

立法會
Legislative Council

LC Paper No. CB(2)2170/00-01

(These minutes have been
seen by the Administration)

Ref : CB2/BC/4/00

**Bills Committee on Drug Dependent Persons Treatment
and Rehabilitation Centres (Licensing) Bill**

**Minutes of meeting
held on Monday, 5 February 2001 at 4:30 pm
in Conference Room A of the Legislative Council Building**

- Members Present** : Hon Cyd HO Sau-lan (Chairman)
Hon James TO Kun-sun
Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP
Hon LAW Chi-kwong, JP
Hon Michael MAK Kwok-fung
Dr Hon LO Wing-lok
Hon IP Kwok-him, JP
- Members Absent** : Hon Andrew WONG Wang-fat, JP
Dr Hon TANG Siu-tong, JP
- Public Officers Attending** : Ms Mimi LEE
Principal Assistant Secretary for Security (Narcotics)
- Miss Christina CHONG
Assistant Secretary for Security (Narcotics)
- Miss Ann HON
Assistant Director of Social Welfare
- Mrs Lily NG
Senior Social Work Officer

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Ms Brenda LAU
Social Work Officer

Ms Francoise LAM
Government Counsel

Clerk in Attendance : Ms Doris CHAN
Chief Assistant Secretary (2) 4

Staff in Attendance : Mr LEE Yu-sung
Senior Assistant Legal Adviser

Ms Dora WAI
Senior Assistant Secretary (2) 4

I. Meeting with the Administration

Prosecution authority for offences under the Bill (LC Paper No. CB(2)788/00-01(01))

Members noted that the Administration had accepted the proposal of the Social Welfare Department (SWD) assuming the investigation and prosecution roles for offences under the Bill.

2. In reply to Dr LO Wing-lok, Principal Assistant Secretary for Security (Narcotics) (PAS(N)) said that one additional full-time staff would be required by SWD to perform such roles. She said that the Department of Justice could provide SWD with the necessary training on prosecution procedures. Assistant Director of Social Welfare (ADSW) added that from past experience this kind of training normally took one week to complete.

Commencement date of the Bill (LC Paper No. CB(2)788/00-01(02))

3. Members noted the Administration's stance that the commencement date of the Bill should not be unduly delayed after the passage of the Bill. Dr LO Wing-lok expressed his support in this regard.

Clause-by-clause examination of the Bill

Clause 1 - Short title and commencement

4. In response to the Chairman, PAS(N) said that in accordance with clause 1(2), this Ordinance would come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette after the passage of the Bill. The commencement notice would be a subsidiary legislation subject to the Council's scrutiny through negative vetting. She assured members that the Administration would take into account the readiness of drug treatment and rehabilitation centres (centres) before finalising its proposal on the commencement date.

Clause 2 - Interpretation

5. In reply to the question raised by the Chairman on the term "psychophysical" which appeared under the definition of "drug dependence", PAS(N) said that this referred to the psychological and physical states of drug dependent persons. She pointed out that the onset of withdrawal symptoms would not only have physical but also psychological effects on these persons. In view of this, the Administration would adopt a working definition of "drug dependence" rather than relying solely on medical advice. She said that the Administration had made reference to overseas practices when drawing up the definition. Centres had also been consulted and they generally accepted it.

Clause 4 - Restriction on operating treatment centres

6. The Chairman asked whether the interpretation of "offence continues" under clause 4(3)(a) would differ from "continuing offence" which was more commonly used in other ordinances. Senior Assistant Legal Adviser (SALA) and Government Counsel (GC) confirmed that the interpretation of the two terms was the same in substance.

7. In reply to Mr Michael MAK, GC said that the Interpretation and General Clauses Ordinance (Cap. 1) stipulated that words and expressions importing the masculine gender included the feminine and neuter genders.

Clause 5 - Contravention of conditions of licence or certificate of exemption

8. SALA enquired about the background of introducing clause 5(3) to the Bill. GC explained that the Administration considered it logical and reasonable to expect that a specified operator of a centre should have knowledge of the condition of the licence or certificate of exemption issued to him. Therefore clause 5(3) was introduced to enable the prosecution to charge the specified operator with an offence under clause 5(1), without the need to prove that he had such knowledge.

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9. The Chairman pointed out that there was no similar provision in the Child Care Services Ordinance (Cap. 243) and the Residential Care Homes (Elderly Persons) Ordinance (Cap. 459) and enquired about the rationale of including clause 5(3) in the Bill. She opined that if this provision was found to be reasonable, the Administration should consider including it in the two Ordinances. Mrs Sophie LEUNG also asked about the reasons for introducing the provision as it seemed to be just stating the obvious. Dr LO Wing-lok enquired whether the introduction of the provision was triggered by problems encountered during the enforcement of the two Ordinances.

10. PAS(N) pointed out that as the nature of a drug treatment and rehabilitation centre was different from a child care centre or an elderly home, the clauses of the Bill and the two Ordinances should not necessarily be the same. The most important consideration was that the clauses under the Bill should be able to effectively achieve the policy intent.

11. Mr IP Kwok-him expressed worry that a specified operator of a centre might commit an offence inadvertently. He held the view that "reasonable supervision and reasonable diligence" under clause 5(2)(b) was too abstract and suggested that concrete requirements to be fulfilled by centres should be provided. SALA said that with clause 5(3), the procedure for taking out prosecution against a specified operator of a centre for an offence under clause 5(1) was simplified as the prosecution was not required to prove that the specified operator had knowledge of the condition of the licence or certificate of exemption the contravention of which constituted the offence. He pointed out that "reasonable supervision and reasonable diligence" was a commonly used term in many ordinances. In deciding whether a specified operator would be considered as having exercised reasonable supervision and reasonable diligence over the management of a centre, the court would consider whether he had done what a reasonable man in his position would have done.

12. GC pointed out that clause 5(3) did not prevent a specified operator charged with an offence under clause 5(1) from raising a defence. She invited members to note that there was a tighter provision in the Residential Care Homes (Elderly Persons) Ordinance (Cap. 459) which provided that it should not be a defence for an operator charged with an offence under the Ordinance on the ground that he had no knowledge of the requirement of obtaining a licence or certificate of exemption to operate a centre.

13. The Chairman suggested that more concrete guidelines in connection with "reasonable supervision and reasonable diligence" should be included in the Code of Practice (the Code). PAS(N) said that guidelines relating to building and fire safety of centres were already included in the Code. As the Code was not yet finalised, she undertook to include more concrete and comprehensive guidelines in it as far as practicable.

Clause 6 - Application for and issue of licence

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14. SALA invited members to note that although non-compliance of the Code to be issued by the Director of Social Welfare (DSW) under clause 25 of the Bill had no legal consequences, DSW might refuse to issue a licence or certificate of exemption to a centre if it did not comply with the requirements set out in the Code. PAS(N) said that in order to allow greater flexibility, the Code would be an administrative tool to provide centres with practical guidance on their operation rather than a subsidiary legislation. This proposed arrangement was supported by centres.

Clause 8 - Application for and issue of certificate of exemption

15. SALA said that the information sought by DSW under clause 8(5) was subject to the Personal Data (Privacy) Ordinance (Cap. 486) such as requiring the information to be directly related to the function of the collection and not excessive. Applicants for a licence or certificate of exemption who were in doubt as to whether the information sought by DSW was in excess of the purposes of the Bill could resort to the Privacy Commissioner for Personal Data for remedy. PAS(N) said that the Administration had taken on board the advice of the Privacy Commissioner for Personal Data to set out in the Code the types of information required for applications of a licence or certificate of exemption. She added that there was no statutory requirement for a centre to obtain detailed criminal and drug addiction records of residents. Instead, applicants for a licence or a certificate of exemption would be required to make a declaration of whether they had criminal records or whether they were addicted to drug in the past 10 and seven years respectively before DSW considered the applications.

Clause 14 – Cancellation of licence or certificate of exemption

Clause 15 – Notice of refusal or cancellation

16. In reply to the question raised by the Chairman, ADSW said that the Administration would follow the practice adopted under the Residential Care Homes (Elderly Persons) Ordinance (Cap. 459) that residents of a centre would be properly transferred to other centres before the closure of the centre due to cancellation of licence or certificate of exemption. In response to Mr IP Kwok-him, GC said that clause 15(1) provided that an applicant or specified operator of a centre might make written representations to DSW within 21 days after the day on which a notice was given to him expressing DSW's intention to refuse his application for a licence or certificate of exemption or for its renewal. Clause 15(2) provided that DSW might serve on an applicant or specified operator a notice of refusal of the application 21 days from the day on which the notice under clause 15(1) was given and after considering the written representations from the applicant or specified operator, if any. The notice under clause 15(2) should not have effect earlier than 21 days from the day on which such notice was given. Therefore there would be at least 42 days in total for a centre to make the necessary arrangements before the cancellation or non-renewal of licence or certificate of exemption took effect. PAS(N) added that in reality a centre would have more time to make the necessary arrangements as there should have been communications between SWD and the centre, such as verbal advice or written warning

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given by SWD, well before the cancellation or non-renewal of licence or certificate of exemption took effect.

Clause 18 – Inspection and other powers

17. PAS(N) undertook to provide the CSAs in relation to SWD assuming the investigation and prosecution roles for offences under the Bill for members' consideration at the next meeting.

Clause 21 – Offences by corporation or partners

18. Referring to clauses 21(1)(b) and 21(2)(b), the Chairman expressed concern about the criminal liability of directors, partners or other persons concerned in the management of a body corporate or partnership who operated a centre. In considering the element of "neglect", she asked whether sufficient protection would be provided for the said persons who might have little involvement in the centre. She questioned why directors or partners of large construction companies were not liable in this aspect as long as they could prove that they had exercised reasonable diligence.

19. GC explained that the construction industry was operated under a multi-layered subcontracting system. The directors and partners in this industry might be unable to exercise direct control over the management of construction projects. As the licence or certificate of exemption under the Bill was issued direct to a body corporate or partnership to operate a centre, the Administration therefore considered it logical and reasonable to expect these persons who voluntarily took up the role of director or partner to be well aware of the responsibilities associated with such directorship or partnership.

20. In reply to the Chairman, GC confirmed that only directors of body corporate or partners of a partnership who were issued the licence or certificate of exemption would be liable to the offences under clause 21. Directors of a subsidiary to a body corporate would not be liable to such offences.

21. In response to the Chairman, SALA pointed out that the defence provision provided under clause 5(2) only applied to offences in contravention of any condition of the licence or certificate of exemption. No defence provision was provided under clause 21 which included all other offences under the Bill. He suggested that the addition of the word "wilful" before "neglect" under clauses 21(1)(b) and 21(2)(b) might provide better safeguard to directors of body corporates and partners in partnerships. As the offences under clause 21 were criminal in nature, the Chairman asked the Administration to consider SALA's suggestion or to include in clause 21 a defence provision which was similar to clause 5(2).

22. GC pointed out that if "reasonable supervision and reasonable diligence" had been exercised as stipulated under clause (5)(2)(b), it would be highly unlikely that the

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directors or partners would commit an offence under clauses 21(1)(b) and 21(2)(b). PAS(N) expressed reservation about the proposed amendments. She stressed the importance of conveying a right message to the public, which was also the policy intent, that directors of body corporate and partners of a partnership who were issued a licence or certificate of exemption to operate a centre should be fully aware of their responsibilities and liability for the operation of the centre.

23. Both Mr LAW Chi-kwong and Dr LO Wing-lok considered that the existing clause 21 was appropriate without any need for amendment.

Clause 24 - Appeals against decisions of Director (DSW)

24. Clause 24(3) provided that the effect of a decision of DSW that was appealed against under clause 24(1) should be suspended as from the day on which the appeal was made until such appeal was disposed of, withdrawn or abandoned unless such suspension would, in the opinion of DSW, be contrary to the public interest. The Chairman asked whether there would be a time limit for such suspension during the appeal period and for the Administrative Appeals Board (AAB) to conclude an appeal. She was worried that AAB might take a long time to conclude an appeal thus protracting the operation of a centre which was not up to certain statutory standards. She also expressed concern that "public interest" might be used as a pretext to override the suspension of DSW's decision under the appeal procedure.

25. GC said that the invocation of clause 24(3) would not affect the on-going process of the appeal by a centre. In her view, AAB would conclude appeals within a reasonable time taking into consideration that there were still residents receiving treatment in the centre during the appeal period. PAS(N) pointed out that clause 24(3) would only be invoked in most exceptional circumstances. She said that AAB did not foresee any problems in handling the appeals in connection with the Bill, if any, in future as it was not expected that many centres would need to have their licences cancelled and therefore the chances of invoking clause 24(3) would be rare.

26. Mr LAW Chi-kwong expressed concern about the meaning and scope of "public interest". He was also concerned whether there would be an appeal mechanism to govern the power given to DSW to immediately stop a centre from operating on the ground of public interest under clause 24(3). In his view, DSW might seek an injunction instead. Dr LO Wing-lok enquired whether the term "public interest" could be replaced by more specific conditions.

27. The Chairman suggested and members agreed that clause 24 should be further discussed at the next meeting to be held on 13 February 2001 at 4:30 pm.

II. Any other business

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28. The meeting ended at 6:35 pm.

Legislative Council Secretariat

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