

立法會
Legislative Council

LC Paper No. CB(2) 324/01-02
(These minutes have been seen by
the Administration)

Ref : CB2/BC/12/00

**Bills Committee on
Public Health and Municipal Services
(Amendment) Bill 2001**

**Minutes of meeting
held on Thursday, 19 April 2001 at 8:30 am
in Conference Room A of the Legislative Council Building**

- Members Present** : Hon Fred LI Wah-ming, JP (Chairman)
Hon WONG Yung-kan
Hon Andrew CHENG Kar-foo
Hon Tommy CHEUNG Yu-yan, JP
Hon Michael MAK Kwok-fung
Dr Hon LO Wing-lok
Hon Audrey EU Yuet-mee, SC, JP
- Members Absent** : Hon Cyd HO Sau-lan
Hon WONG Sing-chi
- Public Officers Attending** : Miss Eva TO
Principal Assistant Secretary for the Environment and Food (A) 3
- Miss Sarah WU
Deputy Director of Food and Environmental Hygiene
(Environmental Hygiene)
- Mr W H CHEUK
Assistant Director (Headquarters)
Food and Environmental Hygiene Department

Mr Lawrence PENG
Senior Assistant Law Draftsman
Department of Justice

Mr W S YIP
Senior Assistant Law Officer
Department of Justice

Clerk in Attendance : Mrs Constance LI
Chief Assistant Secretary (2)5

Staff in Attendance : Mr Stephen LAM
Assistant Legal Adviser 4

Ms Joanne MAK
Senior Assistant Secretary (2)2

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I. The Administration's response to issues raised at the last meeting
(LC Paper No. CB(2) 1314/00-01(01))

The Chairman said that the Administration had been requested to provide information on the appeal channels for licensed and unlicensed food establishments, the feasibility of revealing the reasons for closure to owner of a food premises, and the average length of time required for granting a Provisional Licence and Full Licence to food establishments last year. On the last item, the Chairman asked the Administration why the statistics only covered the second half of year 2000 but not the whole year. Deputy Director of Food and Environmental Hygiene (Environmental Hygiene) (DD(EH)) explained that the Administration had started to simplify the procedures for food establishments licensing since 1 June 2000, therefore only the updated information for the second half of 2000 was provided for members.

2. The Chairman asked whether there was any difference in the licensing time between the old scheme and the new one. DD(EH) advised that the Administration had not made detailed comparisons between the two, but the time required for licensing food establishments had shortened and 99% of the cases could meet the performance pledge after the new scheme was introduced. She stressed that the actual time required for processing applications would depend on individual circumstances such as the conditions of the premises concerned. She pointed out that a licence could

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be issued in one month if all necessary requirements were met while a longer time would be required if problems were found in the course of processing the application. On the average, a licence could be issued in three months.

3. Regarding the appeal channels for food establishments, Principal Assistant Secretary for the Environment and Food (A) 3 (PAS(EF)A3) said that at present, the operator of an unlicensed food establishment could lodge an appeal to the high court against a closure order issued by the Magistrate's court. This was already provided in the existing Ordinance (Cap. 132). As regards those food establishments posing immediate health hazard, the Director of Food and Environmental Hygiene (DFEH) would be empowered to issue a closure order to suspend the operation of the premises concerned. Any aggrieved person could, under clause 20 of the Bill, appeal to the Magistrate's court whose decision would be final. PAS(EF)A3 added that in view of members' concern expressed at previous meetings, the Administration was prepared to consider allowing further appeals against the Magistrate court's decision, so long as the further appeal would not absolve the aggrieved party from eliminating the immediate health hazard while awaiting the outcome of the appeal.

4. PAS(EF)A3 further advised that if a person was aggrieved by DFEH's decision to close the premises, the person could claim damages through civil proceedings because the proposed section 128C would not affect his right in doing so. Moreover, section 138 of the Public Health and Municipal Services Ordinance (Cap.132) provided that the Government would not be relieved from liability of the acts of its servants. It was therefore not necessary to provide a general provision in the new section 128C to reiterate such right or remedy.

5. As regards providing information to the owner of the premises concerned, PAS(EF)A3 said that the Administration had accepted members' suggestion that a copy of the closure order would be sent by registered post to the owner of the premises concerned at his registered business address. Another copy would be posted at a conspicuous place of the food premises.

Stay of execution of a closure order in the course of appeal

6. Referring to paragraph 1 of the Administration's paper, Assistant Legal Adviser 4 (ALA4) pointed out that while the Administration agreed that the aggrieved person could lodge a further appeal against the closure order issued under the proposed section 128C(20), the person would still have to comply with DFEH's order to eliminate the hazard concerned. The proposed section 128C(22) of the Bill provided that the lodging of an appeal did not operate as a stay of execution of a closure order unless the court ordered otherwise. In other words, the aggrieved person still had to take action to eliminate the immediate health hazard in the course of the appeal, although the court might judge otherwise after hearing the appeal. ALA4 said that

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members might wish to consider whether such arrangements were acceptable or reasonable from the policy angle.

7. Ms Audrey EU said that if the Administration agreed to provide a channel for the aggrieved person to lodge appeals against a closure order, then the Magistrate's decision would not be final, and that section 128C(10) and (23) should be deleted.

8. PAS(EF)A3 agreed with Ms Audrey EU that sections 128C(10) and (23) should be deleted. With regard to the stay of the execution of a closure order, DD(EH) explained that a closure order was issued by DFEH against a licensed food establishment on grounds of its posing an immediate health hazard, and that the operator should remove the health hazard within a short period of time. If the health hazard was removed in one or two days, the closure order could immediately be rescinded. It would be for the parties concerned to consider whether to lodge an appeal against the closure order.

9. Senior Assistant Law Officer (SALO) of the Department of Justice explained the difference of the two types of closure orders issued under the proposed sections 128B and 128C. He said that section 128B was concerned with closing unlicensed premises while section 128C dealt with closing food premises which posed immediate health hazard. He said that at present, the Director of Health (D of H) could close a food premise to prevent the spread of infectious diseases. He cited an example in which D of H issued a closure order in 1995 when cholera was found to be caused by the contaminated water in the fish tank of a restaurant. The closure order was rescinded soon after the operator had taken action to clean up the fish tanks in question in a few days. SALO further said that it was now proposed under section 128C that DFEH should also be empowered to close a food premise which posed immediate health hazard to the public, in order that the operator concerned had to take action to eliminate the hazard within a short period of time. The Bill also provided that the aggrieved person could appeal to the court against the closure order. It was hoped that the court could arrange a hearing within seven days and decide whether the closure order should continue or be rescinded. SALO stressed that it would be essential for DFEH to enforce the closure order so that the hazard could be removed as early as possible for the protection of public health.

10. Assistant Director (Headquarters) of Food and Environmental Hygiene Department (AD(HQ)) added that the operator of the food premises subject to a closure order issued under the proposed section 128C could apply to DFEH to enter the closed premises under section 128C(13) to eliminate the hazard concerned. When the health hazard was removed, the operator could apply to DFEH to rescind the closure order under section 128C(5). If DFEH was satisfied with the remedies taken by the operator, she could rescind the closure order. AD(HQ) said that an aggrieved person of a licensed food establishment which was subject to a closure order could

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lodge an appeal with the Magistrate's court, and at the same time apply to enter the closed premises to take the necessary remedial actions. As for unlicensed food premises, the operator would most likely cease business upon receipt of the closure order and would not appeal.

11. The Chairman noted that there might not be many appeals against closure orders as these would be issued after careful consideration by DFEH. However, he considered it necessary to provide a channel of appeal for aggrieved parties. PAS(EF)A3 emphasized that time was important to remove the health hazard in order to safeguard public health. She said that the Administration could not wait until the conclusion of an appeal in removing the health hazard, and that the execution of the closure order had to stay pending the appeal. She reiterated the Administration's position as stated in paragraph 3.

The appeal mechanism

12. Mr Andrew CHENG said that it was important to ensure fairness in any appeal mechanism, and that the question was whether it was really necessary to execute a closure order immediately when the aggrieved party had already lodged an appeal. He referred to the suggestion made at the Panel meeting on 8 January 2001 that the Licensing Appeals Board (LIAB) should also deal with appeals against closure orders. However, the Administration advised the Panel that a Magistrate's court could arrange a hearing within a shorter period than that by LIAB. Mr CHENG said that he doubted the Magistrate's courts could always arrange hearings quickly given the long list of cases awaiting hearings. He requested the Administration to re-consider the suggestion of assigning LIAB to hear appeals against closure orders imposed on food establishments. He stressed that there should be a balance between safeguarding public health and ensuring a fair appeal mechanism for the aggrieved.

13. PAS(EF)A3 said that the Administration had agreed to consider providing a channel for appeals although the Prevention of the Spread of Infectious Diseases Regulation currently did not provide for appeals against D of H's decision to close a food premise. The Administration had considered the suggestion of empowering LIAB to deal with appeals against closure orders imposed on food premises. However, the Administration considered that LIAB was not an appropriate channel because it did not have the experience in dealing with closure order cases. She said that LIAB currently only dealt with cases involving revocation or suspension of food licences as well as the Demerit Points System, following convictions in court. LIAB had no experience in examining whether a food establishment had violated a certain offence under Cap. 132 or in determining whether it should be closed or not.

14. PAS(EF)A3 advised that the Magistrate's court had experience in dealing with cases relating to closure orders made under Cap.132, and it could arrange hearings

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within a short period of time. On the other hand, LIAB would need to take about 28 days to hear an appeal case because of the statutory requirements on meeting arrangements, the notice period for lodging an appeal and preparation of papers.

15. Mr Andrew CHENG said that the statutory requirements regulating the conduct of LIAB could be changed. He also disagreed that LIAB's inexperience in closure order cases should be a reason for not empowering LIAB to hear such appeals. He considered it necessary to provide a level-playing field for all parties concerned.

16. DD(EH) advised that section 128C could also apply to unlicensed food establishments which were outside the purview of LIAB. She emphasized that timing was very important in eliminating a health hazard, for example, where the water source of a food establishment was contaminated or where serious food incidents had occurred. She assured members that DFEH would only issue closure orders based on expert advice, and laboratory evidence, where appropriate.

17. DD(EH) advised that the Magistrate's court could arrange hearings within a reasonably short period of time. She said that based on recent experience, many licensed food factories could rectify the situation in one or two days and continue their business shortly afterwards. Despite this, the Administration was willing to provide an appeal mechanism so that the aggrieved could appeal within seven days against DFEH's decision to close a food premise.

18. The Chairman asked how long it would take for an appeal to be heard by a Magistrate's court. SALO advised that based on past experience, criminal cases were heard the following day after the application had been made. He believed that hearings for appeals against closure order could also be arranged quickly.

19. Mr Tommy CHEUNG expressed doubts that Magistrate's courts could arrange early hearings for appeals against closure orders. He pointed out that a closure order, once issued, would have done significant damage to a licensed food establishment even though the order could be rescinded afterwards. He said that in 1997 - 1998, the cause of the infectious diseases occurred in certain food premises could not be ascertained. However, in these cases, D of H had already issued closure orders, and the licensees were much aggrieved as the damage had been done.

20. Mr Tommy CHEUNG expressed concern that the Bill would give too wide a power to DFEH and that the Bill did not provide for stay of execution of the closure order when the operator had lodged an appeal. Mr CHEUNG further said that DFEH could make a wrong decision as errors might occur in laboratory tests. He queried how the operators' loss could be compensated if a closure order was wrongly issued. In this connection, he strongly felt that an appeal mechanism should be provided for in the Bill and that sections 128C(10) and (23) should be deleted. Mr CHEUNG also

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supported Mr Andrew CHENG's proposal that LIAB could deal with appeals from licensed food establishments, while a separate appeal mechanism could be provided for the unlicensed premises. He said that the Administration should re-consider members' suggestion.

21. PAS(EF)A3 said that she appreciated members' concern that appeals should be heard as quickly as possible. She believed that the Magistrate's court would arrange early hearings for appeals against closure orders issued by DFEH. She added that an aggrieved party could further appeal to the High Court against a decision of the Magistrate's court. PAS(EF)A3 said that the court could order a stay of the execution of a closure order if it was satisfied with the reasons provided.

22. The Chairman said that the Administration had already agreed to consider providing an appeals mechanism and would delete section 128C(10) and (23). Regarding the concerns expressed by Mr Tommy CHEUNG and Mr Andrew CHENG, the Chairman asked the Administration whether it was feasible to have different appeals mechanism for licensed and unlicensed food establishments, and whether LIAB could arrange meetings within a shorter period of time.

23. PAS(EF)A3 explained that the operation of LIAB was governed by law and the statutory requirements for meeting arrangements were to ensure that both the aggrieved and the Authority would have sufficient time to prepare for the hearing. She said that there were statutory time limits for the submission of papers for hearings, and this could not be shortened at liberty or else it might create unfairness to the appellant. PAS(EF)A3 said that if both a licensed and unlicensed food premises were subject to a closure order under section 128C on the same grounds, she saw no reason why there should be different mechanisms to hear appeals of these cases.

24. Mr Tommy CHEUNG said that licensed premises were subject to the regular inspection and monitoring system, and they would rarely be found to pose immediate health hazard unless there were unusual incidents, such as pipe explosion. He considered that a closure order would cause greater damage to a licensed food establishments than to an unlicensed one, hence these establishments should be subject to two different appeal mechanisms.

25. Mr Tommy CHEUNG further said that if the Administration really believed that the operator could eliminate the health hazard in one or two days, the Administration should allow a grace period of one to two days for the operator to make the necessary improvements before issuing a closure order. He considered that the closure order should only be issued if the operator refused or failed to make necessary improvements within the specified period.

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26. PAS(EF)A3 said that while licensed food premises generally posed less health hazard to the public than the unlicensed ones, it was difficult to trace the source of food poisoning cases caused by bacteria, such as O157:H7. As this kind of health hazard was not directly related to the food preparation process, even licensed food premises with satisfactory overall hygiene conditions might still be susceptible to such food incidents. Moreover, contamination of water source could also lead to a sudden deterioration of the hygiene conditions even in licensed premises. She considered that as far as section 128C was concerned, both licensed and unlicensed premises might expose to the same risk.

27. Referring to Mr Tommy CHEUNG's concerns, PAS(EF)A3 emphasized that DFEH would only issue a closure order based on clear evidence, such as laboratory test results, that the premises posed immediate health hazard to the public. She did not consider that a prior warning or grace period would be effective in ensuring that the operator of the food premises concerned would immediately take action to remove such hazard. She explained that the situation was very serious if there was an immediate health hazard, and that immediate closure of the premises was necessary to enable thorough cleansing of the premises to be carried out.

28. DD(EH) supplemented that in practice, if food incidents occurred in licensed food establishments, the Administration would usually take samples to trace the source and conduct laboratory tests. Pending the outcome of the laboratory tests, the operator of the food establishment concerned would be advised to take remedial actions. In other words, the operator would be given time to improve the situation. When the result of the laboratory test was known, the Administration would inspect the premises again to ascertain whether the immediate health hazard was still present warranting the issue of a closure order. The same procedures also applied to unlicensed food establishments. DD(EH) stressed that DFEH would only exercise the power to close a food premise based on scientific test results and professional advice. In most cases, the operator of the food premises concerned would have taken all remedial actions while awaiting the outcome of the laboratory tests, and that no closure order would need to be issued eventually.

29. Ms Audrey EU suggested that an "unless order" could be made by the court to give the same effect. For example, the court might order the operator to carry out certain remedies within a specified period of time, say, six to 12 hours, after the issue of a closure order, and the closure order would only come to effect if the operator did not comply with the court order. This would give the operator concerned a chance to carry out immediate improvements before the execution of a closure order. In this case, an appeal by an operator against the closure order would not affect the operation of a closure order, and that the operator would still need to make the necessary improvements. She considered that the "unless order" should be able to address Mr

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Tommy CHEUNG's concern. She requested the Administration to consider her suggestion.

30. In response, PAS(EF)A3 advised that there was no provision for "unless order" in the principal Ordinance (Cap.132). She considered that the present inspection system and Demerit Point System for licensed food premises already served a similar purpose of providing time for the establishments concerned to rectify the situation if the hygiene conditions required improvements. She reiterated that time was the essence if an immediate health hazard had to be removed from a food establishment within a very short time to safeguard public health. If there was an "unless order", the operator might not take it seriously and would not carry out the improvements within the specified period. If the operator was given a long period of time to rectify the situation, it would defeat the purpose of issuing a closure order. She said that the Administration would need to consider the suggestion of an "unless order" carefully.

31. Ms Audrey EU pointed out that the proposed section 128C(7) did not specify the time limit for the Authority to serve the notice of refusal on the applicant. She expressed concern that if the Authority delayed in serving such a notice, the applicant might not have sufficient time to lodge an appeal. In response, SALO said that the Bill in fact provided for two appeal channels. The aggrieved party could either lodge an appeal under section 128C(20) within seven days following the issue of the closure order, or apply to rescind the closure order after carrying out the remedial work. If the Authority refused to rescind the closure order, the aggrieved could appeal to the Magistrate's court under section 128C(7). SALO advised that the appeal process under section 128C(20) would be faster.

32. PAS(EF)A3 added that section 128C(6) spelt out the circumstances under which a closure order could be rescinded. She agreed that a notice of refusal should be issued as soon as a decision was made in order not to hold up the aggrieved party's action to lodge an appeal within the specified time. However, in considering Ms EU's suggestion, the Administration should have to assess what should be the reasonable time limit for the serving of the notice of refusal under the different situations described in section 128C(6). She would revert to the Bills Committee later on the suggestion.

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33. Referring to SALO's advice in paragraph 31, ALA4 clarified that the two appeal channels under section 128C(20) and (5) applied to different persons, i.e. section 128C(20) referred to a person who was aggrieved by the closure order, while section 128C(5) covered any person who had an interest in the food premises concerned.

34. PAS(EF)A3 explained that normally the aggrieved party would be the operator of the food premises in respect of which a closure order had been made. The

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aggrieved person could either lodge an appeal under section 128C(20), or under sections 128C(5) and (7) if he wished to rescind the closure order. As regards other persons who also had an interest in the premises concerned, such as the landlord, he could also apply to rescind the closure order under sections 128C(5) and (6) so that the premises could be re-opened.

35. Dr LO Wing-lok commented that the Bill affected three concerned parties : the Administration, the person(s) aggrieved by the closure order and the general public. He was of the view that the spirit of section 128C was to eliminate an immediate health hazard in order to safeguard public health. He considered that the proposal of an "unless order" or stay of execution of the closure order would defeat the purpose of issuing a closure order. He said that the crux of the matter was whether the public wished to empower DFEH to issue closure orders against any food premises which posed an immediate health hazard. If members supported the proposal, the whole section 128C should remain intact; otherwise it should be repealed altogether.

36. Mr Andrew CHENG said that while he agreed that safeguarding public health was important, he was concerned that the equity principle should be upheld. He pointed out that previously there were 28 days for suspending execution of the closure order but the Bill did not have such provision. He also had doubts that the Magistrate's court could arrange hearings of appeal cases within a short time given their heavy workload. Mr CHENG said that as the Administration had claimed that LIAB could not arrange early hearings due to certain statutory requirements, he would like the Administration to provide information on such statutory requirements and the procedures to amend these rules. He maintained the view that LIAB should be able to share the workload of the Magistrate's court in dealing with appeals against closure orders issued by DFEH.

37. DD(EH) said that she had strong reservations about introducing a grace period for the execution of a closure order as time was of the essence in eliminating an immediate health hazard. Nevertheless, she appreciated the concerns of the trade and she assured members that DFEH would exercise the power very carefully based on strong medical grounds. She stressed that delaying the execution of a closure order would go against the spirit of the Bill.

38. PAS(EF)A3 added that while the Administration could consider providing further appeal channels for the aggrieved parties, the Administration would not agree to introduce a grace period for the execution of a closure order. She clarified that the 28 days of suspension of enforcement under the LIAB procedure only applied to repeated minor offences of food establishments such as not covering the food properly. Currently, repeated offences of this nature within a period of 12 months could lead to suspension of licence for seven days. As these offences did not pose immediate health hazard, the aggrieved party could appeal to LIAB against the

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decision and sought suspension of enforcement for 28 days pending the outcome of the appeal. She said that where the issue of a closure order was required, the situation was already very serious, and a stay of execution of the order was contradictory to legislative intent of section 128C. She said that given the existing composition of LIAB and its experience, the Administration was of the view that it would be more appropriate for the Magistrate's court to deal with appeals arising from the issue of closure orders. Nevertheless, she undertook to provide information of the operation of LIAB for members' information.

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39. SALO advised that the jurisdictions of LIAB were given in section 125(8) of Cap. 132, which were limited to rescinding, suspending and rejecting of licence applications. He said that legislative amendments would be necessary if Members wished to expand the jurisdictions of LIAB.

40. Mr Andrew CHENG considered that LIAB could accumulate experience in dealing with appeals arising from closure orders. He was concerned that there was no guarantee that an appeal could be heard by a Magistrate's court within seven days. He considered that LIAB could alleviate the burden of the Magistrate's court in taking over the appeal cases relating to closure orders. He suggested the regulations of LIAB be amended so that it could hold meetings to hear appeals against closure orders within seven days. He requested the Administration to provide information on the number of appeals from licensed food premises for which closure orders had been made in the past two years, as well as the reasons and the mechanism adopted for making such orders. PAS(EF)A3 agreed to provide the information.

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42. SALO supplemented that the Magistrate's court could arrange hearings for urgent cases to be held the next day after the day of application, although cases requiring the evidence of many witnesses might have to wait for the next round of hearings. He said that one advantage of having the Magistrate's court to deal with appeals was that further appeals could go directly to the Court of Appeal. On the other hand, decision of LIAB could only be made to the Municipal Services Appeals Board (MSAB) which would take about three months to deliberate and take a decision on a case.

43. Mr WONG Yung-kan expressed concern that it was difficult for food establishments to know whether the fresh food came from safe sources, but food establishments were liable to immediate closure if such food posed a health hazard. DD(EH) said that food source seldom posed an immediate health hazard to the public,

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and it was not the target of section 128C. If this was related to an infectious disease such as cholera, D of H would make a closure order under Cap. 139 to close the food premises concerned.

44. Referring to Dr LO's earlier comments in paragraph 35, Mr Tommy CHEUNG said that members should also look into the consequences and effects of the Bill. Mr CHEUNG said that his main concern was that a mechanism should be put in place to safeguard the interests of the operator of the food premises and all concerned parties, because DFEH could make a wrong decision. He considered that there should be a fast and effective appeal channel for the aggrieved party. He supported Ms Audrey EU's proposal of an "unless order" to allow time for remedial actions to be taken within a short time, (e.g. 24 hours) before execution of a closure order. He said that this would avoid causing unnecessary damages and losses to the food establishment concerned.

45. Ms Audrey EU clarified that the Administration could consider issuing an "unless order" in place of a closure order. Alternatively, the "unless order" could be issued on the condition that the hazard had to be eliminated within a short period of time, (e.g. 12 hours), failing which the food premises would be closed. She said that the issue of an "unless order" would also obviate the need for an aggrieved party to lodge an appeal. Ms EU further said that she was not inclined to support the suggestion of having different appeal mechanisms to deal with appeals against closure orders.

46. DD(EH) reiterated that when FEHD officers took samples from the food premises for laboratory tests, they invariably gave suggestions on remedies to be taken by the operator of the food establishments concerned. When the test result was known, such remedial actions would normally have been taken and the hazard would have been removed. In these cases, no closure order would be issued. Nevertheless, the Administration was prepared to provide an appeal channel in the Bill to further safeguard the interests of all concerned parties and to ensure fairness in the process of executing a closure order.

47. In concluding the discussion, the Chairman requested the Administration to provide the information as requested by members for consideration at the next meeting.

II. Any other business

48. Members agreed that the next meeting would be held on 11 May 2001 at 8:30 a.m.

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49. There being no other business, the meeting ended at 10:30 a.m.

Legislative Council Secretariat

7 November 2001