basis, taking into account actual circumstances of the case.

The Trade Descriptions Ordinance (Cap. 362) under the purview of the Customs and Excise Department prohibits, *inter alia*, false trade descriptions, false, misleading or incomplete information, false marks and mis-statements in respect of goods provided in the course of trade. Depending on how the nutrition and health claims for formula products and IYC foods are made, such claims can be governed by Cap. 362. Nonetheless, as with Cap. 132, the threshold for prosecution under Cap. 362 is high, requiring, among other things, expert evidence, including that to be tendered by the Centre for Food Safety, to prove that the trade description is false to a material degree¹⁰.

Legislation to tackle false advertising via broadcasting, according to the Generic Code of Practice on Television Advertising Standards, issued by the Communications Authority pursuant to section 3 of the Broadcasting Ordinance (Cap. 562), dictates that all factual claims and best-selling claims should be capable of substantiation. Nevertheless, this legislation basically refers to the methods of advertising and not to the products themselves.

It is clear that there is currently no direct legislation on the advertising and health claims of infant formula and follow-on formula in Hong Kong. Any legislation that can be brought against such advertising can only make use of false labelling or false trade claims. In particular, such legislation cannot effectively regulate the nutrition and health claims made on formula products and IYC foods. The recent Government consultation document in early 2015¹⁰ concluded that:

1. Legislation that governs general food labelling and advertisement is not applicable to the nutrition and health claims made on formula products and IYC foods (e.g. Cap. 132W and the Food and Drugs [Composition and Labelling] (Amendment) [No. 2] Regulation 2014).
2. For legislation that is applicable to the nutrition and health claims on formula products and IYC foods, they lack specific provisions on the claims made on these

products. It can be expected that a great deal of effort and research have to be undertaken by the Centre for Food Safety to establish the truthfulness of a nutrition and health claim before a case for prosecution can be established (e.g. section 61 of Cap. 132 and Cap. 362)⁵.

3. The threshold for prosecution under such legislation is high, requiring the prosecution to prove with sufficient evidence that the label in question is intentionally misleading or false (section 61 of Cap. 132) or that the trade description concerned is false to a material degree (as in Cap. 362), so that the chances of successive prosecution will be anticipated to be low.

Recent Developments

The Hong Kong Code

In view of these limitations of the current legislation, the Government set up the Taskforce on Hong Kong Code of Marketing of Breastmilk Substitutes in June 2010 under the Department of Health to develop and promulgate a code of marketing and quality of formula milk and related products for IYC, i.e. the Hong Kong Code. In the course of drafting the code, the Taskforce held meetings with representatives of six multinational formula milk companies, and made reference to the WHO Code 1981, and relevant subsequent World Health Assembly resolution that clarified the WHO Code and sought to bring it up-to-date with scientific developments and evolving marketing strategies. The Taskforce completed the drafting of the Hong Kong Code in October 2012 and the subsequent public consultation received a total of over 150 submissions by early 2014. Views were diversified as to the degree of control particularly over nutrient and health claims¹¹. The consultation on the Hong Kong Code was reported to the Legislative Council in July 2014¹².

The 2015 Consultation on Nutrition and Health Claims

Government proposed a more advanced regulatory framework for nutritional and health claims about infant formula and associated products in January 2015. The proposal in this new consultation is based on the principles of the Codex Alimentarius Commission (Codex) established in 1963 by the Food and Agriculture Organization of the United Nations and WHO to develop food standards, guidelines, and other codes of practice to protect consumer health and ensure fair practices in the food trade and sales.

According to the Codex guidelines, a nutrition claim is any representation that states, suggests, or implies that a food has particular nutritional properties including but not limited to energy value and the content of protein,

fat, carbohydrates, vitamins, and minerals. These nutrition claims may be a nutrient content claim, i.e. that the nutrient contained in the product is at a certain level; or a nutrient comparative claim, that the level of nutrient in the product is, for instance, less than, more than, increased, or reduced compared with another food or breast milk.

According to the Codex, a health claim is defined as any representation that states, suggests, or implies that a relationship exists between a food or a constituent of that food and health. Commonly seen health claims in formula milk advertisements include: (a) nutrient function claims, e.g. phospholipids are essential for the functioning of brain cells and brain development; (b) other function claims that consumption of the product has specific beneficial effects, e.g. probiotics help to regulate bowel and digestive function; and (c) reduction of disease risk claim, e.g. that formula fortified with iron will reduce the risk of anaemia.

The Consultation paper¹⁰ surveyed the regulations in different countries on such nutrition and health claims and found a complicated and varying picture across these different legislations, with different allowances for infant formula, follow-on formula, and IYC foods, reflecting the controversial nature of this issue and the lack of a universally agreed standard. The Government has come up with the following five overarching principles to govern the scope of the regulatory framework:

1. Nutrition claims (including both nutrient content and nutrient comparative claims) should be prohibited for infant formula.
2. Reduction of disease claims should be prohibited in formula products and IYC foods.
3. Nutrition claims including both nutrient content and nutrient comparative claims, and nutrient function claims should be permitted for IYC foods.
4. Nutrients or constituents permitted to be the subjects of claims should be of high importance to the health of IYC.
5. Nutrition and health claims should meet specific content conditions and health claims should be scientifically substantiated and have undergone credible evaluation processes.

It is believed that the first three overarching principles would be more likely to be generally accepted. The other options that are open for debate within this Consultation will then be nutrient function claims for infant formula, nutrient claims and nutrient function claims for follow-on formula, and other function claims for formula products and IYC foods. The Consultation paper calls

for the public's views on whether a restrictive approach (whereby all the above claims would be prohibited) or an inclusive approach (whereby all of the above claims would be allowed), or somewhere in between these two stands should be accepted as the basic regulatory framework for Hong Kong. While the Consultation period has formally been completed for over 1 year at the time of writing, no resolutions have yet been proposed by the government.

The Debate

Pro-breastfeeding groups have advocated more stringent regulation of all nutrition and health claims, and have argued that the exaggerated claims in the advertisements for many of these products have misled parents and the public about their superior or at least non-inferior value compared with breastfeeding. The trade and producers nonetheless would argue that such stringent control is unnecessary, as the nutrition and health claims are well based on scientific data and will provide useful information to consumers, and that in order to substantiate these claims, the trade will have great incentive to invest in product development and research.

By the end of the consultation on 27 April 2015, many had openly expressed their views. Those supporting a restrictive approach include the Hong Kong College of Paediatricians¹³ and the School of Nursing, the University of Hong Kong¹⁴. The Hong Kong Infant and Young Child Nutrition Association¹⁵ seems to support a more midway stand between the restrictive and inclusive approach. Opposing views would argue that this Hong Kong code would violate World Trade Organization law¹⁶, or would set a dangerous precedent of government over-intervention. Some of the arguments put forward are equally rigorous, "This drastic measure will endanger consumer access to information and commercial freedom of speech, both of which are cornerstones of Hong Kong's free market competitiveness...Over-regulation discourages reputable players from Hong Kong, hurts our free market reputation, and adversely impacts on employment opportunities and consumer choice"¹⁷. Indeed, the resistance from milk formulae suppliers and traders has also been intense, and vigorous lobbying has been underway to deter the establishment from producing any formal legal regulatory framework.

Solutions and Summary

The very frequent consultations that the Government has proposed in recent years on the regulation of infant formula milk products are unprecedented. The public debate is also intense, with professional bodies

and pro-breastfeeding advocates fighting for a more and more restrictive approach, and the trade putting up the greatest resistance to protect its commercial interests. The confrontation is not unlike that seen some decades ago in the tobacco industry, although it is dangerous to draw any analogy between infant formula and tobacco, with their distinctly different effects on health. Public receptiveness to the concept of breastfeeding as the best option will be a key factor for the successful passing of more restrictive legislation, and this tide is most likely to be adamantly resisted by the trade. Under existing legislation, actual prosecution for false advertising or unsubstantiated claims/labelling is anticipated to be few and far between, and the establishment of direct and restrictive legislation would have served its purpose to keep misleading and exaggerated

advertising in check. The Government's proposed middle road approach between no direct legislation and complete banning of commercial propaganda seems to have struck a balance between all stakeholders, but is certain to involve vigorous power play between political and financial stakeholders. Given the uncertainties and subtleness of this road forward, perhaps a more direct and less confrontational approach would be for the government to simply focus on enhancing the promotion of breastfeeding to the public, so that through education of consumers, change of consumer behaviour to more baby-friendly practices would overwhelm any effects of milk formula advertising.

Declaration

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