

**立法會**  
**Legislative Council**

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the Administration)

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

**Minutes of meeting  
held on Friday, 11 May 2001 at 8:30 am  
in Conference Room A of the Legislative Council Building**

**Members Present** : Hon Fred LI Wah-ming, JP (Chairman)  
Hon Andrew CHENG Kar-foo  
Hon Tommy CHEUNG Yu-yan, JP  
Dr Hon LO Wing-lok  
Hon Audrey EU Yuet-mee, SC, JP

**Members Absent** : Hon Cyd HO Sau-lan  
Hon WONG Yung-kan  
Hon Michael MAK Kwok-fung  
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 Government Counsel  
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

Miss Betty MA  
Senior Assistant Secretary (2) 1

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**I. The Administration's response to issues raised at the meeting on 19 April 2001**

(LC Paper No. CB(2) 1496/00-01(01))

At the invitation of the Chairman, Principal Assistant Secretary for the Environment and Food (A)3 (PAS(EF)A3) briefed members on the Administration's response to members' suggestions raised at the previous meeting:

- (a) The Administration had reservation about setting a specific time limit for issuing a notice of refusal to application for rescinding a closure order. It considered that a short time limit might not be sufficient to verify the elimination of an immediate health hazard, while setting a longer time limit might not be necessary in other circumstances. Section 70 of the Interpretation and General Clauses Ordinance (Cap.1) had provided that in the absence of a time limit, the Authority had to deal with an application without unreasonable delay.
- (b) The Administration considered that building in the requirement of an "unless order" did not fit in with the existing provisions of the Bill which aimed at protecting the public against exposure to immediate health hazards by taking immediate enforcement actions. There was also the problem of setting a suitable time limit for an "unless order"; as too short a time limit for eliminating the immediate health hazard was not

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practicable for the operator, while too long a time limit would defeat the purpose of the closure order. In reality, the Authority could always warn the operator before issuing a closure order.

- (c) No closure order was issued against licensed food establishments in the past two years by the Director of Health under the Prevention for the Spread of Infectious Diseases Regulation. The latest order was issued in March 1998 to a food premises in relation to an outbreak of cholera. The Regulation did not provide for an appeal channel.
- (d) Regarding the suggestion that appeals against the decision of Director of Food and Environmental Hygiene (DFEH) for closing food establishments posing an immediate health hazard should be made to the Licensing Appeals Board (LIAB), the Administration remained of the view that appeals should be made to the Magistrate court. As LIAB was mainly to hear appeals concerning cancellation, suspension and rejection of granting and renewal of licences, the Administration did not consider it appropriate to extend the jurisdiction of LIAB to cover appeals against immediate closure of food establishments posing immediate health hazards. Moreover, the proposed closure order would not distinguish whether the subject premises were licensed or not. Those appeals from the unlicensed premises would still have to be dealt with by the Magistrate's court. The Administration also pointed out that LIAB usually needed to take 45 days to conduct a hearing whereas a Magistrate's court could take as few as six days to arrange for the case to be heard. Moreover, the First Clerk had the discretion to fix an earlier hearing if necessary. The Administration concluded that it was inappropriate to have two distinctive authorities of different background to hear appeals of the same nature.

2. Mr Tommy CHEUNG noted that the Administration did not consider it appropriate to expand the jurisdiction of LIAB to cover appeal cases against closure orders made under section 128C of the Bill. He considered that the Magistrate's court should have the power to suspend the execution of the closure order if the aggrieved had lodged an appeal to the Magistrate's court. Referring to paragraph 1(b) above, Mr CHEUNG suggested that an "unless order" of, say, 24 hours, should enable the operator concerned to eliminate an immediate health hazard. He also considered that the term "reasonable cause" in the proposed section 128C(1) should be more clearly defined to prevent abuse of DFEH's power in making closure orders.

3. PAS(EF)A3 advised that the Magistrate's court could order stay of execution of the closure upon hearing an appeal if the court was satisfied with the reasons given by the appellant. She stressed that time was the essence in eliminating an immediate

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health hazard, and an "unless order" of a duration of 24 hours or 48 hours would be too long for the purpose of protecting the public from exposing to the health hazard. As regards Mr CHEUNG's concern about the scope of "reasonable cause", the Administration would provide internal guidelines and give examples for members' reference. She said that medical doctors in the Food and Environmental Hygiene Department (FEHD) would give their professional opinions to DFEH before a decision was taken.

4. Mr Tommy CHEUNG said that he was not convinced that there was merit or necessity in empowering DFEH to close a food establishment on grounds that it posed an "immediate health hazard". He was very concerned about the wide powers to be given to DFEH, as a closure order would have significant impact on the investment and operation of food establishments.

5. The Chairman advised that the Panel on Food Safety and Environmental Hygiene generally supported the Bill which also covered the control of unlicensed food establishments. If members disagreed with certain parts of the Bill such as the appeal mechanism, they could consider moving amendments to the Bill.

6. Mr Andrew CHENG expressed doubt that the Magistrate's court could arrange early hearings as claimed by the Administration. He said that he still wanted to seek amendments to the rules of LIAB to expand its jurisdiction and to streamline the procedures for hearing appeals. He was of the view that the requirement for the secretary to LIAB to consult the Chairman or the Vice-Chairman on the date, time and place of hearing was only to provide flexibility rather than to slow down the process of hearing.

7. PAS(EF)A3 explained that there were statutory time limits for preparation of documents for LIAB hearings. For example, a notice of at least 14 days had to be given to both parties for hearing an appeal. Therefore, even if the jurisdiction of LIAB was expanded, the time for hearing an appeal would still need to take some 28 days. Moreover, Mr CHENG's suggestion would give rise to the problem of having two different appeal channels for cases of the same nature. She maintained the view that the Magistrate's court would provide a faster channel to deal with appeals against closure orders of this kind.

8. Mr Andrew CHENG said that there were already many cases awaiting hearing by the Magistrate's court. He insisted that the Administration should consider revamping section 125 in Cap.132, such as section 125B, so that the functions and powers of LIAB might cover appeal cases arising from the closure orders made by DFEH. As regards the time limit for holding LIAB hearings, he said that should the Chairman or the Vice-Chairman decide to hold the hearing 60 days after the serving of notice, the appeal process would be unduly delayed. He requested the Administration

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to provide information on the average time taken for LIAB to hear appeal cases in the past year. PAS(EF)A3 agreed to provide the information.

9. PAS(EF)A3 said that the Administration had evaluated the merits and demerits for the Magistrate's court and LIAB to deal with appeals against the closure orders. As the Administration considered that the Magistrate's court was a more appropriate body than LIAB to deal with such appeals, the Administration did not see the need to revamp the rules of LIAB as suggested by Mr CHENG. She reiterated that even if the scope of LIAB was to be expanded, it was still unable to hear appeals from unlicensed establishments which had to be dealt with by the Magistrate's court.

10. Assistant Director (Headquarters) of Food and Environmental Hygiene Department (AD(HQ)) supplemented that the 28 days notice for arranging a hearing by LIAB was already very tight for the preparation of the relevant papers and documents for the hearing. He said that bilingual versions of the documents were required, which included the background of the case, the reasons of appeal put forward by the appellant, and the Administration's defence which the Department of Justice would need some time to prepare.

11. Dr LO Wing-lok remarked that food establishments which posed an immediate health hazard should be closed at once, and that there was a practical need to empower DFEH to order closure of such food premises. He said that he did not see the need to expand the jurisdiction of LIAB to cover appeals against closure order, as there would not be many cases warranting the issue of a closure order. He commented that the Administration should not relax its control over food safety on economic grounds.

Remedies for wrongful closure

12. Referring to the Administration's response to members' concern about remedies for wrongful closure and removal of paraphernalia [LC Paper No. CB(2)1314/00-01(01)], Assistant Legal Adviser 4 (ALA4) advised that since Government was held liable for the acts of its servants under section 138 of Cap.132, there was no need to reiterate such provisions in the proposed section 128C. Moreover, the aggrieved could also seek compensation under Cap. 132 and under common law for damages. For example, section 59(5) of Cap. 132 provided a channel for an aggrieved person to complain to the court on the seizure and removal of food by the Authority. The court could order the Authority, if necessary, to compensate the aggrieved by such sum of money not exceeding the market value of the food and drug removed. There were similar provisions in section 78 of Cap.132 relating to complaints and compensation arising from the seizure of the carcass of animals which was found unsuitable for human consumption.

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13. Mr Tommy CHEUNG said that while the Authority might provide compensation for the value of the food or carcass, it could not compensate the damage done to the reputation of a food establishment which was subject to a closure order. He was concerned that there should be an appeal mechanism to reduce the damage to the operator or other parties concerned. He was of the view that the protection clauses in sections 59 and 78 of Cap.132 were not sufficient, and he urged the Administration to re-consider the suggestion of an "unless order". He also hoped that the Bill would specify the circumstances under which DFEH could issue a closure order.

14. ALA4 advised that while sections 59 and 78 of Cap.132 provided the scope and amount of compensation by the Authority, the common law provided a wide scope for remedies to be sought through civil proceedings. Senior Assistant Law Officer of the Department of Justice (SALO) agreed with ALA4's analysis. SALO supplemented that the magistrate could immediately decide the amount of compensation in these cases, if the court ruled in favour of the applicant. As for other damages, these would have to be dealt with by a higher court under common law.

Unless order

15. Ms Audrey EU said that she was still unconvinced of the Administration's arguments against an "unless order". She was of the view that as an "unless order" would be the final chance for the operator to eliminate the health hazard before a closure order was issued, the operator would most likely comply with the "unless order". She suggested that the Administration should consider issuing an "unless order" at an earlier stage rather than giving several warnings or reminders to the operator. She said that an "unless order" was to provide the Administration with more flexibility and an additional option to require an operator to eliminate a health hazard.

16. Deputy Director of Food and Environmental Hygiene (Environmental Hygiene)(DD(EH)) thanked Ms EU for her suggestion. She said that the Administration would have to strike a balance between minimizing damage to the operator of a food establishment and safeguarding public interest. She said that the Administration would further discuss with the Department of Justice ways to address members' concerns.

17. Ms Audrey EU clarified that it was not absolutely necessary to specify the "unless order" in the Bill as this was only to provide the Administration with another option. The Administration could decide whether to use the "unless order" or warnings to require an operator to rectify any unsatisfactory hygiene conditions before issuing a closure order.

18. Mr Tommy CHEUNG clarified that he did not object to the immediate closure of a food establishment if it really posed an immediate hazard affecting public health.

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His concern was that the Bill should provide a fair mechanism for all parties concerned, in view of the long process to investigate and establish the cause of the health hazard. He pointed out that it would be very difficult and expensive to seek civil remedies for damages if DFEH made a wrong decision in issuing a closure order. He considered that the Bill should from the outset specify the powers of DFEH and the conditions under which DFEH should issue a closure order.

19. DD(EH) asked whether Mr Tommy CHEUNG was concerned that the posting of a closure order outside the food premises concerned would cause damage to the reputation of the food premises. Mr Tommy CHEUNG said that even if the order was not posted outside the food premises, the damage was done because once a closure order was executed, it would be widely publicised by the media. He considered that if the Administration was only concerned with the immediate removal of the health hazard, the Administration could have other means to compel the operator to do so, say, through the issue of an "unless order". Dr LO Wing-lok agreed that the closure order would be widely known once it was executed. He advised that DFEH should exercise her power carefully.

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20. The Chairman advised the Administration to further consider the concerns raised by members. The Administration noted.

## **II. Clause-by-clause examination**

21. The Bills Committee then proceeded to examine the Bill clause by clause.

### Clauses 1 and 2

22. Members did not raise any queries.

### Clause 3

#### *Section 128A*

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23. ALA4 advised that he had suggested some technical amendments to the proposed section 128A(1)(b), (c) and (d) so that the terms therein were consistent with those used in the relevant subsidiary legislation. PAS(EF)A3 responded that the Administration had agreed to the technical amendments suggested by ALA4 and would introduce Committee Stage amendments (CSAs) accordingly.

24. ALA4 advised that the Administration might need to elaborate the meaning of "unapproved source" of water in the proposed section 128A(3)(b). AD(HQ) explained that under section 33(1)(d) of the Food Business Regulation (Cap.132 sub.leg.), DFEH

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could approve other sources of water supply if she believed that water could not be directed from the main pipe to the food premises. He said that the Regulation had not specified what the approved water source was. In practice, DFEH's approval would be required if the water source was in a very remote place on an outlying island and was not connected to the main pipe of the Water Supplies Department (WSD). The water quality would have to be tested to ensure that it complied with the World Health Organisation standard if the water was to be used for food businesses. Regular tests would be conducted even after the food business was licensed and in operation.

25. Mr Tommy CHEUNG sought clarification on the meaning of "epidemiological investigation" in the proposed section 128A(3)(c), and whether "epidemic disease" was different from "infectious disease". He pointed out that D of H was already empowered to issue a closure order to prevent the spread of infectious disease under the Prevention of the Spread of Infectious Diseases Regulations (Cap.141). He was concerned that there might be overlapping powers in respect of the issue of closure order against food establishments. Dr LO Wing-lok commented that the present Bill was targetted at food which was contaminated and not fit for human consumption, while Cap. 141 was concerned with the spread of infectious disease among people. He advised that epidemiology focused more on the clinical symptoms and its spread within a community, and that "epidemic disease" had a wider scope than "infectious disease".

26. SALO advised that Cap.141 focused on preventing the spread of infectious diseases in all premises including food establishments. The legislation empowered the Authority to isolate any identified source of the infectious disease to prevent its spread.

27. Mr Andrew CHENG asked whether the proposed section 128A(3)(b) or (c) should apply if the water in a fish tank containing live fish was contaminated. He considered that the proposed section 128(A)(a)-(d) should cover all situations warranting the issue of a closure order. DD(EH) responded that section 128A(3)(b) dealt with contamination of water source. She said that the four situations listed in section 128A(3) covered all foreseeable circumstances where a closure order would be issued based on medical opinion. She added that the word "include" in section 128A(3) meant that the four situations listed in section 128A(3) (a) - (d) were not exhaustive.

28. Senior Government Counsel of Department of Justice (SGC) advised that a case warranting the issue of a closure order by DFEH under section 128C had to satisfy the definition of "immediate health hazard" under the proposed section 128A(2) in the first place. Section 128A(3)(a)-(d) gave examples of "immediate health hazard" without the definition of that expression.

29. Mr Andrew CHENG asked how the Administration would define "contamination" under section 128A(3)(b) and whether this should require evidence



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such as inspection findings, investigation data or laboratory evidence as in the case of section 128A(3)(c). Mr Tommy CHEUNG shared similar concern. He commented that section 128A(3)(b) should not apply to "water in fish tank", because the section only referred to "water in preparing food".

30. Dr LO Wing-lok considered that definitions should be sufficiently wide to cover all possible scenarios, for example, the scope of "food unfit for human consumption" in section 128A(3)(c) had a wide scope. He said that if the fish in a fish tank was to be eaten fresh as sashimi, it would be unfit for human consumption if the water in the fish tank was proved to be contaminated. It should therefore fall within section 128A(3)(c).

31. Mr Andrew CHENG said that although section 128A(3)(c) was intended to cover a wide scope, there was some ambiguity in the way section 128A(3) was drafted. He suggested the following for the Administration's consideration:

- (a) to use "or" instead of "and" between sections 128A(3)(c) and (d);
- (b) to define "contaminated" in section 128A(3)(b) and include objective scientific data as evidence that the contaminated food was unfit for human consumption, and
- (c) to define "food" in section 128A(3)(b) to include uncooked food such as live fish in fish tank.

32. SGC said that "and" was used in section 128A(3)(c) because section 128A(3) was a non-exhaustive definition and the word "include" was used to link paragraph (a)-(d). Moreover, as "immediate health hazard" in section 128A(2) referred to "any circumstances that cause or are likely to cause any food .... to become a source of food-borne infection", it could cover cases where the water in a fish tank was contaminated. ALA4 suggested to simply the term "include" in section 128A(3) to "include one or more of the following circumstances". Mr Tommy CHEUNG suggested to use "include but not limited to".

33. Mr Andrew CHENG remained concerned that there might be cases where the fish tank water was contaminated but not the fish inside. He considered that there should be objective yardsticks to determine whether the food or the water was contaminated.

34. Referring to section 128A(3)(b), Dr LO Wing-lok considered the word "unapproved" unnecessary because a contaminated water source would pose immediate health hazard irrespective of whether the water came from approved or unapproved source. PAS(EF)A3 advised that section 128A(3)(b) referred to

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Admin unlicensed food factories or food premises in remote areas where there was no approved water source or sewage arrangement. She agreed to consider Dr LO's suggestion.

35. Mr Andrew CHENG requested the Administration to provide information on the criteria to determine that a food establishment was infested with vermin under section 128A(3)(d).

Admin 36. The Chairman requested the Administration to consider Mr CHENG and Dr LO's suggestions and provide a response.

**III. Any other business**

Clerk 37. Mr Tommy CHEUNG proposed that the trade and medical professionals should be consulted on the Bill. Mr Andrew CHENG and Dr LO Wing-lok expressed support for the proposal. The Chairman advised that an advertisement would be put on the LegCo's web page to invite the public and any interested parties to express their views on the Bill at the coming meeting of the Bills Committee.

38. Members agreed that the next meeting would be held on 23 May 2001 at 8:30 am.

39. The meeting ended at 10:45a.m.