

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

Appeals against decisions of the Director of Social Welfare

At the Bills Committee meeting on 5 February 2001, the meeting discussed the appeal mechanism provided under clause 24 of the Drug Dependent Persons Treatment and Rehabilitation Centres (Licensing) Bill (the Bill). Under clause 24(3), the effect of a decision of the Director of Social Welfare (the Director) that is appealed against under subsection(1) shall be suspended as from the day on which the appeal is made until such appeal is disposed of, withdrawn or abandoned unless :-

- (a) such suspension would, in the opinion of the Director, be contrary to the public interest; and
- (b) the notice of the decision contains a statement to that effect.

2. Members expressed concern about the definition of “public interest” and the use of it as a “pretext” to override the suspension of the Director’s decisions under the appeal procedure.

Public interest

3. “Public interest” refers to matters wider than the merits of an individual case and embraces matters of concern to society at large (Findlay v Secretary of State for the Home Department [1984] 3 All ER 801).

4. In the context of the Bill, while the interests of the persons operating a drug treatment and rehabilitation centres and the residents of such centres should be taken care of, the interest of the public at large should also be safeguarded. The Director must therefore consider if the suspension of the effect of a decision that is appealed against will be contrary to public interest. It needs to be stressed that the exercise of such powers by the Director is not without constraint – it is open to the court to strike down a Government official’s decision on the alleged existence of a public interest if on the evidence and facts before the

official, it was irrational for him to come to the conclusion he did (Prudential Hotel (BVI) Ltd v AG MP No 3851 of 1995).

5. Apart from the above, it is worth-noting that clause 24(3) is not unique to the Bill. Section 12(2) of the Residential Care Homes (Elderly Persons) Ordinance (Cap. 459) also contains a provision similar to clause 24(3). Section 12(2) of Cap. 459 stipulates that “A decision under section 10 that is appealed against under subsection (1) shall be suspended in its operation as from the day on which the appeal is made until such appeal is disposed of, withdrawn or abandoned unless such suspension would, in the opinion of the Director, be contrary to the public interest and the notice of the decision contains a statement to that effect.”

6. It needs to be stressed that the need to invoke clause 24(3) of the Bill is expected to be not frequent, if not rare. For Members’ information, despite the fact that Cap. 459 has been put into full implementation since June 1996, and the number of residential care homes for the elderly under licence or certificate of exemption (681) far exceeds that of drug treatment and rehabilitation centres targeted under the Bill (about 40), the Director has not received any appeal lodged under section 12 so far and has not invoked section 12(2) of Cap. 459.

7. In spite of the above, section 12(2) of Cap. 459, and similarly clause 24(3) of the Bill is still required because there may still be some exceptional situations that warrant the Director to invoke such power. An example could be when a treatment centre is so poorly managed that it has been used as a vice den causing nuisance and risk to the public, particularly residents in the neighbourhood. It may then serve the public interest better if the licence of the centre is cancelled as soon as practicable instead of the cancellation decision being suspended during the appeal period. Nonetheless, it must be certain that there is sufficient evidence indicating such case before the Director uses his power under this clause.

8. The Administration has also considered the proposal to specify possible situations which warrant the Director to invoke the power given to him under clause 24(3). After careful consideration, the Administration considers that it will be impracticable and ineffective to do so as the law should be comprehensive and not case specific.

Injunction issued by the court

9. Judges of the High Court of Hong Kong are of superior (unlimited) jurisdiction with inherent power to grant injunctions. The general practice in civil litigation when seeking an injunction is to issue a writ seeking an interim injunction until the trial of the action and a permanent injunction as part of the relief one claims in the writ. The order of a permanent injunction at the end of a trial of an action is rarely controversial as it is seen as one of the heads of relief a party is entitled to receive if he has established his case. The test set out by the House of Lords for the granting of an interim injunction in American Cyanamid v. Ethicon Ltd. [1975] AC 396 (a leading case in this regard) is that an applicant must show :

- (a) that there is a serious question to be tried, i.e. that he has a reasonable prospect of succeeding in his claim for a permanent injunction; and
- (b) that the balance of convenience lies in favour of granting the injunction, i.e. any harm to a party by the granting of the injunction could adequately be compensated by an award of damages.

General speaking, an interim injunction will be granted in circumstances where the failure to do so will or could result in a party suffering losses that cannot be compensated by monetary damages. In some cases the Court will grant an injunction to maintain the status quo until it has had an opportunity to consider the issue at the full trial of the action. In other words, the failure to grant an injunction may have the effect of making any final judgement irrelevant.

10. Injunction can be sought on an ex-parte basis (without notice to the other side) or on inter-parties basis (with notice). An ex-parte application can only be made in the most urgent of cases where it is accepted that there is no time to give the other side notice and/or that to do so would have the effect of giving him advance warning allowing him to do the actions before the order can be obtained. In the case of inter-parties application the other side has been given notice and will have the

opportunity to argue against the granting of injunction. Given the nature of drug treatment and rehabilitation centres with residents living inside the premises, inter-parties injunctions would be more relevant as arrangement to transfer residents out of the centre and staff settlement matters need to be handled prior to cessation/suspension of operation.

11. As far as procedure is concerned, the party seeking an injunction is required to show good reasons in an Affirmation drafted by a lawyer and sworn by a party with knowledge of the facts. In civil actions it is usual for a Court to require an undertaking as to damages to be given by the Plaintiff. The hearing of the application for an injunction will usually be in chambers with one or both parties in attendance. In the context of this Bill, these procedures take time and require expertise outside that of the Social Welfare Department. Application for an injunction would not be an effective way to achieve the objective of protecting public interest in the rare circumstances under which the Director of Social Welfare has to invoke clause 24(3).

12. In the Administration's view, it would be a poor decision to require the Director to seek an injunction when he immediately wants to stop a treatment centre from operating. To do so will mean that where clear facts exist that justify the immediate cancellation of the licence of an operator, the Director will also be required to engage a lawyer, at a considerable cost of time and resources, to prepare for an application for an injunction. The decision to grant an injunction is on the Court and is discretionary. Further, as the Bill is currently drafted, an operator is afforded with the greatest protection since once an appeal has been made against the Director's decision, it acts as an automatic suspension of the decision. It follows that even if the operator subsequently loses the appeal, he cannot be found to have been operating the treatment centre in contravention of the Bill because it specifically provides that he is entitled to do so during the appeal period. Clause 24(3) serves only to cater for the remote eventuality where public interest concerns clearly override the operator's automatic right to resume operation should an appeal has been launched.

13. In fact, if the centre finds that the invocation of clause 24(3) by the Director of Social Welfare has been made on wrong premises, or if there were other procedural irregularities, it could always seek a judicial

review of the Director's decision. During the time when clause 24(3) is being invoked, the appeal by the centre concerned will still be on-going and handled by the Administrative Appeals Board.

Consideration

14. In proposing clause 24(3) of the Bill, the prime consideration was to protect the well-being of drug dependent persons and the interest of the community at large. The clause allows the Director to react promptly to urgent scenarios such as those mentioned in paragraph 7 above, and will only be invoked most exceptionally where objective circumstances so truly justify. We therefore think that clause 24(3) is appropriate and afford both the clients of a drug treatment and rehabilitation centre and the public at large the necessary protection.

Security Bureau
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